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SUPPLEMENT

TO THE

ENCYCLOPÆDIA

OF

PLEADING AND PRACTICE.

COMPILED UNDER THE EDITORIAL SUPERVISION OF
WILLIAM M. McKINNEY.

VOL. I.

NORTHPORT, LONG ISLAND, N. Y.
EDWARD THOMPSON COMPANY, LAW PUBLISHERS.
1903.

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19939

HOW TO USE THE SUPPLEMENT.

THE titles of the articles are repeated in the order in which they are to be found in the original work. At the top of each page are given the name of the article and the pages thereof which are supplemented by reference to and statement of the late cases. Thus:

350-353	<i>BILLS IN EQUITY.</i>	Vol. III.
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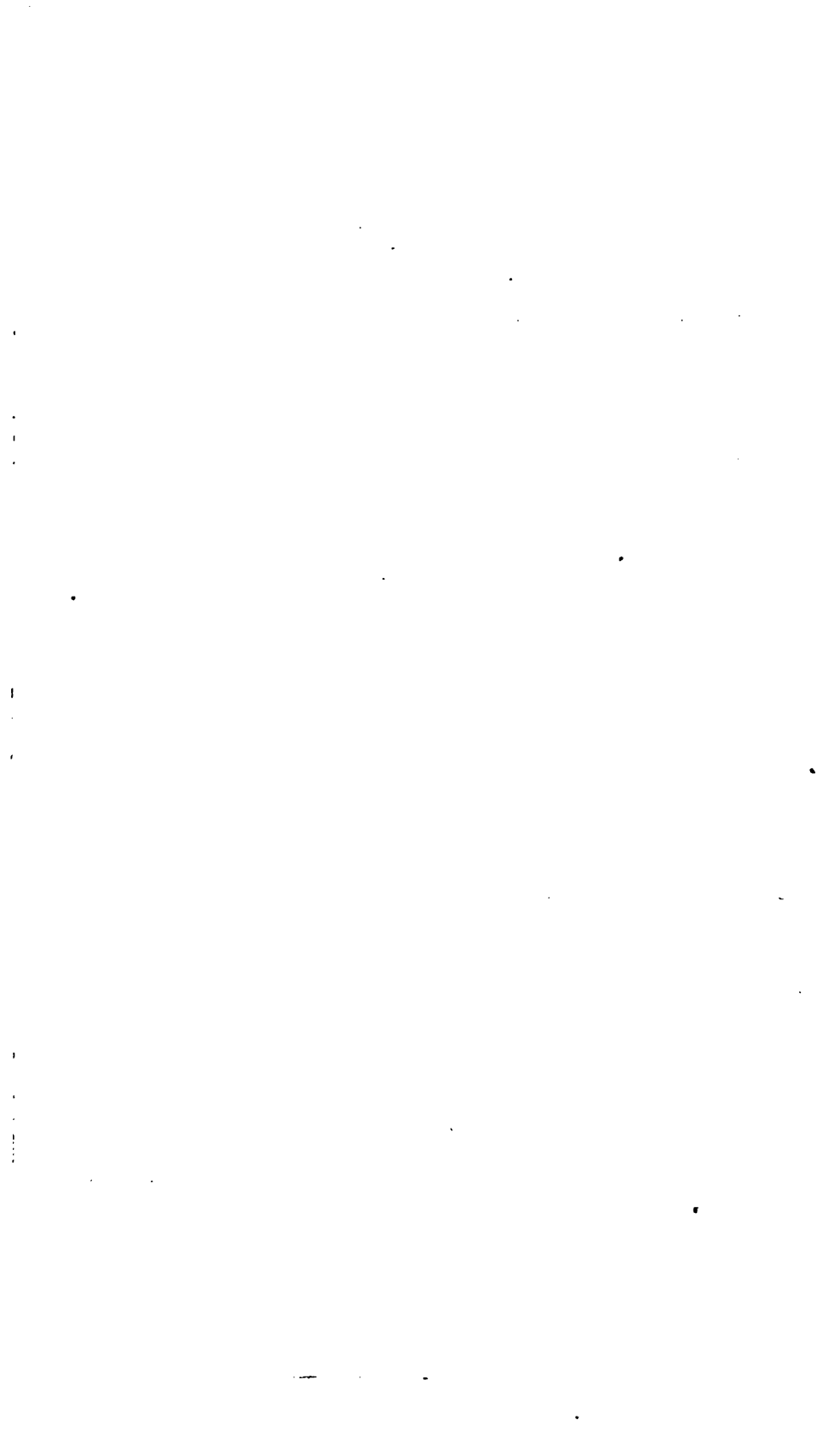
at the top of a page signifies that pages 350 to 353 of the article "Bills in Equity" in the third volume of the original work are supplemented.

In both text and notes the catch lines which appear in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE* are here repeated in connection with new cases, thereby denoting that such new cases support the statement of law made in the text or notes of the original work under the corresponding catch line.

The large heavy-faced figures refer to the pages of the volume of the original work. The smaller figure following the page number in the notes refers to the original note numbered by that same figure on that page. Thus, a note numbered **350. 1.**, with cases cited, indicates that those cases support the proposition to which the cases in note 1 on page 350 were cited.

In some instances the new cases have necessitated the writing of new text, and the fact that such text is new is indicated by inclosing it with brackets. In the notes great freedom has been indulged in stating new illustrations and applications.

The omission of a title that appeared in the original work implies that no new cases on that subject have been found.



Supplement to the Encyclopædia

OF

Pleading and Practice.

ABATEMENT IN PLEADING.

1. I. DEFINITION. — [See note 1.]

2. They Do Not Go to the Merits. — See note 1.

Must Give Plaintiff a Better Writ. — See note 2.

3. II. KINDS OF PLEAS IN ABATEMENT — **2. Pleas to the Jurisdiction.** — See JURISDICTION.

9. 3. Infancy — Plea or Demurrer. — See note 3.

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4. Coverture. — See HUSBAND AND WIFE.

10. 5. Capacity to Sue — When Raised by Plea. — See notes 1, 2.

11. 6. Real Party in Interest — How Objection Taken. — See note 4.

12. 7. Misnomer. — See NAMES; PARTIES TO ACTIONS.

13. 8. Misjoinder. — See PARTIES TO ACTIONS.

14. 9. Nonjoinder — Plea or Demurrer. — See note 6.

1. 1. *Winer v. Mast*, 146 Ind. 177, in which case the definition of pleas in abatement is as given in the original text. See also Voluntary Relief Dept. *v. Spencer*, 17 Ind. App. 123.

2. 1. *Combs v. Union Trust Co.*, 146 Ind. 688.

2. *Guarantee Co. v. Lynchburg First Nat. Bank*, 95 Va. 480.

9. 3. *Delcourt v. Whitehouse*, 92 Me. 254; *McMullin v. McMullin*, 92 Me. 338; *Lyddon v. Dose*, 81 Mo. App. 64.

4. *Watson v. Wrightsman*, 26 Ind. App. 437; *Delcourt v. Whitehouse*, 92 Me. 254; *McMullin v. McMullin*, 92 Me. 338; *Lyddon v. Dose*, 81 Mo. App. 64; *Foster v. Eoff*, 19 Tex. Civ. App. 405; *Blumauer v. Clock*, 24 Wash. 596. See also *Peck v. Cain*, (Tex. Civ. App. 1901) 63 S. W. Rep. 177, holding that if an infant defendant is made a party to an action and files a plea of infancy

within a month after such action is instituted, he will not be deemed to have waived his right to the plea of infancy.

10. 1. See *obiter* in *People v. Chicago*, 193 Ill. 543, *quoting* 1 ENCYC. OF PL. AND PR. 10.

2. *Fischer v. Stiefel*, 179 Ill. 59, *citing* 1 ENCYC. OF PL. AND PR. 10. And see PARTIES TO ACTIONS.

11. 4. *People v. Chicago*, 193 Ill. 543, *quoting* 1 ENCYC. OF PL. AND PR. 11. And see PARTIES TO ACTIONS.

14. 6. *Berlin v. Sheffield Coal, etc., Co.*, 124 Ala. 322 [*quoting* 1 ENCYC. OF PL. AND PR. 14]; *North Powder Milling Co. v. Coughanour*, 34 Oregon 9; *Evens, etc., Fire Brick Co. v. Hadfield*, 93 Wis. 665, the latter two cases *citing* 1 ENCYC. OF PL. AND PR. 14. See also *Sheridan Gas, etc., Co. v. Pearson*, 19 Ind. App. 252. And see PARTIES TO ACTIONS.

17. Requisites of Plea. — See note 4.

18. See note 1.

20. 12. Variance. — See VARIANCE.

21. Must Show Service Defective. — See SERVICE OF PROCESS AND PAPERS.

22. 14. Action Premature — How Objection Raised. — See note 3.

23. III. REQUISITES AND CONSTRUCTION — Construed Strictly. — See note 3.

24. Must Be Certain and Anticipate Defense. — See notes 1, 2.

25. Duplicity. — See note 2.

Must Give Better Writ. — See note 5.

26. Cannot Be Amended. — See note 2.

Rules Not Obsolete. — See note 3.

17. 4. Cone v. Cone, 61 S. Car. 512 [quoting 1 ENCYC. OF PL. AND PR. 17]; *North Powder Milling Co. v. Coughanour*, 34 Oregon 9, citing 1 ENCYC. OF PL. AND PR. 17. See also PARTIES TO ACTIONS.

18. 1. Cone v. Cone, 61 S. Car. 512 [quoting 1 ENCYC. OF PL. AND PR. 18]; *Mitten v. New York, etc.*, R. Co., 58 N. Y. App. Div. 260; *Palmer v. Field*, 76 Hun (N. Y.) 229; *Holt v. Streeter*, 74 Hun (N. Y.) 538; *Orange Mill Supply Co. v. Goodman*, (Tex. Civ. App. 1900) 56 S. W. Rep. 700. See also PARTIES TO ACTIONS.

22. 3. Grand Lodge, etc., v. Randolph, 186 Ill. 89; *Fitterling v. Welch*, 76 Minn. 441; *Iselin v. Simon*, 62 Minn. 128; *Fiore v. Ladd*, 29 Oregon 528; *Lombard v. McMillan*, 95 Wis. 627, each of which cases cited 1 ENCYC. OF PL. AND PR. 22. See also *Bacon v. Schepflin*, 63 Ill. App. 17; *Voluntary Relief Dept. v. Spencer*, 17 Ind. App. 123.

23. 3. U. S. v. Greene, 113 Fed. Rep. 683 [quoting with approval 1 ENCYC. OF PL. AND PR. 23]; *Law Trust Soc. v. Hogue*, 37 Oregon 544 [citing 1 ENCYC. OF PL. AND PR. 23]. See also *Ward v. State*, 102 Tenn. 724 [quoting 1 ENCYC. OF PL. AND PR. 23]; *Walko v. Walko*, 64 Conn. 74; *Woodward v. State*, 33 Fla. 508; *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515.

Where Complaint States Two Causes of Action. — If a plea in abatement is good as to one cause of action set out in the complaint, but bad as to another cause of action as set out, a demurrer to the insufficiency of the plea in abatement should be sustained. *Pappe v. Trout*, 3 Okla. 260.

Courts will not only strictly construe dilatory pleas as to their contents, but will be zealous that they are filed within

the time required by statute or by rules of court. *Horne v. Rodgers*, 103 Ga. 649. See also *Indiana, etc., R. Co. v. Cohoon*, 95 Ill. App. 92.

24. 1. National Parlor Furniture Co. v. Strauss, 75 Ill. App. 276; *Phoenix Ins. Co. v. Hedrick*, 73 Ill. App. 601; *U. S. v. Greene*, 113 Fed. Rep. 683.

Dilatory Pleas in Criminal Cases are required to be accurate, precise, free from ambiguity, and certain to every intent. *Knight v. State*, 42 Fla. 546.

2. U. S. v. Greene, 113 Fed. Rep. 683 [quoting 1 ENCYC. OF PL. AND PR. 24]; *Finch v. Galigher*, 181 Ill. 625; *Moore v. Morris*, 142 Ind. 354; *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515; *Stahl v. State*, 5 Ohio Cir. Dec. 29, 11 Ohio Cir. Ct. 23; *Gardner v. Hudgins*, (Tex. Civ. App. 1894) 29 S. W. Rep. 69; *Alkire Grocery Co. v. Richesin*, 91 Fed. Rep. 79.

25. 3. Guarantee Co. v. Lynchburg First Nat. Bank, 95 Va. 480; *Briggs v. Stroud*, 58 Fed. Rep. 717. And see DUPLICITY.

A defendant may demur to one part of a bill, plead in abatement to another part, and answer as to another part. But all these defenses must clearly refer to separate and distinct parts of the bill, and if he pleads in abatement to a part to which he has demurred, or pleads different matters to the whole bill, the plea will be bad for duplicity. *New York, etc., Coal Co. v. Spencer*, 3 Pa. Dist. 694.

5. North Powder Milling Co. v. Coughanour, 34 Oregon 9 [citing 1 ENCYC. OF PL. AND PR. 25]; *Guarantee Co. v. Lynchburg First Nat. Bank*, 95 Va. 480; *Riley v. Jarvis*, 43 W. Va. 43.

26. 3. Bacon v. Schepflin, 185 Ill. 122, citing 1 ENCYC. OF PL. AND PR. 26. And see AMENDMENTS.

3. U. S. v. Greene, 113 Fed. Rep. 683.

27. IV. PRAYER, SIGNATURE, AND VERIFICATION — Proper Prayer Necessary. — See notes 2, 3.

28. Signature. — See note 4.

Affidavit. — See note 5.

29. Requisites of Affidavit. — See note 5.

30. V. JUDGMENT AND TRIAL — Judgment for Defendant. — See note 7.

31. Judgment for Plaintiff on Demurrer. — See note 1.

Judgment for Plaintiff on Issue of Fact. — See note 2.

32. Trial. — [The merits of the plaintiff's case are not proper subjects of inquiry on a plea in abatement. See note 3a.]

33. VI. WAIVER OF PLEA — By Pleading to Merits. — See notes 1, 2.

27. 2. Mudge v. Rinkle, 45 Ill. App. 604.

3. Guarantee Co. v. Lynchburg First Nat. Bank, 95 Va. 480.

Where the plea attempts to put in issue the agency of a person upon whom the writ was served, a prayer that the writ be quashed is sufficient on a demurrer to a writ which assigns as a special cause that the plea in abatement should have prayed judgment of the writ. *Lanza v. McNulta*, 46 Ill. App. 69.

28. 4. Contra. — *Kenney v. Howard*, 67 Vt. 375, holding that a plea in abatement which goes to the jurisdiction of the court should be signed by the party and not by counsel.

5. Tennessee Statute. — Under Annot. Code Tenn. (1896), § 4622, a plea in abatement which is not verified as required by the statute will be treated as a nullity, and the plaintiff or complainant in the case may proceed to judgment without noticing it. *Tyler v. E. G. Bernard Co.*, (Tenn. Ch. 1899) 57 S. W. Rep. 179.

29. 5. Armstrong v. State, 101 Tenn. 389, citing 1 ENCYC. OF PL. AND PR. 29. See also VERIFICATION.

30. 7. Campbell v. Hudson, 106 Mich. 523, citing 1 ENCYC. OF PL. AND PR. 30.

31. 1. See Nigh v. Dovel, 84 Ill. App. 228.

3. Italian Swiss Agricultural Colony v. Pease, 96 Ill. App. 45, holding that if an issue of fact is joined and found for the plaintiff, the jury should assess the damages, and that the judgment should be peremptory, *quod recuperet* and not *respondeat ouster*. *Affirmed* 194 Ill. 98.

32. 3a. Sauerwein v. Champagne Co., 68 Mo. App. 29.

33. 1. Alabama. — *Grimes v. State*, 105 Ala. 86.

Colorado. — *Union Pac., etc., R. Co. v. Perkins*, 7 Colo. App. 184.

Georgia. — *McGahee v. Hilton, etc., Lumber Co.*, 112 Ga. 513.

Illinois. — *Porter v. Chicago*, 176 Ill. 605; *Greene v. Masten*, 66 Ill. App. 345; *Callender v. Gates*, 45 Ill. App. 374.

Indiana. — *Eel River R. Co. v. State*, 155 Ind. 433; *Smith v. Pedigo*, 145 Ind. 361; *Ft. Wayne Ins. Co. v. Irwin*, 23 Ind. App. 53.

Iowa. — *Moffitt v. Chicago Chronicle Co.*, 107 Iowa 407.

Kentucky. — *Covington v. Limerick*, (Ky. 1897) 40 S. W. Rep. 254; *American Acc. Co. v. Fidler*, (Ky. 1896) 35 S. W. Rep. 905.

Michigan. — *Griffin v. Wattles*, 119 Mich. 346, citing 1 ENCYC. OF PL. AND PR. 33.

Nebraska. — *Grand Lodge, etc., v. Bartes*, (Neb. 1902) 90 N. W. Rep. 901; *Baker v. Union Stock Yards Nat. Bank*, (Neb. 1902) 89 N. W. Rep. 269.

New York. — *Bunker v. Langs*, 76 Hun (N. Y.) 543.

North Carolina. — *Fort v. Penny*, 122 N. Car. 230.

Oklahoma. — *Leader Printing Co. v. Lowry*, 9 Okla. 89.

Pennsylvania. — *Smith v. People's Mut. Live Stock Ins. Co.*, 173 Pa. St. 15.

South Carolina. — *Cone v. Cone*, 61 S. Car. 512.

Tennessee. — *Southern R. Co. v. Briggman*, 95 Tenn. 624.

Texas. — *Wallace v. Gallatin First Nat. Bank*, (Tex. 1901) 65 S. W. Rep. 180; *Schauer v. Beitel*, 92 Tex. 601, *affirmed* on rehearing; *Meade v. Jones*, 13 Tex. Civ. App. 320; *Jolly v. Pryor*, 12 Tex. Civ. App. 149.

United States. — *Marshall v. Otto*, 59 Fed. Rep. 249; *Ex p. Davidson*, 57 Fed. Rep. 883.

The General Rule Is that whatever matter of defense shows that the plaintiff can have no cause of action must be pleaded in bar; but that which merely defends the present suit and does not conclude the plaintiff from obtaining an action upon the cause stated should be pleaded in abatement. *Kincaid v. Storz*, 52 Mo. App. 564.

Where the same matter is pleaded in abatement and in bar, the plea in bar will be considered and decided before the question as to order or language of the same matter pleaded in abatement is determined. *Crowns v. Forest Land Co.*, 99 Wis. 103. But compare *Cincinnati, etc., R. Co. v. McCollum*, 105 Tenn. 623. Compare also *Dorroh v. McKay*, (Tex. Civ. App. 1900) 56 S. W. Rep. 611, holding that in a justice's court a plea setting up the right to be sued in another county and alleging misjoinder with other defendants to obtain jurisdiction is not waived by appearing and announcing readiness to go to trial after such plea has been overruled.

In *Arkansas* pleas in abatement as such have been abolished, and matter in abatement may be introduced in connection with pleas in bar. *Union Guaranty, etc., Co. v. Craddock*, 59 Ark. 593.

In *Indiana* it is a statutory rule that a plea in abatement must precede an answer in bar, and so the courts have universally held. *Sanders v. Hartge*, 17 Ind. App. 243.

In *Iowa*, under Code 1873, § 2732 (Code 1897, § 3642), pleas in abatement and in bar may be joined, but this statute does not undertake to specify what shall be considered a good plea in abatement. The question must be determined independently of that statute. *Moffitt v. Chicago Chronicle Co.*, 107 Iowa 407.

In *Missouri*, under Rev. Stat. (1889), § 2043 (Rev. Stat. 1899, § 598), a plea to the jurisdiction may be coupled with a plea to the merits; and the latter plea does not, as at common law, waive the former. *Johnson v. Detrick*, 152 Mo. 243.

In *New York*, under Code Civ. Pro., § 499, the objection to jurisdiction of the subject-matter in controversy is not waived by first pleading in answer. *Chambers v. Feron, etc., Co.*, (Supm. Ct. Tr. T.) 56 N. Y. Supp. 338.

In *Tennessee*. — Act Tenn. 1897, c. 121, p. 277, permits a defendant to offer proof and support of his plea in abatement after he has filed a plea of tender. *Cincinnati, etc., R. Co. v. McCollum*, 105 Tenn. 623.

In *Texas* a plea to the jurisdiction upon the ground that the plaintiff has fraudulently stated the amount of his claim must be filed before an answer to the merits. *Eden v. Osborne*, (Tex. Civ. App. 1895) 29 S. W. Rep. 414. See also *Hoffman v. Cleburne Bldg., etc., Assoc.*, 85 Tex. 409, in which case many conflicting authorities upon the question of waiver of pleas in abatement by answering to the merits were discussed.

After Appeal from Justice's Court. — In *Blankenship v. Blackwell*, 124 Ala. 355, the defendant, after the case had been brought into the Circuit Court by appeal from a justice's court, filed a motion to abate an attachment, and it was declared that as a plea in abatement it came too late.

Reservation in Plea in Bar of Plea in Abatement. — A plea in abatement and a plea in bar may be filed coincidentally when there is an express reservation that the plea in abatement is not thereby waived. *McConkey v. Peach Bottom Slate Co.*, 14 Pa. Co. Ct. 514. See also *Emmons v. Lexington, etc., Min. Co.*, (Ky. 1901) 65 S. W. Rep. 593; *Barry v. Wachosky*, 57 Neb. 534.

Waiver of Right to Amend. — In *Horn v. Noble*, 95 Ill. App. 101, it was held that where a plea in abatement is overruled on demurrer and leave is given to amend, the right to file an amended plea in abatement is waived by filing the general issue.

Plea in Bar Before Decision on Plea in Abatement. — In *Behrens Drug Co. v. Hamilton*, 92 Tex. 284, it was held that a plea to the merits may be filed after a plea in abatement, but before a decision has been had on the latter plea.

Answering "ready" at the call of a calendar in open court is not such a plea to the merits of a case as will waive the right to plea in abatement. *Feist v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 240.

A Plea in Abatement Against an Intervenor who comes in after an answer to the merits has been put in may be filed notwithstanding such answer. *Gulf, etc., R. Co. v. Foster*, (Tex. Civ. App. 1898) 44 S. W. Rep. 198.

Stipulation Preserving Rights under Plea in Abatement. — It is necessary, in

24. Affidavit of Merits — Going to Trial. — See notes 1, 2.

Pleading Out of Order. — See notes 3, 4.

Withdrawing Plea to Merits. — See note 5.

25. Exception to Rule. — See note 2.**26. By Demurring.** — See note 1.

By Laches or Agreement. — See note 2.

Proceeding in Cause. — See note 6.

order to prevent waiver of a plea to the jurisdiction of the court, that a stipulation be entered into that such matters are not waived before a plea to the merits of the case is filed. *Ft. Worth, etc., R. Co. v. Harlan*, (Tex. Civ. App. 1901) 62 S. W. Rep. 971.

33. 2. *Fiore v. Ladd*, 29 Oregon 528, citing 1 ENCYC. OF PL. AND PR. 32.

34. 1. *Brownwell, etc., Car Co. v. Barnard*, 139 Mo. 142.

Reconsideration of Order Overruling Plea in Abatement. — Going to trial on the merits after a plea in abatement has been overruled does not amount to a waiver if the court afterwards reconsiders the plea and holds it to be sufficient. *Amos v. Stockert*, 47 W. Va. 109.

2. When Agreement Prevents Estoppel to Plea. — Where a defendant pleads the same matters in an answer to the merits of the case that he has pleaded in a plea of abatement, he is not estopped from insisting that the matter previously pleaded in abatement can be shut out in an answer if there has been an express agreement that the filing of an answer did not work waiver of plea. *Rogers v. O'Mary*, 95 Tenn. 514.

3. *Warren v. McCutcheon*, 16 Tex. Civ. App. 167; *Davis v. Texas, etc., R. Co.*, 12 Tex. Civ. App. 427.

4. Reallocation of Facts. — When the same matter is pleaded in both abatement and bar, the latter overrides the former. *Crowns v. Forest Land Co.*, 99 Wis. 103. See also *Carmien v. Cornell*, 148 Ind. 83; *Sanders v. Hartge*, 17 Ind. App. 243.

A plea in abatement cannot be pleaded with an answer in bar. *Huntington Mfg. Co. v. Schofield*, 28 Ind. App. 95.

Indiana Statute. — Under *Burns's Annot. Stat. Ind.* (1894), § 638 (*Horner's Stat. Ind.* 1901, § 365), an answer in abatement cannot be pleaded with an answer in bar, but must precede it, and the issue must be tried first and separately. *Carmien v. Cornell*, 148 Ind. 83.

5. *Eden v. Osborne*, 14 Tex. Civ. App. 314, wherein there was a delay of four years.

After a Mistrial on the merits of the case, it is too late to withdraw the pleadings and substitute therefor a plea in abatement. *Hawkins v. Armour Packing Co.*, 105 Ala. 545.

35. 2. Defects Appearing upon the Face of the complaint, objections thereto must be taken by answer or demurrer, or the objections are waived. *Isear v. Hoadley*, 44 N. Y. App. Div. 161, holding also that where a Lloyds' insurance policy is attached to the complaint and referred to as a part thereof, it is a part of the complaint within the meaning of this rule.

36. 1. Contra. — *Deane v. Echols*, 2 App. Cas. (D. C.) 522.

2. *Hazen v. Wright*, 85 Me. 314; *Hall v. Howell*, (Tex. Civ. App. 1900) 56 S. W. Rep. 561.

Rev. Stat. Tex., art. 1269, provides that pleas to the jurisdiction must be determined at the term in which they are filed; also a rule of court provides that such a plea must be tried at the term in which it is first called to the attention of the court. A failure thus expeditiously to determine a plea in abatement to the jurisdiction of the court will be held to have been waived when three terms of court are allowed to pass without effort being made to dispose of the plea. *Watson v. Mirike*, (Tex. Civ. App. 1901) 61 S. W. Rep. 538. See also *State v. Woodville*, 13 Tex. Civ. App. 217, holding that if it was not convenient for the court to take up the plea at the first term, or if the parties were absent and were not ready to try the issue presented by the plea, the plea was not waived. See further *Weekes v. Sunset Brick, etc., Co.*, 22 Tex. Civ. App. 556; *Bennett v. Stratton*, (Tex. Civ. App. 1901) 61 S. W. Rep. 949; *Spencer v. James*, 10 Tex. Civ. App. 327.

6. *Cone v. Cone*, 61 S. Car. 512.

The Court Will Not Entertain an Oral Motion to abate an action when the

37. VII. PLEAS PUIS DARREIN CONTINUANCE — Matter Arising After Issue. — See note 1.

39. VIII. REPLICATION, ETC. — Demurrer. — See notes 1, 2.

Defeating Plea Without Replication. — See note 6.

40. IX. IN EQUITY — Must Raise Objections by Demurrer or Answer. — See note 5.

grounds stated in the motion should have been taken advantage of at the time required by the rules of the court. *Bishop v. Woodward*, 103 Ga. 281.

37. 1. *Horne v. Rodgers*, 103 Ga. 649.

39. 1. *Dauids v. People*, 192 Ill. 176 [*citing* 1 ENCYC. OF PL. AND PR. 39]; *Finch v. Galigher*, 181 Ill. 625.

2. The distinction between those matters which go to abate an action and the facts which allege a defense on the

merits must be maintained, and a plea in abatement which does not maintain this distinction will be declared bad on demurrer. *Sloan v. Lowder*, 23 Ind. App. 118.

6. *Dauids v. People*, 192 Ill. 176, *citing* 1 ENCYC. OF PL. AND PR. 39.

40. 5. *Waiver of Plea in Abatement.* — In equity, as at common law, a plea to the merits waives a plea in abatement. *Hudson v. Randolph*, (C. C. A.) 66 Fed. Rep. 216.

ABBREVIATIONS.

42. I. IN GENERAL. — See note 2.

43. II. WITHIN JUDICIAL KNOWLEDGE — 1. **Officials.** — See note 1.
2. **Proper Names** — *a.* **INITIALS.** — See note 2.

44. Distinction Between Vowels and Consonants. — See note 1.

45. Middle Initial Not Part of Name. — See note 1.

46. *b.* CONTRACTIONS. — See note 2.

c. **PREFIXES AND SUFFIXES.** — See note 3.

48. III. MISCELLANEOUS. — See note 1.

42. 2. *Heaton v. Ainley*, 108 Iowa 112, citing 1 ENCYC. OF PL. AND PR. 42.

43. 1. *Marsee v. Middlesborough Town Lands Co.*, (Ky. 1901) 65 S. W. Rep. 118; *State v. Kyle*, 166 Mo. 287; *Trimble v. State*, 61 Neb. 604.

2. *Taylor v. Insley*, 7 Colo. App. 175; *Davis v. Philbrick*, 87 Me. 196.

44. 1. *Eaves v. State*, 113 Ga. 749; *National Parlor Furniture Co. v. Strauss*, 75 Ill. App. 276; *Hinkle v. Collins*, 113 Mich. 105; *Rice v. Coutant*, 38 N. Y. App. Div. 543; *Foshier v. Narver*, 24 Oregon 441; *Swanner v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 186; *Whitener v. State*, 38 Tex. Crim. 146; *Niblo v. Dyer*, (Tex. Civ. App. 1900) 56 S. W. Rep. 216; *Simmons v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 968; *Milburn v. Smith*, 11 Tex. Civ. App. 678; *Churchill v. Bielstein*, 9 Tex. Civ. App. 445; *U. S. v. Jones*, 74 Fed. Rep. 543.

Here Misnomer Which May Be Waived.

— By recognizing initials as names, the use of the initial instead of the full Christian name that it represents is merely a misnomer, where there is no question as to identity of the party, and such a defect can be remedied by amendment, or it may be waived by pleading to the merits. *Stever v. Brown*, 119 Mich. 196.

Christian Name Consisting of Letters. —

There is no legal presumption that a person's Christian name cannot be "M. H." The fact that the party has another name for which these letters are simply initials must be brought to the attention of the court by a plea in abatement. *Taylor v. Insley*, 7 Colo. App. 175. But see *Davis v. Philbrick*, 87 Me. 196, in which case the court said that if the defendant was known by the letter "W" only, "it would be so unusual and unlikely a thing that he should so state it specially in his plea."

Service by Publication. — A distinction exists between personal service of process and notice by publication. In the latter case the law must be rigidly observed, and the Christian name and surname must be set forth accurately. *Turner v. Gregory*, 151 Mo. 100.

45. 1. *Clafin v. Chicago*, 178 Ill. 549; *Gross v. Grossdale*, 177 Ill. 248; *Harrington v. People*, 90 Ill. App. 456; *Ratcliff v. State*, 23 Ind. App. 64; *Lancy v. Snow*, (Mass. 1902) 62 N. E. Rep. 735; *Com. v. Robinson*, 165 Mass. 426; *State v. Garvin*, 48 S. Car. 258; *Olibare v. State*, (Tex. Crim. 1898) 48 S. W. Rep. 69.

When Middle Initial Material. — The middle initial is material when only the initial of the first name is given. *State v. Higgins*, 60 Minn. 1.

46. 2. *People v. Armstrong*, 114 Cal. 570; *Bonardo v. People*, 182 Ill. 411.

3. *Dauids v. People*, 192 Ill. 176; *Bonardo v. People*, 182 Ill. 411; *Guignon v. Union Trust Co.*, 156 Ill. 135; *State v. Dankwardt*, 107 Iowa 704; *Hunt v. Searcy*, 167 Mo. 158; *State v. Allen*, 45 W. Va. 65.

48. 1. "Chicago F. G. A. Co." — In *Chicago Fuel Gas Appliance Co. v. Jewett*, 66 Ill. App. 489, it was held to be permissible for the clerk of the court, in certifying the record to the appellate court, to use the abbreviation "Chicago F. G. A. Co."

"Acct." for Account. — *Heaton v. Ainley*, 108 Iowa 112.

"Co." for County. — *Wilkinson v. State*, 106 Ala. 23.

"Do." for Ditto. — See *Mason v. Belfast Hotel Co.*, 89 Me. 384.

"Ex." for Except, "A." for Acres, and "Cor." for Corner, used in a description of land, being well-understood abbreviations, are sufficient. *State v. Vaile*, 122 Mo. 33.

ABDUCTION.

51. II. THE INDICTMENT — The Form. — See note 1.

52. Joinder of Counts. — See note 3.

III. INSTRUCTIONS. — See note 4.

51. 1. Necessity to Charge that Acts Were Done Feloniously. — Where the words used in the statute are, "whoever shall unlawfully take or detain," etc., the acts mentioned in the statute when unlawfully done constitute the whole of the crime, and it is not necessary to charge that the acts were done "feloniously." *Higgins v. Com.*, 94 Ky. 54. And see generally **INDICTMENTS, INFORMATIONS, AND COMPLAINTS.**

Approved Precedent. — In *State v. Johnson*, 115 Mo. 480, will be found set forth in full an indictment drawn under Rev. Stat. Mo. (1889), § 3484, which was held sufficient.

52. 3. State v. Bussey, 58 Kan. 679, in which case it was held that facts constituting two or more different kinds of abduction as defined by statute should not be set forth in one count, but may be alleged in different counts. It was further held that where there was evidence in support of a count charging the taking to have been for the purpose of prostitution, and also evidence in support of another count charging that the taking was for the purpose of concubinage, the defendant was not prejudiced by the court's refusal to require an election. Upon a verdict of guilty upon both counts a *nolle prosequi* as to the first count was entered and the defendant was sentenced upon the second count.

4. Refusal of Instruction Which Ignores One of Charges in Indictment. — In *Boyet v. State*, 130 Ala. 77, in which case the defendant was indicted for the abduction of a girl "for the purpose of prostitution, concubinage, or marriage," the defendant requested an instruction that the jury, before it could find him guilty, should believe that he not only took the girl away from her father for the purpose of concubinage, but also that she was under the statu-

tory age. It was held that this instruction was properly refused because it withdrew from the consideration of the jury the charge that the defendant took the girl for the purpose of prostitution or marriage.

Necessity to Define Word "Prostitution." — On a prosecution for abducting a young girl for the purpose of prostitution the court need not in its instructions define the word "prostitution," as this is not a technical word but one that has a general meaning. *Tores v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 880.

Necessity to Define Separately Abduction for Purpose of Marriage and Abduction Resulting in Prostitution. — In *Tores v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 880, the defendant was indicted for abduction for the purpose of prostitution, and it was held that the court, in defining the offense, did not err in limiting the offense to the specific character of crime charged, and that there was no necessity to define separately abduction for the purpose of marriage and abduction resulting in prostitution.

Defining Words "Against Her Will." — In *Higgins v. Com.*, 94 Ky. 54, the defendant was indicted for detaining a woman "against her will" with intent to have carnal knowledge with her, and, it appearing that the woman was insane, it was held that the court properly instructed the jury that any act done towards her by the defendant, other than acts of kindness, courtesy, or friendship, were done "against her will."

Withdrawing Question of Fact from Jury. — In *People v. Brown*, 71 Hun (N. Y.) 601, there was some evidence tending to show a conspiracy between the defendant and others, and it was held that the court properly refused to instruct the jury that it could not find the defendant guilty unless it found

59. [IV. JURISDICTION OF CRIMINAL PROSECUTIONS.] — Where the woman is enticed from one county into another, the prosecution may be in the county from which she was enticed, it being immaterial where the defendant accomplished the object for which he enticed her. See note 4a.]

[V. CIVIL ACTIONS — FORM OF REMEDY.] — An action by a parent for the abduction of his daughter may be brought in case, but trespass is also an appropriate remedy. See note 4b.]

that there was a conspiracy, as it was for the jury to determine the questions of fact involved in the request.

4a. *State v. Johnson*, 115 Mo. 480.

4b. *Wheeler v. Price*, 21 R. I. 99, citing *Hoover v. Helm*, 7 Watts (Pa.) 62; *Chamberlain v. Hazelwood*, 5 M. & W. 515; and *Ditcham v. Bond*, 2 M. & S. 436.

ABIDING THE EVENT.

54. II STIPULATIONS AND AGREEMENTS — Power of Attorney. — See note 3.

55. Form of Stipulations. — See note 1.

Meaning of Words in Stipulations. — See note 3.

[**Relief from Stipulation.** — When the test action is not tried upon its merits, or fails for some reason for which the parties to the stipulation are not responsible, the stipulation may be set aside and the parties remitted to their rights in their own action. See note 3a.]

58. IV. BONDS AND RECOGNIZANCES — Civil Actions. — See note 1.

59. V. COSTS. — See notes 2, 3.

Where a New Trial Is Granted. — See note 4.

54. 3. *Goodenow v. Foster*, 108 Iowa 508; *Hallenbeck v. Smith*, 51 N. Y. App. Div. 344; *McCafferty v. Celluloid Co.*, (C. C. A.) 104 Fed. Rep. 305.

New Issues of Fact Not Affected. — A stipulation that the law of one case shall apply to another does not preclude the raising of other issues of fact. *Swisher v. McWhinney*, 64 Ohio St. 343.

55. 1. *Willis v. Sims*, (Tex. Civ. App. 1898) 47 S. W. Rep. 55.

3. Parties Not Precluded from Appealing. — A stipulation to "abide the final event of the action in this court of" *Blumenthal et al.* "against the above-named defendants," means the final result which settles the right of the plaintiffs to recover, including the determination of such appeals as are necessary to review the judgment entered. *Herman v. Michel*, 36 N. Y. App. Div. 127.

3a. *Moore v. Martin*, (Miss. 1895) 18 So. Rep. 119; *Keens v. Robertson*, 46 Neb. 837; *Magnolia Metal Co. v. Pound*, 60 N. Y. App. Div. 318.

Relief from Stipulation Denied. — Application for relief from a stipulation to abide the final determination of another action then pending, made after the determination on the ground that the agreement was entered into through "inadvertence, excusable neglect, and mistake of fact," may be denied where the inadvertence is wholly inexcusable or arises from negligence. Such mat-

ters rest in the sound discretion of the trial court, and will not be disturbed on appeal unless the court has abused its discretion. *Moffitt v. Jordan*, 127 Cal. 628.

58. 1. *Huntington v. Aurand*, 67 Ill. App. 260; *Broden v. Thorpe Block Sav., etc., Assoc.*, 20 Ind. App. 684; *Cole v. Edwards*, 104 Iowa 373; *Hughan v. Grimes*, 62 Kan. 258; *Griswold v. Hazels*, 62 Neb. 888; *Halbert v. San Saba Springs Land, etc., Assoc.*, (Tex. Civ. App. 1895) 34 S. W. Rep. 636; *Peace River Phosphate Co v. Edwards*, (C. C. A.) 70 Fed. Rep. 728.

Liability of Sureties. — A stipulation given for the release of a vessel upon a libel to recover damages for injury caused by a collision does not bind the sureties thereon to respond to claims set up by intervening petitions filed subsequently to the release. *The Willamette*, (C. C. A.) 70 Fed. Rep. 874.

59. 2. *Matter of Proctor*, 103 Iowa 232. And see generally *Costs*.

3. The Costs of a Motion to Open the Defendant's Default should not be made to abide the event, as such course holds out to the defendant the promise of a reward as a premium upon his default in case the action be determined against the plaintiff. *Richardson v. Sun Printing, etc., Assoc.*, 20 N. Y. App. Div. 329.

4. *Battin v. Marshalltown*, (Iowa 1898) 77 N. W. Rep. 493, quoting *Code*

60. See note 2.

61. See notes 1, 2.

VI. FUNDS IN COURT. — See note 4.

Iowa (1873), § 2840, to the effect that "costs of all new trials shall either abide the event of the suit or be paid by the party to whom such new trial is granted, according to the order of the court, to be made at the time of granting such new trial."

When Costs Are Awarded by an Appellate Court to Abide the Event of a Second Trial, they are taxable by the clerk of the appellate court and not by the District Court. *Schlesinger v. David Mayer Brewing Co.*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 353. See also *Van Bussum v. Metropolitan L. Ins. Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 40.

Setting Aside Verdict. — An order of the trial court setting aside a verdict as against the weight of evidence should award costs against the moving party absolutely, and not to abide the event. *Silverman v. Dry Dock, etc., R. Co.*, 69 N. Y. App. Div. 22.

60. 2. *Belt v. American Cent. Ins. Co.*, 33 N. Y. App. Div. 239; *Bueb v. Geraty*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 22, in which the court overruled *Elliott v. Luengene*, (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 428, and disapproved *Starr Cash Car Co. v. Reinhardt*, (C. Pl. Gen. T.) 6 Misc. (N. Y.) 365.

61. 1. *Bank of Commerce v. Elliott*, 109 Wis. 648.

New York. — Costs paid to the clerk of a District Court of the city of New

York, to perfect the appeal pursuant to Code Civ. Pro. N. Y., § 3047, are such necessary disbursements upon the appeal as may be taxed by the appellant when absolutely awarded to him, or if granted to abide the event, when he has succeeded ultimately in the action. *Bradley Salt Co. v. Meinhold*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 468.

2. *Miller v. King*, 32 N. Y. App. Div. 349; *Smith v. Smith*, 22 N. Y. App. Div. 319; *Moss's Estate*, (Supm. Ct. Spec. T.) 24 Civ. Pro. (N. Y.) 438.

When the Judgment of the Trial Court Is Reversed on Appeal, the reversal entitles the successful party to the costs which accrued in the trial court after the rendition of the judgment and to the costs in the appellate court, including the transcript fee. The costs of the trial prior to the rendition of the judgment will abide the final determination of the suit. *Jennings v. St. Louis, etc., R. Co.*, 59 Mo. App. 530.

4. *Fetterhoff v. Sheridan*, 94 Md. 445; *Rumbaugh v. Petersin*, 17 Pa. Co. Cl. 79; *Mundy v. Louisville, etc., R. Co.*, (C. C. A.) 67 Fed. Rep. 633.

Interpleader Proceedings. — A bill of interpleader is defective when the plaintiff neither brings the money into court nor offers to do so. *Barroll v. Foreman*, 86 Md. 675. See also *Gardiner Sav. Inst. v. Emerson*, 91 Me. 535; *Home L. Ins. Co. v. Caulk*, 86 Md. 385; *Bliss v. French*, 117 Mich. 538; *Look v. McCahill*, 106 Mich. 108.

ABORTION.

- 62. II. FORM OF THE INDICTMENT.** — See note 2.
63. IV. ALLEGATION OF PREGNANCY. — See note 6.
64. VI. SPECIFYING MEANS — Naming Medicine. — See note 3.
 Describing Instruments. — See note 4.
VII. NEGATING EXCEPTIONS — General Rule. — See note 6.
65. Manner of Negating. — See note 1.
VIII. JOINDER OF COUNTS. — See note 2.
 Specifying Different Means. — See note 3.

[IX. CIVIL ACTIONS — THE COMPLAINT. — In an action for damages for producing an abortion, the justifiableness of the act under an exception in the statute defining the offense is a matter of defense and need not be negated. See note 3a.]

62. 2. *Eggart v. State*, 40 Fla. 527; *State v. Crews*, 128 N. Car. 581. And see generally INDICTMENTS, INFORMATIONS, AND COMPLAINTS.

When Statute Is Not Sufficiently Descriptive of Offense. — The words of the statute are not sufficient where, from the nature of the offense, they do not clearly and definitely apprise the defendant of the offense charged against him. In such a case the acts constituting the offense must be specifically set forth. *Cochran v. People*, 175 Ill. 28; *State v. Fiske*, 66 Vt. 434.

Allegation of Death. — *State v. Dean*, 85 Mo. App. 473.

63. 6. *Com. v. Surles*, 165 Mass. 59, holding that the allegation of pregnancy is not necessary where the statute omits to state that the offense must be committed upon a pregnant woman.

64. 3. *State v. Moothart*, 109 Iowa 130; *State v. Crews*, 128 N. Car. 581; *Cave v. State*, 33 Tex. Crim. 335.

4. Manner in Which Instrument Was Used. — Where the indictment charges the commission of a crime by means of an instrument the name of which is unknown, it must state with reasonable certainty the manner in which the instrument was used. *Cochran v. People*, 175 Ill. 28.

6. *State v. Aiken*, 109 Iowa 643. But see *State v. Quinn*, 2 Penn. (Del.) 339, in which case an indictment was bot-tomed on 17 Laws Del., c. 226, § 2,

providing that the attempt to produce a miscarriage shall be a criminal act "unless the same be necessary to pre-serve her [the woman's] life," and it was held that it was not necessary to negative the exception. And see generally INDICTMENTS, INFORMATIONS, AND COMPLAINTS.

65. 1. Insufficient Negative Allegation. — An averment that "the per-forming of said operation, and the entering, forcing, and thrusting of said instrument into the womb * * * not * * * being necessary to save the life of" the woman, it being no-where previously alleged that miscar-riage was produced, does not negative the exception that the miscarriage was not necessary to save the life of the woman. *State v. Stevenson*, 68 Vt. 529.

2. *Hauk v. State*, 148 Ind. 238.

3. *Diehl v. State*, 157 Ind. 549; *Moore v. State*, 37 Tex. Crim. 552.

Several Counts Charging Two or More Attempts at different times to commit the same offense upon the same woman are properly joined in one indictment. *Eggart v. State*, 40 Fla. 527.

3a. *Miller v. Bayer*, 94 Wis. 123, which was an action against a physician and another defendant who had pro-duced the pregnancy of the plaintiff, and who had caused her to abort pur-suant to a conspiracy. And see gen-erally PHYSICIANS AND SURGEONS.

ACCESSORIES AND THE LIKE.

67. II. PRINCIPALS IN THE SECOND DEGREE — *Distinction Made.* — See note 2.

May Be Charged as Principal in the First Degree. — See note 3.

No Evidence Showing Principal in First Degree Guilty. — See note 4.

Form of Indictment. — See note 5.

68. III. ACCESSORY BEFORE THE FACT — *Must Be Indicted as Such.* — See note 2.

Joinder with Principal. — See note 3.

Indicted Alone. — See note 4.

Principal Must Be Convicted. — See note 5.

69. IV. ACCESSORY AFTER THE FACT. — *Averment of Knowledge.* — See note 3.

Allegations of Manner. — See note 4.

67. 2. In Crimes Admitting of Different Degrees of guilt, a defendant charged in the indictment as principal in the second degree may be tried and convicted of a higher degree of the crime than that of which the one charged as principal in the first degree has been convicted. *Green v. State*, 40 Fla. 191; *Bruce v. State*, 99 Ga. 50; *Goins v. State*, 46 Ohio St. 457.

3. Gaskins v. Com., 97 Ky. 494; *Travis v. Com.*, 96 Ky. 77; *Com. v. Carter*, 94 Ky. 527; *State v. Snell*, 5 Ohio Dec. 670; *Jones v. State*, 7 Ohio Cir. Dec. 305; *State v. Webb*, 20 Wash. 500.

4. State v. Haines, 51 La. Ann. 731; *Strait v. State*, 77 Miss. 693.

5. Sufficiency of Allegations. — An indictment which charges a defendant with aiding and abetting the commission of a crime sufficiently charges him as a principal. *State v. Littell*, 45 La. Ann. 655.

68. 2. Oerter v. State, 57 Neb. 135; *Rix v. State*, 33 Tex. Crim. 353; *State v. Roberts*, 50 W. Va. 422.

Conversely, One Indicted as an Accessory cannot be convicted as a principal. *Casey v. State*, 49 Neb. 403.

3. State v. Atkinson, 40 S. Car. 363, holding that the principal and accessory may be properly joined in one count of the indictment. See also *State v. Roberts*, 50 W. Va. 422, citing *Code W. Va.*, c. 152, § 8.

Form of Indictment. — An indictment

against an accessory before the fact need not set forth the means by which he incited, procured, or assisted the principal to commit the offense. *State v. Neddo*, 92 Me. 71; *Coffin v. U. S.*, 156 U. S. 432.

4. Necessary Averments. — Where the necessary formal words are used in describing the offense as committed by the principal offender, they may be referred back to and not repeated in the charge against the accessory, though the more extended form is preferable. *Jones v. State*, 58 Ark. 390.

5. Kingsbury v. State, 37 Tex. Crim. 259.

Escape of Principal — *Texas Statute.* — Under Pen. Code Tex., art. 90, the accessory may be tried first in case the principal has escaped, but under no other condition can the accessory be tried and convicted before the trial and conviction of his principal. *Moore v. State*, 40 Tex. Crim. 389; *Kingsbury v. State*, 37 Tex. Crim. 259.

69. 3. Street v. State, 39 Tex. Crim. 134, *per Henderson, J.* See also *State v. Neddo*, 92 Me. 71, in which case it was held that, the felony committed by the principal being properly alleged, it is sufficient to aver that the accessory knew the principal to be such principal felon and to have committed the crime aforesaid.

4. Manner and Means Need Not Be Alleged. — *State v. Neddo*, 92 Me. 71; *Dent v. State*, (Tex. Crim. 1901) 65 S.

69. [Death of Principal. — It has been held that the death of the principal precludes the prosecution of an accessory after the fact. See note 4a.]

70. V. DISTINCTION BETWEEN ACCESSORIES AND PRINCIPALS ABOLISHED — 1. Generally. — See note 1.

2. Accessory May Be Charged as Principal. — See note 2.

3. May Be Treated as Accessory. — See note 3.

4. How to Allege the Offense When Accessory Treated as Principal. — See note 4.

5. Alleging Offense When Accessory Treated as Such — Common-law Indictment Sufficient. — See note 5.

[Following Language of Statute. — In accordance with the general rule, if an indictment which follows the language of the statute does not inform the defendant of the exact nature of the offense, it is insufficient. See note 5a.]

71. Must Show Principal Committed the Offense. — See note 1.

6. May Be Charged as Both Principal and Accessory. — See note 4.

7. Principal Need Not Be First Convicted. — See note 5.

W. Rep. 627; *Gann v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 837.

69. 4a. *Moore v. State*, 40 Tex. Crim. 389.

70. 1. *State v. Stark*, 63 Kan. 529; *Wagner v. State*, 43 Neb. 1; *People v. Mullins*, 5 N. Y. App. Div. 172; *State v. DeBoy*, 117 N. Car. 702; *Thompson v. State*, 105 Tenn. 177; *Atkins v. State*, 95 Tenn. 474; *Winnard v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 555; *Gallot v. U. S.*, (C. C. A.) 87 Fed. Rep. 446. In the foregoing cases it was recognized that such statutes do not relate to misdemeanors. In misdemeanors there were no accessories even at common law, and therefore all who participate therein, if guilty, are principals and are to be indicted and tried as such.

2. *Noble v. People*, 23 Colo. 9; *State v. Smith*, 106 Iowa 701; *State v. Clark*, 60 Kan. 450; *State v. Patterson*, 52 Kan. 335; *People v. Peckens*, 153 N. Y. 576; *Jones v. State*, 7 Ohio Cir. Dec. 305; *State v. Snell*, 5 Ohio Dec. 670; *Pearce v. Territory*, (Okla. 1902) 68 Pac. Rep. 504; *State v. Steeves*, 29 Oregon 85; *Com. v. Bradley*, 16 Pa. Super. Ct. 561.

Where Accessory Could Not in Fact Have Been Principal. — One who counsels, procures, or aids and abets a crime may be indicted and punished therefor as a principal, even where, from the peculiar nature of the case or relation of the parties, he could not himself have

committed the criminal act. *State v. Rowe*, 104 Iowa 323 [citing 1 Am. and Eng. Encyc. of Law (2d ed.) 260]; *State v. Comstock*, 46 Iowa 265; *State v. Elliott*, 61 Kan. 518; *People v. Peckens*, 153 N. Y. 576; *People v. McKane*, 143 N. Y. 455.

3. *State v. Clark*, 60 Kan. 450; *State v. Schuchmann*, 133 Mo. 111; *State v. Gleim*, 17 Mont. 17; *People v. Peckens*, 153 N. Y. 576; *Com. v. Bradley*, 16 Pa. Super. Ct. 561. *Contra*, *Fixmer v. People*, 153 Ill. 123; *Ussellton v. People*, 149 Ill. 612. *Compare* *State v. Gifford*, 19 Wash. 464.

4. *Noble v. People*, 23 Colo. 9; *State v. Geddes*, 22 Mont. 68; *State v. Kent*, 4 N. Dak. 577; *Pearce v. Territory*, (Okla. 1902) 68 Pac. Rep. 504; *State v. Steeves*, 29 Oregon 85; *Com. v. Bradley*, 16 Pa. Super. Ct. 561. But see *contra*, *State v. Gifford*, 19 Wash. 464, *overruling* expressly *State v. Duncan*, 7 Wash. 336, 38 Am. St. Rep. 888, and by implication *State v. Golden*, 11 Wash. 422.

5. *State v. Gleim*, 17 Mont. 17.

5a. *Farrell v. People*, 8 Colo. App. 524. And see INDICTMENTS, INFORMATION, AND COMPLAINTS.

71. 1. *People v. Garnett*, 129 Cal. 364, holding that an information charging a defendant as accessory after the fact must allege that the person actually committing the crime has been "charged with a felony."

4. *State v. Burbage*, 51 S. Car. 284.

5. See also *dicta* in *Ussellton v. People*,

71. 8. May Be Convicted as Either Principal or Accessory —
Indicted as Principal. — See note 6.

Indicted as Accessory. — See note 7.

72. 9. Statute Does Not Affect Accessory After the Fact — Not to
Be Charged as Principal. — See note 3.

149 Ill. 612; *Pearce v. Territory*, (Okla. 1902) 68 Pac. Rep. 504; *Bliss v. U. S.*, (C. C. A.) 105 Fed. Rep. 508.

Conviction of Accessory of Higher Degree of Crime. — The accessory may be convicted of a higher degree of a crime than that of which the principal has been convicted. *State v. Gray*, 55 Kan. 135; *Wilson v. State*, 1 Ohio Cir. Dec. 350.

Evidence Must Show Principal Guilty. — *Brooks v. State*, 103 Ga. 50.

71. 6. State v. Branton, 33 Oregon 533.

7. Com. v. Bradley, 16 Pa. Super. Ct. 561.

72. 3. Duplicity. — Under a statute making an accessory before the fact a principal, an indictment charging a defendant as accessory both before and after the fact was held bad for duplicity. *State v. Hinkle*, 33 Oregon 93.

ACCORD AND SATISFACTION.

73. II. MAY BE PLEADED IN ALL ACTIONS. — See note 2.

74. III. MATTER MUST BE PLEADED — At Common Law. — See note 1.

Under the Codes. — See note 3.

75. IV. AT WHAT TIME TO BE PLEADED. — See note 1.

76. V. FORM OF THE PLEA — At Common Law. — See note 3.

Under the Codes. — See note 4.

77. VI. NECESSARY ALLEGATIONS OF ACCORD AND SATISFACTION — Allegation of Time. — See note 2.

Allegation of Acceptance. — See note 3.

73. 2. *Carpenter v. Chicago, etc.*, R. Co., 7 S. Dak. 584, *quoting* 1 ENCYC. OF PL. AND PR. 73.

74. 1. Common-law Rule Stated. — At common law accord and satisfaction may be shown under the general issue in actions of contract. In actions of debt on specialties and judgments, and in trespass *vi et armis*, it must be specially pleaded, unless it is waived or brought into the case by the plaintiff. *Covell v. Carpenter*, (R. I. 1902) 51 Atl. Rep. 425.

3. *Atchison v. Atchison*, 67 Conn. 35; *Ingram v. Hilton, etc.*, Lumber Co., 108 Ga. 194; *Dibble v. Dimick*, 143 N. Y. 549; *Habrich v. Donohue*, 51 N. Y. App. Div. 375; *Niggli v. Fochry*, 83 Hun (N. Y.) 269; *Jacobs v. Day*, (C. Pl. Gen. T.) 5 Misc. (N. Y.) 410; *Seaver v. Wilder*, 68 Vt. 423; *Barker v. Ring*, 97 Wis. 53.

75. 1. Plea After Dismissal of Action as to One Defendant. — Where two defendants are sued jointly for the same negligent act, and the plaintiff, during the pendency of the action, executes to one defendant an accord and satisfaction, acknowledging receipt of a sum of money in full settlement for the damages sustained, and discontinues the action as to that defendant, the other defendant should be permitted to amend his plea or answer in order to show that the plaintiff has received satisfaction from his codefendant. *Donaldson v. Carmichael*, 102 Ga. 40.

76. 3. Approved Form. — See *Troy Min. Co. v. White*, 10 S. Dak. 475.

Express Admission Not Necessary. — A plea of accord and satisfaction need not specifically confess the allegations of the declaration. *Snyder v. Witt*, 99 Tenn. 618.

4. *Forbes v. Petty*, 37 Neb. 899; *Lindsay v. Gager*, 11 N. Y. App. Div. 93.

Execution of accord and satisfaction should be shown by an allegation of acceptance of consideration. *Troy Min. Co. v. White* 10 S. Dak. 475.

A sufficient plea of accord and satisfaction must allege that the parties agree on the terms of settlement, and must show an actual performance of the contract or a tender to perform in accordance with the agreement. *Perdew v. Tillma*, 62 Neb. 865.

77. 2. When Material. — The allegation of time may be material in the nature of the case, as where a plea sets up, as the basis of the sole defense to a suit upon an unconditional contract in writing, a subsequent accord and satisfaction between creditors, including the plaintiff. *Smith v. Mechanics Nat. Bank*, 108 Ga. 211.

3. *Nance v. Winship Mach. Co.*, 94 Ga. 649; *Van Housen v. Broehl*, 58 Neb. 348; *Arkansas City First Nat. Bank v. Leech*, 94 Fed. Rep. 310.

The Accord as well as the satisfaction or the delivery or performance of what is so agreed upon must be averred. *Hale v. Grogan*, 99 Ky. 170, *citing* 1 ENCYC. OF PL. AND PR. 73. See also *Goble v. American Nat. Bank*, 46 Neb. 891.

78. Allegation of Mistake. — See note 1.

79. Replication. — See note 3.

80. See note 1.

VII. INSUFFICIENT ALLEGATIONS OF ACCORD AND SATISFACTION — Received on Account. — See note 2.

To Whom Satisfaction Was Made. — See note 3.

"Satisfied and Discharged." — See note 4.

Statement of Legal Conclusion. — See note 5.

81. All Elements to Be Embodied. — See note 2.

82. VIII. MISCELLANEOUS — 3. Pro Tanto. — See note 2.

Plea Must Set Forth Whole Agreement. — Where the plea omits all reference to material terms of the accord as shown by the proof, there is a fatal variance. *Smith v. Elrod*, 122 Ala. 269. See also *Smith v. Mechanics Nat. Bank*, 108 Ga. 211; *Walker v. Reese*, 110 Ga. 582.

Defect Waived. — A plea setting up an assignment of a leasehold interest in satisfaction of a claim, but failing to aver that the assignment was accepted in satisfaction, is demurrable; but the right to object is waived where the plaintiff replies to it according to its obvious intent as a plea of accord and satisfaction. *Oil Well Supply Co. v. Wolfe*, 127 Mo. 616.

78. 1. **Plaintiff's Mistake.** — Where the plaintiff alleges mistake and a state of facts which, if proved, would be fraud on the part of the defendant, and the defendant sets up an accord and satisfaction, the plaintiff should be permitted to show the facts alleged. *Belt v. American Cent. Ins. Co.*, 148 N. Y. 624.

79. 3. *Brainard v. Van Dyke*, 71 Vt. 359, in which case the court said: "When a party seeks to avoid the effect of an alleged accord and satisfaction by reason of fraud, it is not enough to say that the accord and satisfaction were procured by the fraud of the other party. He must go further and set forth the facts which constitute such fraud," and must also allege the return of the consideration. See also **FRAUD.**

Allegation of Disaffirmance. — A reply to an answer setting up an accord and satisfaction wherein the plaintiff claims that at the time of the agreement he was *non compos mentis* must allege restoration to reason and disaffirmance, or continued unsoundness of mind and disaffirmance by guardian, as well as the return of the consideration received.

Louisville, etc., R. Co. v. Herr, 135 Ind. 591.

80. 1. *Long v. Scanlan*, 105 Ga. 424. **Insufficiency of General Denial.** — Where the defendant pleads a contract of settlement, and the plaintiff meets this with a general denial and without any specific attack, the contract cannot be impeached under this pleading, after its execution is established. *Solor Refining Co. v. Elliott*, 8 Ohio Cir. Dec. 225.

Admission by Failure to Deny in Reply. — Where the reply of the plaintiff in no way denies the affirmative allegation in the answer of an accord and satisfaction, but substantially admits it, the allegation of accord and satisfaction stands confessed by the pleadings. *Reichel v. Jeffrey*, 9 Wash. 250.

2. *Barnum v. Green*, 13 Colo. App. 254; *Morrill v. Baggott*, 157 Ill. 240; *Sheets v. Russell*, 12 Ind. App. 677; *Chambers v. Niagara F. Ins. Co.*, 58 N. J. L. 216.

3. *Smith v. Mechanics Nat. Bank*, 108 Ga. 211.

4. *Heath v. Doyle*, 18 R. I. 252.

5. *Gowing v. Thomas*, 67 N. H. 399. And see generally **LEGAL CONCLUSIONS.**

81. 2. *Lindsay v. Gager*, 11 N. Y. App. Div. 93; *Rogers v. Spokane*, 9 Wash. 168.

Plea of Payment. — Evidence tending to show an accord and satisfaction is not admissible under a plea of payment. The special agreement amounting to accord and satisfaction must be pleaded in full. *Freiermuth v. McKee*, 86 Mo. App. 64.

82. 2. **Partial Performance.** — A right of action upon the original contract is not extinguished by an accord merely, without complete satisfaction, where the agreement was that performance, not mere promise, is to constitute the satisfaction, and a tender of money received thereunder was not necessary

82. 4. Question for Jury. — See note 3.

before commencing suit on the original contract. *Long v. Scanlan*, 105 Ga. 424.

82. 3. Instructions to Jury.—If the defendant satisfies the jurors that he has made such a payment as he claims to have made, he is entitled to have them told explicitly what its effect would be on the plaintiff's right to recover. *Ford v. Hubinger*, 64 Conn. 129.

Question for Court. — Where the sole evidence to support an alleged accord and satisfaction consists of letters, in relation to which there is no dispute of fact, the question whether these letters constitute a complete accord and satisfaction is one for the court. *Logan v. Davidson*, 18 N. Y. App. Div. 353.

ACCOUNTS AND ACCOUNTING.

84. I. COMMON-LAW ACTION OF ACCOUNT — 1. Generally Fallen into Disuse. — See note 3.

2. When It Lies — Against Guardian. — See GUARDIANS.

Against Bailiff. — See note 8.

Joint Tenants and Tenants in Common. — See JOINT TENANTS AND TENANTS IN COMMON.

85. Merchant and Broker. — See FACTORS AND BROKERS.

Executors and Administrators. — See EXECUTORS AND ADMINISTRATORS.

Partnership Affairs. — See PARTNERSHIP.

87. 6. Proceedings Before the Auditors. — See REFERENCES.

II. ACCOUNT STATED — 1. Generally — Defined. — See note 5.

Inserting Count. — See note 6.

88. 2. Must Be Declared on as Such. — See note 1.

Complaint Not to Be Dismissed. — See note 2.

3. The Complaint or Declaration — Sufficient Complaint. — See note 4.

Allegations of Assent. — See note 5.

84. 3. Field v. Brown, 146 Ind. 293, citing 1 ENCYC. OF PL. AND PR. 84, 85.

In Illinois this form of action is fully recognized, though rarely used. Kemp v. Merrill, 92 Ill. App. 46.

8. Kemp v. Merrill, 92 Ill. App. 46, citing 1 ENCYC. OF PL. AND PR. 84.

87. 5. McDowell v. North, 24 Ind. App. 435, quoting 1 ENCYC. OF PL. AND PR. 87; Ward v. Stewart, 103 Ga. 260, citing 1 ENCYC. OF PL. AND PR. 87-89; Jorgensen v. Kingsley, 60 Neb. 44, citing 1 ENCYC. OF PL. AND PR. 87.

6. Clements v. Mayfield Woolen Mills, 128 Ala. 332; Griffin v. Murdock, 88 Me. 254.

88. 1. Mather v. Mather, 38 N. Y. App. Div. 32 [quoting 1 ENCYC. OF PL. AND PR. 88]; Davis v. Boswell, 77 Mo. App. 294; McGuire v. De Frese, 77 Mo. App. 683; Wilson v. Waldron, 12 Wash. 149; Patillo v. Allen-West Commission Co., (C. C. A.) 108 Fed. Rep. 723; McKenzie v. Poorman Silver Mines, (C. C. A.) 88 Fed. Rep. 111.

2. Leiser v. McDowell, 69 N. Y. App. Div. 444.

Judgment for Separate Item. — Where the action is tried as being upon an account stated, there can be no recovery

for any separate item therein. *Johnson v. Tyng, 1 N. Y. App. Div. 610.*

Assigned Claim. — While in an action between the original parties great liberality may be shown where the proof varies from the allegations, yet when an assignee of a claim alleges an account stated, he must recover, if at all, strictly upon the issue which he tenders. *Hughes v. Smither, 23 N. Y. App. Div. 590.*

4. Ward v. Stewart, 103 Ga. 260; McDowell v. North, 24 Ind. App. 435; Hale v. Hale, 14 S. Dak. 644.

Implied Promise to Pay. — Under Mills's Annot. Code Colo. (1896), § 49, when, from the facts stated, the law implies a promise to pay, the actual promise to pay need not be alleged. *Mine, etc., Supply Co. v. Parke, etc., Co., (C. C. A.) 107 Fed. Rep. 881.*

Allegations as to Original Debt. — It is unnecessary in an action upon an account stated to set forth in the complaint any of the subject-matter of the original account. *Schotz v. Morette, 146 N. Y. 137. See also Moss v. Lindblom, 39 N. Y. App. Div. 586.*

5. Davis v. Boswell, 77 Mo. App. 294.

Defect Waived. — Where the complaint

89. Allegations of Breach. — See note 1.

Bill of Particulars. — See note 2.

4. The Answer or Plea — Defense Must Be Pleading. — See note 3.

Fraud. — See note 5.

Denial and Nonassumpsit. — See note 8.

90. III. ACTIONS ON ACCOUNTS — 1. Particularity. — See note 2.

Copy of Account. — See note 3.

contains no allegation of assent or promise by the defendant, the defect is waived by failure to demur. *Ward v. Stewart*, 103 Ga. 260.

Insufficient Allegations. — The allegation that certain statements had been rendered to the defendants and retained without objection, and that one payment had been made thereafter without objection, is not a good declaration upon an account stated, either at common law or under the code. *Patillo v. Allen-West Commission Co.*, (C. C. A.) 108 Fed. Rep. 723.

89. 1. McDowell v. North, 24 Ind. App. 435, citing 1 ENCYC. OF PL. AND PR. 89, note 1.

2. Ward v. Stewart, 103 Ga. 260; *McDowell v. North*, 24 Ind. App. 435; *Commercial Electrical Supply Co. v. Kroell*, 85 Mo. App. 337. See also **BILLS OF PARTICULARS.**

In New York, where the complaint is upon an account stated, and the defendant makes answer under oath, and demands a verified copy of the account, and the plaintiff furnishes an unverified copy thereof, a motion for an order for a verified bill of particulars will be granted. *Rhineland v. Haan*, 66 N. Y. App. Div. 505.

Copy of Account Stated — California Statute. — Under Code Civ. Pro. Cal., § 454, the plaintiff is required to furnish a copy of the stated account, but not the original items of the open account. *Coffee v. Williams*, 103 Cal. 550.

Copy of Cause of Action — Florida Statute. — The copy of the cause of action required by the statute to be attached to the declaration is no part of such declaration, unless expressly made a part thereof by apt words, and its absence is not a subject of demurrer; the defendant's remedy is to refuse to plead until such copy is filed. *Martyn v. Arnold*, 36 Fla. 446.

3. Crawford v. Hutchinson, 38 Oregon 578.

5. Martyn v. Arnold, 36 Fla. 446; *Bergen v. Hitchings*, 22 N. Y. App. Div. 395. See also **FRAUD.**

8. Proof of Payment under Denial of Account Stated. — Where the defendant denies that an account was ever stated between him and the plaintiff, he should be permitted to show that the items upon which the claim was based had been paid prior to the time the account was alleged to have been stated. *Kaminsky v. Mendelson*, (Supr. Ct. App. T.) 25 Misc. (N. Y.) 500.

90. 2. Fletcher v. Co-operative Pub. Co., 58 Neb. 511; *Howell Cotton Co. v. Citizens Nat. Bank*, (C. C. A.) 81 Fed. Rep. 767. See also **DEFINITENESS AND CERTAINTY IN PLEADINGS.**

Pleading and Proof. — An action on an open account may be supported by proof of an account stated. *Sullivan Timber Co. v. Brushagel*, 111 Ala. 114.

3. Morrisette v. Wood, 128 Ala. 505; *Townsend v. Cleveland Fire Proofing Co.*, 18 Ind. App. 568; *Coombs Commission Co. v. Block*, 130 Mo. 668; *Howell Cotton Co. v. Citizens Nat. Bank*, (C. C. A.) 81 Fed. Rep. 767. See also **EXHIBITS.**

Copy of Account Part of Petition. — When a copy of the account sued on is attached to the petition, it must be considered as a part thereof when construing the allegations of the petition. *McArthur v. Clark Drug Co.*, 48 Neb. 899.

Failure to Demand Copy of Account. — Where the defendant fails to demand a copy of the account as provided in Code Civ. Pro. S. Car., § 179, he cannot object to the plaintiff proving the sums sued on generally under the provisions of that section. *Albion Phosphate Min. Co. v. Wyllie*, (C. C. A.) 77 Fed. Rep. 541.

Objectionable Bill of Particulars. — If the bill of particulars is for any reason objectionable, and the defendant proposes to object to the introduction of evidence, he must, previous to the trial, move for an order to exclude such evidence. *McCarthy v. Mt. Tecarte Land, etc., Co.*, 110 Cal. 687.

90. 2. Statutory Provisions. — See note 4.

3. Pleading by Copy. — See note 5.

91. Account Must Be Specific. — See note 1.

Allegation that Amount Is "Due." — See note 2.

Remedies for Defective Accounts. — See note 3.

4. Probated Accounts — Generally. — See note 4.

92. Meaning of "Account" — See note 1.

Petition or Declaration. — See note 2.

How Issue Made Up. — See note 3.

90. 4. Hartsell v. Masterson, (Ala. 1902) 31 So. Rep. 616; McCarthy v. Mt. Tecarie Land, etc., Co., 110 Cal. 687; Scott v. Frost, 4 Colo. App. 557; Ward v. Stewart, 103 Ga. 260; Badger v. Gilroy, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 466.

When the Action Is upon a Verified Complaint, or a sworn copy of the account, the plaintiff is entitled to judgment unless the defendant makes a sworn denial of all or part of the claim, and the plaintiff is required to prove only the items so denied. *Clements v. Mayfield Woolen Mills*, 128 Ala. 332; *Rockmore v. Cullen*, 94 Ga. 648; *Bonner v. White*, 78 Miss. 653.

5. McArthur v. Clarke Drug Co., 48 Neb. 899.

91. 1. Alexander v. Moore, 111 Ala. 410; McClendon v. Hernando Phosphate Co., 100 Ga. 219; Cook v. Barnham, etc., Co., 3 Kan. App. 27; Glidden v. Korter, 90 Me. 269; Turgeon v. Cote, 88 Me. 108; Dawson v. Quillen, 1 Mo. App. Rep. 421; Home F. Ins. Co. v. Arthur, 48 Neb. 461; Loeb v. Heere, 19 Pa. Co. Ct. 641; Hickman v. Scudder-Gale Grocer Co., (Tex. Civ. App. 1901) 62 S. W. Rep. 1081.

Pleading and Proof — Variance. — A plaintiff cannot declare on an itemized account and recover on an account stated. *McGuire v. DeFreese*, 77 Mo. App. 683.

2. McClendon v. Hernando Phosphate Co., 100 Ga. 219; Holton v. Sand Point Lumber Co., (Idaho, 1901) 64 Pac. Rep. 889.

Necessity to Plead Set-off. — Whatever the form of the declaration, an action upon an open and mutual account current is in effect for the balance due, and any credit to which the defendant is entitled should be allowed, although not pleaded as a set-off. *Kingsley v. Delano*, 169 Mass. 285.

3. Elm City Club v. Howes, 92 Me. 211.

Demurrer to Particular Items. — If the account contains items which are not strictly the subject of an account, the proper practice is for the defendant to demur to those items. *McKemy v. Goodall*, 1 Ohio Cir. Dec. 14.

Variance Between Complaint and Account Attached. — If the defendant is not misled by and does not object to a variance between the complaint and the account stated, the defect is waived. *General Electric Co. v. Blacksburg Land, etc., Co.*, 46 S. Car. 75.

4. In Justice's Court. — In *Bass v. Go-bert*, 113 Ga. 262, it was held that it is in a justice's court only that a party is allowed under special circumstances to prove the correctness of his account by his *ex parte* affidavit, and such an affidavit is not admissible in an action in the Superior Court.

92. 1. DeLong v. Miller, (Tex. Civ. App. 1896) 37 S. W. Rep. 191.

Physician's Account. — An account by a physician for his services is not such as can be proved under the statute providing that verified open accounts shall be *prima facie* evidence of the existence of the debt. *Garwood v. Schlichenmaier*, (Tex. Civ. App. 1901) 60 S. W. Rep. 573.

Club Dues. — *Indebitatus Assumpsit* upon an account annexed will lie for the recovery of club dues. *Elm City Club v. Howes*, 92 Me. 211.

2. Morgan v. Roper, 119 N. Car. 367; Roberts v. Pawley, 50 S. Car. 491.

Failure to File Sworn Account. — Where the complaint avers that the action is upon a sworn account, when none has in fact been filed, the plaintiff may prove the account sued on as if no averment of its verification had been made. *Sullivan Timber Co. v. Brushagel*, 111 Ala. 114.

3. Sworn Answer. — In an action on a verified account the plaintiff must prove only those items which the defendant denies under oath in his answer. *Shu-*

92. The Affidavit. — See note 4.

93. IV. ACCOUNTING IN EQUITY — 1. Equity Jurisdiction in Cases of Accounts — *a. WHAT MUST BE ALLEGED.* — See note 2.

b. BASIS AND EXTENT OF JURISDICTION. — See note 4.

94. Under Codes. — See note 1.

c. MUTUAL ACCOUNTS. — See note 3.

95. d. COMPLICATED ACCOUNTS. — See notes 1, 2.

ford *v. Chinski*, (Tex. Civ. App. 1894) 26 S. W. Rep. 141. See also *Low v. Griffin*, (Tex. Civ. App. 1897) 41 S. W. Rep. 73.

Statute of Limitations. — Under the statute now embodied in Rev. Stat. Ariz. (1901), par. 1358, 2554, providing that a verified account shall be taken as *prima facie* evidence thereof unless the defendant files a written denial verified by affidavit, an answer pleading only the statute of limitations need not be verified. *Wagner v. Boyce*, (Ariz. 1898) 52 Pac. Rep. 1122.

92. 4. Brin v. Wachusett Shirt Co., (Tex. Civ. App. 1897) 43 S. W. Rep. 295.

Affidavit of Bookkeeper Insufficient. — A statute providing that an account coming from another county of the state, with the affidavit of the plaintiff to its correctness, shall be conclusive against the defendant unless he denies it on oath, does not permit the affidavit to be made by a bookkeeper or any other person than the plaintiff, and if the plaintiff cannot, for want of information, make the oath himself, he must prove the account as in other cases. *Foster v. Scott County*, 107 Tenn. 693.

93. 2. Dargin v. Hewlitt, 115 Ala. 510; *Lathan v. Harby*, 50 S. Car. 428.

4. Seattle Nat. Bank v. School Dist. No. 40, 20 Wash. 368; *McDonnell v. Jones*, 24 Pa. Co. Ct. 40, in which cases the courts respectively *quoted* and *cited* 1 ENCYC. OF PL. AND PR. 93; *Dargin v. Hewlitt*, 115 Ala. 510; *Southworth v. People*, 183 Ill. 621; *Crown Coal, etc., Co. v. Thomas*, 177 Ill. 534; *Gleason, etc., Mfg. Co. v. Hoffman*, 168 Ill. 25; *Sligo Iron Store Co. v. Blanks*, 105 La. 663; *Bruns v. Spalding*, 90 Md. 349; *Clark v. Equitable L. Assur. Soc.*, 76 Miss. 22; *Devereux v. McCrady*, 46 S. Car. 133; *Christian v. Smith*, 105 Fed. Rep. 466; *U. S. v. National Bank*, 73 Fed. Rep. 379.

Suit for Accounting by Distributees. — In *Teal v. Chancellor*, 117 Ala. 612, it

was held that where an intestate leaves no debts, and therefore an administrator is unnecessary, a suit in equity for an accounting may be maintained by one of the distributees against those in possession. See also *LEGATEES AND DISTRIBUTEES*.

Accounting and Discovery. — Where a bill prays for a discovery and an accounting, the discovery, if material to the relief, is *prima facie* incidental, and if there is no right to an accounting the whole bill is bad on demurrer. *Everson v. Equitable L. Assur. Soc.*, (C. C. A.) 71 Fed. Rep. 570.

Necessity of Accounting Alone. — The necessity of an accounting is not alone sufficient to deprive the law side of the court of jurisdiction. *Church v. Anti-Kalsomine Co.*, 118 Mich. 219. See also *Ellis v. Southwestern Land Co.*, 102 Wis. 409.

94. 1. Coward v. Clanton, 122 Cal. 451; *Abbey v. Wheeler*, 85 Hun (N. Y.) 226; *Dorney v. Thacher*, 76 Hun (N. Y.) 361; *Lee v. Washburn*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 311.

In Kentucky, under the Act of 1890 (*Carroll's Code*, 1895, p. 20, § 10, subsec. 4), where an action is brought on contract it may be transferred to equity if the items in the account are numerous and complicated. *Covington v. Lime-rick, Ky.* (1897) 40 S. W. Rep. 254.

3. Seattle Nat. Bank v. School Dist. No. 40, 20 Wash. 368 [*quoting* 1 ENCYC. OF PL. AND PR. 94]; *Aitalla Min., etc., Co. v. Winchester*, 102 Ala. 184; *McCormick v. Page*, 96 Ill. App. 447; *Brooks v. Goodwin*, 70 N. H. 281; *Moore v. Hammond*, 110 Fed. Rep. 897.

95. 1. Blodgett v. Foster, 114 Mich. 688 [*citing* 1 ENCYC. OF PL. AND PR. 95]; *Powell v. Dunn*, 7 Pa. Dist. 275; *Gunn v. Brinkley Car Works, etc., Co.*, (C. C. A.) 66 Fed. Rep. 382.

2. Crown Coal, etc., Co. v. Thomas, 177 Ill. 534; *Chase v. Knickerbocker Phosphate Co.*, 32 N. Y. App. Div. 400; *Schuetz v. German-American Real Estate Co.*, 21 N. Y. App. Div. 163.

96. See note 1.

c. FIDUCIARY RELATION. — See note 2.

97. **2. The Bill or Complaint**—*a.* GENERALLY. — See notes 1, 2.

b. CERTAINTY AND PARTICULARITY. — See note 3.

98. **Necessary Allegations.** — See note 2.

Superfluous Averments. — See note 4.

c. ALLEGATION OF DEMAND. — See note 5.

d. OFFER TO PAY BALANCE. — See note 6.

96. 1. *Henderson v. Flanagan*, 75 Ill. App. 283; *Brewer v. Swartz*, 83 Mo. App. 451; *Rutherford v. Alyea*, 54 N. J. Eq. 411; *Bellingham v. Palmer*, 54 N. J. Eq. 136; *Howell v. Crosby*, 89 Hun (N. Y.) 355; *Safety Electric Constr. Co. v. Creamer*, 84 Hun (N. Y.) 570; *Silvis v. Clons*, 1 Pa. Super. Ct. 41; *Latham v. Harby*, 50 S. Car. 428.

2. *Davis v. Hofer*, 38 Oregon 150 [*citing* 1 ENCYC. OF PL. AND PR. 96]; *Tarabino v. Nicoli*, 5 Colo. App. 545; *Fowler v. Catton*, 13 Hawaii 487; *Northern Trust Co. v. Marsh*, 98 Ill. App. 596; *Blodgett v. Foster*, 114 Mich. 688; *Cornell v. Redrow*, 60 N. J. Eq. 251; *Knorr v. Lloyd*, (N. J. 1900) 47 Atl. Rep. 53; *Simpson v. Simpson*, 44 N. Y. App. Div. 492; *Rose v. Durant*, 44 N. Y. App. Div. 381.

97. 1. *Angelo v. Angelo*, 146 Ill. 629; *Meyer v. Saul*, 82 Md. 459; *Schantz v. Oakman*, 163 N. Y. 148; *Harrison v. Union Trust Co.*, 144 N. Y. 326; *Forker v. Brown*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 161; *Thompson v. Snyder*, 113 Fed. Rep. 531; *Robinson v. West Virginia Loan Co.*, 90 Fed. Rep. 770.

2. In the following cases the bill or complaint was held to be sufficient: *Coward v. Clanton*, 122 Cal. 451; *San Pedro Lumber Co. v. Reynolds*, 111 Cal. 588; *Reid v. Wilson*, 109 Ga. 424; *Southworth v. People*, 183 Ill. 621; *Adams v. Shewalter*, 139 Ind. 178; *Blodgett v. Foster*, 114 Mich. 688; *Simpson v. Simpson*, 44 N. Y. App. Div. 492; *Donnelly v. Lambert*, 62 N. Y. App. Div. 189; *Reeves v. Bushby*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 226; *Johnston v. Price*, 172 Pa. St. 427; *Renshaw v. Tullahoma First Nat. Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 194; *Meyer v. Garthwaite*, 92 Wis. 571.

See the following cases where the bill or complaint was held to be insufficient to sustain a decree for an accounting: *Olds v. Regan*, (N. J. 1895) 32 Atl. Rep. 827; *Schantz v. Oakman*, 163 N. Y. 148; *Dykman v. Keeney*, 154 N. Y. 483; *Conger v. Judson*, 69 N. Y.

App. Div. 121; *Rivelson v. Silverstein*, (Supm. Ct. App. Div.) 72 N. Y. Supp. 594; *McLellan v. Goodwin*, 43 N. Y. App. Div. 148; *Lafond v. Lassere*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 77; *Murphy v. Eddy*, 19 R. I. 41.

Under Codes. — If the complaint shows that the plaintiff is entitled to some relief, but fails to demand the proper relief, the complaint is not demurrable as not stating a cause of action. *Teasley v. Bradley*, 110 Ga. 497; *Baylis v. Bullock Electric Mfg. Co.*, 59 N. Y. App. Div. 576; *Chaurant v. Maillard*, 56 N. Y. App. Div. 11; *Wisner v. Consolidated Fruit Jar Co.*, 25 N. Y. App. Div. 362; *Middleton v. Ames*, 37 N. Y. App. Div. 510; *Dunn v. Johnson*, 115 N. Car. 249. But see *O'Brien v. Fitzgerald*, 143 N. Y. 377, in which case the plaintiff demanded a money judgment.

3. *Tutwiler v. Dugger*, 127 Ala. 191; *Fox v. Mackay*, 125 Cal. 54; *Fuller v. John S. Davis's Sons Co.*, 184 Ill. 505; *Freeman v. Wood*, (N. Dak. 1901) 88 N. W. Rep. 721; *Gernt v. Cusack*, 106 Tenn. 141. See also DEFINITENESS AND CERTAINTY IN PLEADINGS.

Multifariousness. — Where a bill for an accounting sets up several grounds for relief, but so related to each other that all must be determined in order to settle the account, the bill is not multifarious. *Canon v. Ballard*, 62 N. J. Eq. 383. See also MULTIFARIOUSNESS AND MISJOINDER (IN EQUITY).

98. **2.** *Schantz v. Oakman*, 163 N. Y. 148; *Gernt v. Cusack*, 106 Tenn. 141; *Seattle Nat. Bank v. School Dist. No. 40*, 20 Wash. 368.

4. *Elias v. Schweyer*, 27 N. Y. App. Div. 69. See also SURPLUSAGE, IRRELEVANT OR REDUNDANT MATTER.

5. *Johnson v. National Bldg., etc., Assoc.*, 125 Ala. 465; *Fowler v. Catton*, 13 Hawaii 487; *Seattle Nat. Bank v. School Dist. No. 40*, 20 Wash. 368, in each of which cases the court cited 1 ENCYC. OF PL. AND PR. 98.

6. *Continental Divide Min. Invest.*

99. *c.* PRAYER. — See note 1.

3. The Answer — Cross-bill. — See note 3.

102. 4. The Plea of Stated Account — *cf.* UNDER THE CODES — Must Be Pleaded. — See note 2.

Reply Must Surcharge and Falsify. — See note 4.

5. Practice. — See note 5.

Costs. — See note 6.

6. The Decree. — See note 7.

103. Frame and Scope. — See note 2.

104. 8. Parties. — See note 3.

Partners. — See PARTNERSHIP.

Co. v. Bliley, 23 Colo. 160. Compare *Barber v. Levy*, (Miss. 1895) 18 So. Rep. 438, which was a suit for an injunction pending an accounting. See also TENDER.

99. 1. *Miesse v. Loren*, 8 Ohio Dec. 448; *Whorley v. Tennessee Centennial Exposition Co.*, (Tenn. Ch. 1901) 62 S. W. Rep. 346; *Santleben v. Froese*, 17 Tex. Civ. App. 626; *Wade v. Meyers*, (Ky. 1901) 60 S. W. Rep. 483, in which last case the parties were permitted to replead. See also PRAYERS FOR RELIEF.

Form of Prayer. — The prayer should be for judgment in favor of the plaintiff for whatever sum the settlement may disclose, and not for a specific amount. *Richard v. Mouton*, 106 La. 435.

General Prayer. — A general prayer for relief will sustain a decree only when the facts alleged justify it; a decree can never rest upon a prayer alone, whether it be for specific or general relief. *Fuller v. John S. Davis's Sons Co.*, 184 Ill. 505.

3. *Whitemore v. Patten*, 84 Fed. Rep. 51, citing 1 ENCYC. OF PL. AND PR. 99. See also CROSS-BILLS.

102. 2. See *Nodine v. Union First Nat. Bank*, (Oregon 1902) 68 Pac. Rep. 1109, in which case the answer was held sufficient after verdict.

4. *Risk v. Basche*, 31 Oregon 178.

Former Settlement. — Where a former settlement is surcharged and falsified, the whole transaction is not to be overhauled, but an account must be made of the items surcharged or falsified. *Windon v. Stewart*, 43 W. Va. 711.

5. *Royster v. Wright*, 118 N. Car. 152; *Stibich v. Goenner*, 8 Pa. Dist. 227. See also REFERENCES.

6. *Glasgow v. Hood*, (Tenn. Ch. 1900) 57 S. W. Rep. 162; *Everett v. Haulenbeek*, 77 Fed. Rep. 12; *Hohorst*

v. Hamburg-American Packet Co., 76 Fed. Rep. 472. See also COSTS.

Costs Divided. — Where both the plaintiff and the defendant asked for the appointment of a receiver and an accounting, the costs may be equally divided between the parties. *Isehart v. Hazen*, (Kan. App. 1901) 63 Pac. Rep. 451.

7. *Silliman v. Smith*, (Supm. Ct. App. Div.) 76 N. Y. Supp. 65. And see generally DECREES.

103. 2. *Rhodes v. Ashurst*, 176 Ill. 351, citing 1 ENCYC. OF PL. AND PR. 103.

Reopening Decree. — A decree for a general accounting will not be reopened in order to allow the plaintiff to charge the defendant with additional items unless it be shown that the plaintiff had no knowledge of the existence of such items before the decree was rendered, and that he could not have obtained such knowledge by the exercise of ordinary diligence; and both lack of knowledge and the exercise of due diligence must be averred in the petition for reopening. *Gunn v. Byrom*, 107 Ga. 147.

104. 3. *Schaake v. Eagle Automatic Can Co.*, 135 Cal. 472; *Witt v. Day*, 112 Iowa 110; *Canon v. Ballard*, 62 N. J. Eq. 383; *Rutherford v. Alyce*, 53 N. J. Eq. 580; *Hamilton v. Faber*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 64; *Donnelly v. Lambert*, 62 N. Y. App. Div. 189. And see generally PARTIES TO ACTIONS.

Waiver of Defect of Parties. — A defendant in an action for an accounting who fails to object to the proceedings for want of proper parties by demurrer or answer cannot urge this objection on the trial or on appeal. Moreover, it will be proper on a reference, without the presence of such parties, for the defendant to show who, in prefer-

105. Corporations. — See note 1.

Assignees. — See ASSIGNMENT FOR BENEFIT OF CREDITORS.

Trusts. — See TRUSTS AND TRUSTEES.

107. 9. Proceedings to Impeach an Account. — See **BILLS TO IMPEACH DECREES AND JUDGMENTS.**

ence to the plaintiff, is entitled to relief, and the referee can make suitable provision for their protection in his report. *Rose v. Durant*, 44 N. Y. App. Div. 381.

105. 1. *Miesse v. Loren*, 8 Ohio Dec. 448 [*citing* 1 ENCYC. OF PL. AND PR. 104, 105]; *Dargin v. Hewitt*, 115 Ala. 510. And see for additional annotations, STOCK AND STOCKHOLDERS.

ACTIONS.

110. I. WHAT IS AN ACTION — 1. Generally; Definition. — See note 1.

111. Legislative Meaning. — See note 1.

112. 2. Special Proceedings — a. GENERALLY. — See note 1.

b. PARTICULAR PROCEEDINGS — Probate Proceedings. — See PROBATE AND CONTEST OF WILLS; SETTLEMENT OF DECEDENTS' ESTATES.

113. Mandamus. — See MANDAMUS.

Attachment. — See note 2.

Certiorari, Prohibition, and Quo Warranto. — See CERTIORARI; PROHIBITION; QUO WARRANTO.

Partition. — See PARTITION.

114. Habeas Corpus. — See HABEAS CORPUS.

Divorce and Alimony Proceedings. — See ALIMONY; DIVORCE.

Condemnation of Land. — See EMINENT DOMAIN.

Vacating, Setting Aside, and Impeaching Judgments. — See OPENING, AMENDING, AND VACATING JUDGMENTS.

115. Miscellaneous Cases. — See note 3.

116. II. WHAT IS A CAUSE OF ACTION. — See note 1.

110. 1. Gibson v. Sidney, 50 Neb. 12, quoting 1 ENCYC. OF PL. AND PR. 110. See also *Matter of Joseph*, 118 Cal. 660; *Losey v. Stanley*, 83 Hun (N. Y.) 420; *Hook v. McCune*, 184 Pa. St. 292; *Bartley's Estate*, 7 Pa. Dist. 36; *State v. Huegin*, 110 Wis. 189.

Suit in Equity. — *Hook v. McCune*, 184 Pa. St. 292.

Case. — The word "case" is not synonymous with "action." Whether it will be construed as including an action will depend upon the particular terms of the statute. *Carpenter v. Jones*, 121 Cal. 362; *Matter of Joseph*, 118 Cal. 660.

111. 1. Actions by the Crown. — Criminal proceedings are sometimes designated as actions by statute. *Comp. Laws Dak.* (1887), § 4813 (Annot. Stat. S. Dak. 1901, § 6013), divides actions into "1. Civil. 2. Criminal." *Madison v. Horner*, 15 S. Dak. 359.

Meaning of "Action" Dependent upon Legislative Intent. — See *Code Civ. Pro. Cal.*, § 21; *Matter of Joseph*, 118 Cal. 660. See also *Bartley's Estate*, 7 Pa. Dist. 36; *Jones v. Leeds*, 10 Ohio Dec.

173; *Hook v. McCune*, 184 Pa. St. 292; *Smith v. Wildman*, 178 Pa. St. 252; *Emerick's Estate*, 172 Pa. St. 191.

112. 1. Matter of Cent. Irrigation Dist., 117 Cal. 382, *quoting 1 ENCYC. OF PL. AND PR. 112*, where a general definition of a special proceeding is given. See also *State v. Huegin*, 110 Wis. 189.

Special Proceeding — "Civil Case." — Although a special proceeding is not a civil action, it is nevertheless a "civil case," especially when such proceeding is one in which issues are made and trials authorized as in civil actions. *Carpenter v. Jones*, 121 Cal. 362.

113. 2. Contra. — *Gibson v. Sidney*, 50 Neb. 12. See also *Jordan v. Dewey*, 40 Neb. 639.

115. 3. Penalties. — *Moller v. U. S.*, (C. C. A.) 57 Fed. Rep. 490. See also PENALTIES AND PENAL ACTIONS.

116. 1. McDonald v. Stear, 7 Pa. Dist. 190 [*quoting 1 ENCYC. OF PL. AND PR. 116*]; *McCandless v. Inland Acid Co.*, 115 Ga. 968 [*citing 1 ENCYC. OF PL. AND PR. 116 et seq.*]; *Platte Valley Irrigation Co. v. Buckers Irrigation*,

117. Delict Alone as Cause of Action. — See note 1.

119. III. — WHEN IS AN ACTION COMMENCED? — 1. Generally.
— [See note a.]

2. In the Various States — Alabama. — See note 1.

120. Arkansas. — See note 2.

122. Connecticut. — See note 2.

123. Georgia. — See note 1.

etc., Co., 25 Colo. 77; Wildman v. Wildman, 70 Conn. 700; Occidental Consol. Min. Co. v. Comstock Tunnel Co., 111 Fed. Rep. 135. See also Farthing v. Carrington, 116 N. Car. 315, wherein 1 ENCYC. OF PL. AND PR. 116 is quoted in a dissenting opinion by Avery, J.

Combination of Right and Delict — *Damnum Absque Injuria.* — Damage without violation of a right is *damnum absque injuria*. Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126.

Right Without Delict. — A right without delict does not constitute a cause of action. Arrick v. Fry, 8 App Cas. (D. C.) 125; Jennings v. Zerr, 48 Mo. App. 528; Banigan v. Nyack, 25 N. Y. App. Div. 150; Kelly v. Oliver, 113 N. Car. 442. See also PREMATURE SUITS.

Injuria Absque Damno. — Injury resulting from a wrongful act is an essential element of a cause of action. Without injury the wrongful act cannot be made the subject of an action. Pitkin v. New York, etc., R. Co., 64 Conn. 482.

There Must Be Two Parties to a cause of action. One cannot hold a right against himself, and hence he cannot have a cause of action against himself. Oliver v. Oliver, 178 Ill. 527; Sweetland v. Porter, 43 W. Va. 189.

117. 1. Delict Alone as Cause of Action. — A cause of action consists of the delict which produces the effect, rather than in the effect of the delict in its application to different primary rights, and hence an injury to the person and to the property as a result of a single delict gives rise to separate items of damage, but a single cause of action. King v. Chicago, etc., R. Co., 80 Minn. 83. See also Bliss v. New York Cent., etc., R. Co., 160 Mass. 447; Reilly v. Sicilian Asphalt Paving Co., 31 N. Y. App. Div. 302, *distinguishing* Skoglund v. Minneapolis St. R. Co., 45 Minn. 330.

119. a. McGrath v. St. Louis, etc., R. Co., 128 Mo. 1, citing 1 ENCYC. OF PL. AND PR. 119.

1. Under Civ. Code Ala. (1896), § 675, providing that the filing of a bill in equity is the commencement of the suit if such suit is thereafter prosecuted, a suit in chancery is commenced by the filing of a bill with a *bona fide* effort to have process thereon served. A delay in the issuance of a summons occasioned by a press of business, or from any mere negligence of the officer whose duty it is to issue it, not carried beyond the next term of the court after the filing, and especially when unknown to the plaintiff or contrary to his orders, will not change the statutory rule. This rule, however, is restricted to suits not involving any *lis pendens*. In cases involving *lis pendens* it seems that the lien dates from the service of the subpoena or other process after the filing of the bill. Greenwood v. Warren, 120 Ala. 71.

120. 2. St. Louis, etc., R. Co. v. Shelton, 57 Ark. 459.

The Filing of an Amended Petition setting up a new and distinct cause is equivalent to the beginning of a new suit. Wood v. Wood, 59 Ark. 441.

122. 2. Substitution of New Plaintiff. — The substitution, pursuant to the statutory authority, of one plaintiff in the place of another does not constitute the beginning of a new action, but is merely a continuation of the action as originally brought. Bowen v. National L. Assoc., 63 Conn. 460. See SUBSTITUTION OF PARTIES.

123. 1. Service Perfected. — Code Ga. (1882), § 3333 (2 Code Ga. 1895, § 4973), providing that an action is commenced by the filing of the declaration, has been held to mean that when the suit is perfected by service on the defendant its commencement shall date back to the filing of the declaration; and hence the mere filing of a declaration which is not followed up by service within the statutory limit in which the action may be brought will not save the action from being barred. McClendon v. Hernando Phosphate Co., 100 Ga. 219.

124. Illinois. — See note 2.

128. Maine. — See note 3.

129. Massachusetts. — See note 2.

Michigan. — See note 3.

130. Minnesota. — See note 1.

Missouri. — See note 3.

131. Nebraska. — See note 2.

124. *S. Milwaukee Mechanics' Ins. Co. v. Schallman*, 188 Ill. 213, *citing 1 ENCYC. OF PL. AND PR.* 124. See also *McKee v. Allen*, 94 Ill. App. 147 [*following Schroeder v. Merchants, etc., Ins. Co.*, 104 Ill. 71]; *Schmidt v. Balking*, 91 Ill. App. 388.

In *McKee v. Allen*, 94 Ill. App. 147, it was admitted by the court that the language of cases subsequent to *Schroeder v. Merchants, etc., Ins. Co.*, 104 Ill. 71, which was followed in the case under consideration, seemed to imply that the delivery of the summons to the sheriff is necessary to constitute a commencement of an action; but it was held that *Schroeder v. Merchants, etc., Ins. Co.*, 104 Ill. 71, had not been overruled on the point under consideration, and it was therefore followed. But see *Collins v. Manville*, 170 Ill. 611; *Fairbanks v. Farwell*, 141 Ill. 354; *Hekla Ins. Co. v. Schroeder*, 9 Ill. App. 472.

Suits as to Intervenor are commenced at the time of the intervention. *Mason v. Chicago*, 163 Ill. 351.

Commencement as to New Party. — Where an amended bill is filed bringing in a new party, the action is commenced as to such party at the date of the filing of such amendment. *Metamora v. Eureka*, 163 Ill. 9.

Suit in Equity. — Under *Starr & Curt. Annot. Stat. Ill.* (1896), c. 22, par. 4, the filing of the bill is the commencement of a suit in equity. *Johnson v. Davidson*, 162 Ill. 232.

128. *S. Rev. Stat. Me.*, c. 81, § 95, provides that a suit is commenced when the writ is actually made with the intention of service. *Larrabee v. Southard*, 95 Me. 385, wherein it was held that where a writ was not delivered to an officer, but remained in the possession of an attorney who thereafter changed the date and had it served, the action was commenced as of the date of the change, the changed writ being equivalent to a new one.

129. *S. Farrell v. German American Ins. Co.*, 175 Mass. 340; *Veginan*

v. Morse, 160 Mass. 143, both of which cases support the text.

3. In *Michigan* a suit is commenced by the suing out of a summons and delivering or transmitting it to an officer, with the *bona fide* intention of having it served. *Peck v. German F. Ins. Co.*, 102 Mich. 52.

Commencement Authorizing Attachment. — Within the meaning of *How. Annot. Stat. Mich. Supp.* (1883-1890), § 8058, authorizing an attachment "at the time of or after the commencement of suit," an action is commenced by the filing of the declaration. *McDonald v. Alanson Mfg. Co.*, 107 Mich. 10.

130. **1. Intervention Suits.** — As to intervenors, a suit is commenced upon the filing of their petitions or complaints. *London, etc., Mortg. Co. v. St. Paul Park Imp. Co.*, 84 Minn. 144.

3. Under *Rev. Stat. Mo.* (1889), § 2013 (*Rev. Stat. Mo.* 1899, § 566), a suit is deemed to be commenced in a court of record when the petition is filed. *McGrath v. St. Louis, etc., R. Co.*, 128 Mo. 1 [*overruling Watkins v. St. Louis, etc., R. Co.*, 53 Mo. App. 659]; *State v. Ross*, 122 Mo. 435; *Moore v. Runlow*, 83 Mo. App. 51 [*overruling Watkins v. St. Louis, etc., R. Co.*, 53 Mo. App. 659]; *Chapman v. Currie*, 51 Mo. App. 40.

Necessity of Good Faith. — Where, after filing a complaint, the plaintiff instructs the clerk not to issue the summons until notified to do so, the original filing will not constitute the commencement of the action. *White v. Reed*, 60 Mo. App. 380.

131. *S. Pickens v. Polk*, 42 Neb. 267; *Burlingim v. Cooper*, 36 Neb. 73.

Service by Publication. — Where service by publication is proper, the action will be deemed to be commenced at the date of the first publication, provided such publication is duly completed. See *Code Civ. Pro. Neb.*, § 19. *Pickens v. Polk*, 42 Neb. 267; *Burlingim v. Cooper*, 36 Neb. 73.

Suit on Notes Secured by Mortgage. — Where a deficiency judgment is sought

132. New Jersey. — See note 1.

133. New York. — See note 1.

135. Ohio. — See note 2.

136. Oklahoma. — See note 1.

Oregon. — See note 2.

140. Washington. — See note 3.

in a suit to foreclose a mortgage securing notes, the date of the commencement of the foreclosure suit is also the date of the commencement of a suit on the notes. *Patrick v. National Bank of Commerce*, (Neb. 1901) 88 N. W. Rep. 183.

132. 1. *Margaret County v. Pacific Coast Borax Co.*, 67 N. J. L. 48.

Bona Fide Intent to Serve Necessary. — The signing and sealing of a summons which is retained in an attorney's office without any purpose of immediate service does not constitute a commencement of a suit. *Lynch v. New York, etc., R. Co.*, 57 N. J. L. 4, *distinguishing Updike v. Ten Broeck*, 32 N. J. L. 106.

130. 1. *Benson v. Eastern Bldg., etc., Assoc.*, 67 N. Y. App. Div. 319, *citing 1 ENCYC. OF PL. AND PR.* 120-141.

Attempt to Commence Equivalent to Actual Commencement. — Code Civ. Pro. N. Y., § 399, provides that an attempt to commence an action in a court of record is equivalent to a commencement thereof against each defendant, within the meaning of each provision of the act which limits the time for commencing an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff; but that the delivery of the summons must be followed within sixty days after the expiration of the time limit for the actual commencement of the action by personal service thereof upon the defendant. *Gough v. McFall*, 31 N. Y. App. Div. 578. This section applies to limitations by contract as well as to those created by statute. *Hamilton v. Royal Ins. Co.*, 156 N. Y. 327.

136. 3. Under Bates's Annot. Stat. Ohio, § 5035, providing that "a civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon," an action is not commenced until the summons is issued. *Dwelle v. Hinde*, 8 Ohio Cir. Dec. 177.

136. 1. Code Civ. Pro. Okla., § 57 (which is the same as Code Civ. Pro.

Kan., § 52), provides that "a civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon." Sections 72 and 73 provide for service by publication. Under these sections it has been held that an action is commenced by filing a petition and procuring a summons to be issued, or by filing a petition with an affidavit for publication, where the service by publication is duly perfected by commencing the publication of such notice within sixty days after the filing of the petition. *Raymond v. Mix*, 5 Okla. 656, wherein the point under consideration was whether the action had been commenced at the time when an attachment was issued.

2. *Burns v. White Swan Min. Co.*, 35 Oregon 305, *quoting 1 ENCYC. OF PL. AND PR.* 136, as to when an action is deemed to be commenced in Oregon.

Effect of Appearance. — See Hill's Annot. Laws Oregon, § 14; *Hawkins v. Donnerberg*, 40 Oregon 97. See also *Dunne v. Portland St. R. Co.*, 40 Oregon 295.

Where there Are Several Defendants. — An action is deemed commenced as to each defendant when the complaint is filed and the summons served upon him or upon a codefendant who is joint maker or otherwise united in interest with him. *Smith v. Day*, 39 Oregon 531.

Attempt to Commence. — Hill's Annot. Laws Oregon, § 15, provides that an attempt to commence an action is equivalent to the commencement thereof, within the meaning of the statute of limitations, when the complaint is filed and the summons delivered, with the intent that it shall be actually served, to the sheriff of the county in which the defendants or one of them usually resides, provided the service is actually made or the first publication had within sixty days. *Morrison v. Holladay*, 27 Oregon 175.

140. 3. Code Pro. Wash., § 171, providing that an action is commenced by the filing of the complaint, has been

141. Federal Courts. — See note 4.

142. IV. ABOLITION OF FORMS OF ACTION — 1. Statutory Provisions. — See note 1.

144. 3. The True Rule Followed. — See note 1.

partially repealed by Practice Act Wash., § 1, Laws 1893, providing that civil actions in the superior courts shall be commenced by the service of a summons. *Cosh-Murray Co. v. Tutlich*, 10 Wash. 449. This was again amended in 1895. See Ball. Annot. Codes & Stat. Wash. (1897), § 4869.

Attachments. — An attachment suit is commenced by the filing of the complaint, Code Pro. Wash., § 171 (Ball. Annot. Codes & Stat. Wash. 1897, § 4869), not having been repealed, in so far as attachments are concerned, by Practice Act Wash., § 38, Laws 1893. *Cosh-Murray Co. v. Tutlich*, 10 Wash. 449.

141. 4. A Suit in Equity in a Federal Court is commenced by suing out the proper process, the expression "suing out process" being held to mean the same thing as in an action at law, viz., that upon the filing of a bill a writ of subpoena is filled out by the clerk and delivered for service. *U. S. v. American Lumber Co.*, (C. C. A.) 85 Fed. Rep. 827, affirming 80 Fed. Rep. 309.

142. 1. Mississippi. — It has been held that the effect of the constitutional provision is a complete blending of law and equity, the only exception being that separate courts are maintained to administer them. Under this rule, if a court of law takes cognizance of a suit in equity, and decides it properly, there is no error; likewise, if a court of equity takes cognizance of an action at law. *Goyer Cold Storage Co. v. Wildberger*, 71 Miss. 438.

Ohio. — The form in which an action is brought, that is, whether in law or equity, may be changed by amendment, and the case will then be proceeded with as if the form indicated by the amendment had originally been adopted. *Raymond v. Toledo*, etc., R. Co., 57 Ohio St. 271.

Pennsylvania. — By Act Pa. May 25, 1887, Pub. Laws Pa. 271, the distinctions theretofore existing between actions of trespass, trespass on the case, and trover, so far as they related to procedure, were abolished. *Miller v. Allentown*, etc., Rapid Transit R. Co., 181 Pa. St. 622.

144. 1, Christofferson v. Pfennig,

16 Wash. 491, quoting 1 ENCYC. OF PL. AND PR. 143. See also the following cases:

California. — *Hoffman v. Kirby*, 136 Cal. 26.

Colorado. — *Home Ins. Co. v. Atchison*, etc., R. Co., 19 Colo. 46; *Tarabino v. Nicoli*, 5 Colo. App. 545.

Connecticut. — *Metropolis Mfg. Co. v. Lynch*, 68 Conn. 459; *Thresher v. Stonington Sav. Bank*, 68 Conn. 201; *Craft Refrigerating Mach. Co. v. Quinpiac Brewing Co.*, 63 Conn. 551.

Georgia. — *South Carolina*, etc., R. Co. v. *Augusta Southern R. Co.*, 111 Ga. 420; *Kruger v. Walker*, 111 Ga. 383.

Kansas. — *Brawley v. Smith*, 8 Kan. App. 411.

Minnesota. — *Bell v. Mendenhall*, 71 Minn. 331.

Missouri. — *Glasier v. Nichols*, 112 Fed. Rep. 877.

Montana. — *American Sav.*, etc., Assoc. v. *Burghardt*, 19 Mont. 323.

Nebraska. — *Alter v. Stockham Bank*, 53 Neb. 223; *Kirkwood v. Hastings First Nat. Bank*, 40 Neb. 484, 497.

New York. — *Devlin v. New York*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 106; *Chaurant v. Maillard*, 56 N. Y. App. Div. 11.

North Carolina. — *Fisher v. Greensboro Water Supply Co.*, 128 N. Car. 375.

South Carolina. — *Sheppard v. Green*, 48 S. Car. 165.

Texas. — *Heinze v. Marx*, 4 Tex. Civ. App. 599.

Wisconsin. — *Jordan v. Warner*, 107 Wis. 539.

Where No Answer Is Interposed. — In *California* it is provided by Code Civ. Pro., § 580, that where no answer is interposed relief cannot be granted to the plaintiff in excess of that which he has demanded in his complaint; and hence it has been held that the extent to which the court may disregard the form of the plaintiff's action and grant relief according to the facts shown depends on whether there is an answer. If there is an answer the court may grant any relief within the facts and issues, but if there is no answer, the plaintiff is confined to the theory of his case, legal or equitable, in his complaint. *Hoffman v. Kirby*, 136 Cal. 26.

144. 4. Substantive Distinction Preserved. — See note 2.

145. 5. No New Causes of Action Created. — See note 1.

6. The Civil Action a Substitute. — See note 2.

146. V. CHARACTER OF ACTION; HOW DETERMINED UNDER CODES — **1. A Question of Construction.** — See note 1. See also **THEORY OF THE CASE.**

147. 2. When the Prayer May Be Consulted. — See **THEORY OF THE CASE.**

3. Actions ex Contractu and Actions ex Delicto. — See **THEORY OF THE CASE.**

In *New York* there is a provision (Code Civ. Pro., § 1207) similar to the California provision, *supra*, and the rule adopted is the same as in California, except that it seems that where the complaint sets out an equitable cause and the evidence establishes only a common-law cause, the court may, in its discretion, either dismiss the case or send it to the trial calendar. *Hawes v. Dobbs*, 137 N. Y. 465; *Black v. Vanderbilt*, 70 N. Y. App. Div. 16; *Ketchum v. Depew*, 81 Hun (N. Y.) 278; *Chaurant v. Maillard*, 56 N. Y. App. Div. 11; *Ashley v. Lehmann*, 54 N. Y. App. Div. 45; *Thomas v. Schumacher*, 17 N. Y. App. Div. 441.

144. 2. The following cases support the text:

Arkansas. — *Cockrill v. Butler*, 78 Fed. Rep. 679.

Colorado. — *Home Ins. Co. v. Atchison, etc.*, R. Co., 19 Colo. 46; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200.

Nebraska. — *Hopkins v. Washington County*, 56 Neb. 596.

Oklahoma. — *Phelps, etc., Co. v. Halsell*, (Okla. 1901) 65 Pac. Rep. 340.

South Carolina. — *Bolt v. Gray*, 54 S. Car. 95.

South Dakota. — *Luscombe v. Grigsby*, 11 S. Dak. 408.

145. 1. *Phelps, etc., Co. v. Halsell*, (Okla. 1901) 65 Pac. Rep. 340. See also *Farthing v. Carrington*, 116 N. Car. 315, wherein the text is quoted by Avery, J., in a dissenting opinion.

Cases Not Provided for by Code. — Code Civ. Pro. Neb., § 901, provides: "If a case ever arise in which an action for the enforcement or protection of a right or the redress or prevention of a wrong cannot be had under this code, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." *Cochran v. Cochran*, 42 Neb. 612; *Smithson v. Smithson*, 37 Neb. 535.

2. California. — *Southern Pac. R. Co. v. Hyatt*, 132 Cal. 240; *Rogers v. Duhart*, 97 Cal. 500.

Colorado. — *Allen v. King*, 4 Colo. App. 319, affirmed 23 Colo. 255.

Kansas. — *Brawley v. Smith*, 8 Kan. App. 411; *German Ins. Co. v. Davis*, 6 Kan. App. 268; *Freeman v. Trickett*, 6 Kan. App. 84.

Nebraska. — *Hopkins v. Washington County*, 56 Neb. 596.

New York. — *Devlin v. New York*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 100.

Distinction Between Actions ex Delicto and ex Contractu Abolished. — See *Metropolis Mfg. Co. v. Lynch*, 68 Conn. 459, wherein it was held that where a complaint was sufficient to sustain recovery for breach of contract, such recovery should have been granted although the plaintiff had proceeded upon the theory that his action was one in trover, and his evidence was not sufficient to sustain the latter action. See also *Rogers v. Duhart*, 97 Cal. 500; *Denver Tramway Co. v. Cloud*, 6 Colo. App. 445; *Duff v. Blair*, 74 N. Y. App. Div. 364; *Johnston v. Meaghr*, 14 Utah 426.

Distinction Between Forms of Action ex Delicto Abolished. — One form of action, called a civil action, has been substituted for the various forms of action *ex delicto*. *Rogers v. Duhart*, 97 Cal. 500; *Johnston v. Meaghr*, 14 Utah 426.

The Substantive Distinction between the several classes of torts has not been abolished. One form of civil action is adopted, but the facts constituting the various causes of action for which that form was prescribed are necessarily different. *Johnston v. Meaghr*, 14 Utah 426.

146. 1. *Christofferson v. Pfennig*, 16 Wash. 491 [quoting 1 ENCYC. OF PL. AND PR. 146]; *Miesse v. Loren*, 8 Ohio Dec. 448, citing 1 ENCYC. OF PL. AND PR. 146.

148. VI. SPLITTING CAUSES OF ACTION — 1. Generally. — See note 2. See also ABATEMENT OF ACTIONS; AMOUNT IN CONTROVERSY; ANOTHER SUIT PENDING; FORMER ADJUDICATION.

148. S. Barnes v. Black Diamond Coal Co., 101 Tenn. 354, *citing* 1 ENCYC. OF PL. AND PR. 148. See also the following cases:

Alabama. — *Jasper Mercantile Co. v. O'Rear*, 112 Ala. 247.

Arkansas. — *Reynolds v. Jones*, 63 Ark. 259.

Colorado. — *McMurray v. Marsh*, 12 Colo. App. 95; *Taub v. McClelland-Cott Commission Co.*, 10 Colo. App. 190; *Snedden v. Harms*, 5 Colo. App. 477; *Welch v. Mayer*, 4 Colo. App. 440; *Hallack v. Gagnon*, 4 Colo. App. 360.

Georgia. — *Atlanta Elevator Co. v. Fulton Bag, etc., Mills*, 106 Ga. 427; *Parks v. Oskamp*, 97 Ga. 802.

Illinois. — *Hoblit v. Bloomington*, 71 Ill. App. 204; *Ryan v. Waukesha Spring Brewing Co.*, 63 Ill. App. 334.

Iowa. — *Day v. Breton*, 102 Iowa 482.

Kansas. — *Thister v. Miller*, 53 Kan. 515; *Bolen Coal Co. v. Whitaker Brick Co.*, 52 Kan. 747; *Wells v. Hickox*, 1 Kan. App. 485.

Maryland. — *Olmstead v. Bach*, 78 Md. 132.

Minnesota. — *King v. Chicago, etc., R. Co.*, 80 Minn. 83; *O'Brien v. Manwaring*, 79 Minn. 86.

Missouri. — *Wheeler Sav. Bank v. Tracey*, 141 Mo. 252; *Och v. Missouri, etc., R. Co.*, 130 Mo. 27; *Hoffmann v. Hoffmann*, 126 Mo. 486; *Cunningham v. Union Casualty, etc., Co.*, 82 Mo. App. 607; *Morrison v. De Donato*, 76 Mo. App. 643; *Alkire Grocer Co. v. Tagart*, 60 Mo. App. 389; *Hermann v. Schwartz*, 59 Mo. App. 649; *La Crosse Lumber Co. v. Andrain County Agricultural, etc., Soc.*, 59 Mo. App. 24.

Nebraska. — *Richardson v. Opelt*, 60 Neb. 180; *Hopkins v. Washington County*, 56 Neb. 596.

New York. — *Hahl v. Sugo*, 169 N. Y. 109; *Lorillard v. Clyde*, 142 N. Y. 456; *Van Keuren v. Miller*, 78 Hun (N. Y.) 173, *affirmed* 149 N. Y. 583; *Reilly v. Sicilian Asphalt Paving Co.*, 91 N. Y. App. Div. 302, 170 N. Y. 40; *King v. King*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 63; *Fox v. Phyfe*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 207; *Barnard v. Devine*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 182; *Gentles v. Pinck*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 153.

North Carolina. — *Fort v. Penny*, 122 N. Car. 230, *following* *Magruder v. Randolph*, 77 N. Car. 79.

South Carolina. — *Catawba Mills v. Hood*, 42 S. Car. 203.

South Dakota. — *Fargo v. Vincent*, 6 S. Dak. 211.

Tennessee. — *Sully v. Campbell*, 99 Tenn. 434.

Vermont. — *Ballard v. Thorpe*, 66 Vt. 599.

Washington. — *Achey v. Creech*, 21 Wash. 319.

West Virginia. — *St. Lawrence Boom, etc., Co. v. Price*, 49 W. Va. 432.

United States. — *Maine v. U. S.*, 36 Ct. Cl. 531.

Missouri. — *Barnes v. Black Diamond Coal Co.*, 101 Tenn. 354 [*citing* 1 ENCYC. OF PL. AND PR. 150, note]; *Hermann v. Schwartz*, 59 Mo. App. 649.

Rule Against Splitting Not Applicable — When Plaintiff Restricted by Law from Asserting His Full Claim. — *Taub v. McClelland-Cott Commission Co.*, 10 Colo. App. 190, wherein it was held that where, in replevin against the assignee of an insolvent estate, only a part of the property was found, and the court confined the recovery to that part, the judgment in such action was not a bar to a subsequent action against such assignee for the money into which the other part of the property had been converted. See also *Lovell v. Hammond Co.*, 66 Conn. 500; *Gordon v. Van Cott*, 38 N. Y. App. Div. 564; *Flat Top Grocery Co. v. McClaugherty*, 46 W. Va. 419; *Crockett v. Miller*, (C. C. A.) 112 Fed. Rep. 729.

Where Plaintiff Ignorant of Full Extent of His Demand. — The rule against splitting presupposes all the constituent elements of a cause of action sought to be divided. *Cunningham v. Union Casualty, etc., Co.*, 82 Mo. App. 607; *Gedney v. Gedney*, 160 N. Y. 471; *Jones v. Beaman*, 117 N. Car. 259.

A Partial Settlement does not necessarily preclude a subsequent action for the balance. *Och v. Missouri, etc., R. Co.*, 130 Mo. 27, wherein it was held that a settlement for injuries which is expressly confined to those injuries developed at the time of such settlement will not bar a subsequent action for injuries subsequently developing; *Yaple v. New York, etc., R. Co.*, 57 N.

150. Foundation of Rule. — See note 1.

2. What Constitutes an Entire Cause of Action. — See note 2.

Y. App. Div. 265, wherein it was held that one who receives injury to his person and property by the same negligent act may accept a settlement for one of the injuries, and thereafter sue for the other, though, as was held, both injuries constitute a single cause of action.

Subrogation as to Part of Claim. — Where a party primarily liable pays a portion of the claim, and a party secondarily liable pays the balance, the rule against splitting will not prevent an action by the latter against the former for such balance. *San Francisco Sav. Union v. Long*, (Cal. 1898) 53 Pac. Rep. 907; *Hartford F. Ins. Co. v. Wabash R. Co.*, 74 Mo. App. 106.

Cumulative Remedies. — A single breach of a single contract may give rise to causes of action against different persons, though there is but a single claim for damages. In such a case the rule against splitting is not applicable, and the injured party has cumulative remedies enforceable by separate suits until satisfaction is obtained. *Glenn v. Hunt*, 120 Mo. 330; *Selz v. Collins*, 55 Mo. App. 55; *American Trading Co. v. Thomas Wilson Sons*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 76; *Brooklyn First Nat. Bank v. Wallis*, 84 Hun (N. Y.) 376, *affirmed* 156 N. Y. 663; *Sully v. Campbell*, 99 Tenn. 434.

Single Debt with Separate Securities — Action on Securities. — Where a running account is secured by separate bonds with different sureties, separate actions may be maintained upon the several bonds without violating the rule against splitting. *People v. Sheehan*, 118 Mich. 539.

Action on Principal Debt. — Where a single debt is secured by several liens, a judgment in an action for a portion of the principal debt will bar a subsequent action to enforce the liens securing the balance. *La Crosse Lumber Co. v. Audrain County Agricultural, etc., Soc.*, 59 Mo. App. 24.

150. 1. *Hopkins v. Washington County*, 56 Neb. 596, *citing* 8 Am. & Eng. Encyc. of Law (2d ed.) 1069, 1070. See also the following cases which give the foundation of the rule as stated in the text: *Bolen Coal Co. v. Whitaker Brick Co.*, 52 Kan. 747; *Cunning-*

ham v. Union Casualty, etc., Co., 82 Mo. App. 607; *Sully v. Campbell*, 99 Tenn. 434; *Bullard v. Thorpe*, 66 Vt. 599; *Evans v. Durango Land, etc., Co.*, (C. C. A.) 80 Fed. Rep. 433.

Exhausting Possibilities. — *Day v. Brenton*, 102 Iowa 482; *Kansas City Southern R. Co. v. Railroad Commission*, 106 La. 583; *Wheeler Sav. Bank v. Tracey*, 141 Mo. 252; *Richardson v. Opelt*, 60 Neb. 180; *Hahl v. Sugo*, 169 N. Y. 109, *reversing* (Supm. Ct. App. Div.) 61 N. Y. Supp. 770; *Achey v. Creech*, 21 Wash. 319.

Consent of Defendant. — Since the rule against splitting causes of action is founded on the right of a defendant to protection against vexatious litigation, it follows that he may waive his right and consent to a splitting of a cause of action against him. *Welch v. Mayer*, 4 Colo. App. 440; *McDonald v. Tison*, 94 Ga. 549; *Gerhart v. Fout*, 67 Mo. App. 423; *Simpson v. Elwood*, 114 N. Car. 528; *Clafin v. Mather Electric Co.*, (C. C. A.) 98 Fed. Rep. 699, *reversing* 87 Fed. Rep. 795. But see AMOUNT IN CONTROVERSY as to defendant's right to consent to a splitting in order to confer jurisdiction.

Separate Causes Not Required to Be Joined. — The rule against splitting does not require distinct causes of action to be prosecuted in a single suit, though they are such as may be properly joined. *Richardson v. Opelt*, 60 Neb. 180; *Van Keuren v. Miller*, 78 Hun (N. Y.) 173, *affirmed* 149 N. Y. 583; *Fox v. Phyfe*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 207; *Gentles v. Finck*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 153; *Scott v. Haines*, (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 153; *Fargo v. Vincent*, 6 S. Dak. 211. See *infra*, VIII. 1. *Code States — Statutory Provisions*, note 3.

2. *Barnes v. Black Diamond Coal Co.*, 101 Tenn. 354, *citing* 1 ENCYC. OF PL. AND PR. 150.

Test of Single Cause of Action. — *Violations of Separate Rights by Separate Acts* afford separate causes of action. *Gentles v. Finck*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 153.

A Single Act Which Violates Several Rights affords several causes of action. Obligations resulting from tort may be superadded to those arising from con-

151. 3. Contracts Generally. — See note 1.

152. See note 1.

Independent Stipulations. — See notes 2, 3.

153. All Breaches to Be Sued For. — See note 1.

4. Specific Contracts — a. SALES. — See note 2.

b. ACCOUNTS. — See note 3.

tract, and conventional obligations may be superadded to those arising from tort. *Castille v. Caffery Cent. Refinery, etc., Co.*, 48 La. Ann. 322.

A Single Violation of a Single Right constitutes a single cause of action, though there are several remedies, with different measures of damages, by which such cause may be enforced. *Hart v. Walter*, 7 Ohio Dec. 409; *Bailey v. Chicago, etc., R. Co.*, 3 S. Dak. 531; *Porter v. Mack*, 50 W. Va. 581.

Successive Violations of the Same Right, when separate and distinct, constitute separate causes of action. *Irving v. Media*, 10 Pa. Super. Ct. 132.

Where the Same Evidence Will Establish All the Claims there is a single cause of action, and where different evidence is required for the different claims there are several causes. *Richardson v. Opelt*, 60 Neb. 180.

Other Cases involving the determination of what constitutes a single cause of action will be found *infra*, VII. 3. *Single Cause of Action*; VIII. 2. *a. Generally.*

Damages Accruing Pendente Lite by reason of delays caused by the litigation and in regard to the subject-matter of litigation cannot be made the basis of a subsequent action. *Bracken v. Atlantic Trust Co.*, 167 N. Y. 510.

151. 1. Alabama. — *Jasper Mercantile Co. v. O'Rear*, 112 Ala. 247; *Cooke v. Cook*, 110 Ala. 567.

California. — *Nelson v. Merced County*, 122 Cal. 644.

Connecticut. — *Cole v. Fowler*, 68 Conn. 450.

Georgia. — *Atlanta Elevator Co. v. Fulton Bag, etc., Mills*, 106 Ga. 427; *McDonald v. Tison*, 94 Ga. 549.

Illinois. — *Marshall v. John Grosse Clothing Co.*, 184 Ill. 421.

Iowa. — *Day v. Brenton*, 102 Iowa 482.

Kansas. — *Bolen Coal Co. v. Whitaker Brick Co.*, 52 Kan. 747; *Wells v. Hickox*, 1 Kan. App. 485.

Kentucky. — *Davis v. Brown*, 98 Ky. 475.

Missouri. — *Pryor v. Kansas City*, 153 Mo. 135; *Hoffmann v. Hoffmann*,

126 Mo. 486; *Alkire Grocer Co. v. Tagart*, 60 Mo. App. 389.

Vermont. — *Bullard v. Thorpe*, 66 Vt. 599.

152. 1. Barnes v. Black Diamond Coal Co., 101 Tenn. 354, supporting the text and *citing* 1 ENCYC. OF PL. AND PR. 150, note 1.

Separate Pieces of Property. — When several items of property are pledged at the same time to secure a single debt the transaction constitutes a single contract, and a separate suit for the different items of the property cannot be maintained. *Bullard v. Thorpe*, 66 Vt. 599.

2. Capital City Ins. Co. v. Jones, 128 Ala. 361.

3. Moore v. Johnston, 108 Ala. 324; *Hallack v. Gagnon*, 4 Colo. App. 36c; *Marshall v. John Grosse Clothing Co.*, 184 Ill. 421; *Pettit v. American Cent. Ins. Co.*, 69 Mo. App. 317; *Union Switch, etc., Co. v. Johnson*, (C. C. A.) 72 Fed. Rep. 147.

153. 1. Pettit v. American Cent. Ins. Co., 69 Mo. App. 317; *Barnes v. Black Diamond Coal Co.*, 101 Tenn. 354, both of which cases *cite* 1 ENCYC. OF PL. AND PR. 153, and follow the rule there set forth. See also *Cooke v. Cook*, 110 Ala. 567; *Hallack v. Gagnon*, 4 Colo. App. 360.

2. Intent of Parties. — Whether several sales of chattels made at the same time will constitute a single contract affording a single cause of action depends upon the intent of the parties, as evidenced by the circumstances of the sale. *Alkire Grocer Co. v. Tagart*, 60 Mo. App. 389, wherein it was held that several sales made on the same day and represented by separate bills of sale, each providing for a different term of credit, with interest from the maturity thereof, constituted separate contracts.

For the rule as to sales made at different times, see *infra*, VI. 4. *b. Accounts.*

3. Jasper Mercantile Co. v. O'Rear, 112 Ala. 247; *Snedden v. Harmes*, 5 Colo. App. 477; *Welch v. Mayer*, 4 Colo. App. 440; *McDonald v. Tison*, 94

155. c. INSTALMENTS.—See notes 1, 2.**d. RENT.**—See note 3.

Ga. 549; Bolen Coal Co. v. Whittaker Brick Co., 52 Kan. 747; Catawba Mills v. Hood, 42 S. Car. 203. *Contra*, Phelps v. Abbott, 116 Mich. 624, *citing*, as authority for the ruling, Reid v. Ferris, 112 Mich. 693. The decision in the latter case, however, was based upon the fact that the several items of the account were purchased at different times, and otherwise depended upon separate and distinct agreements. This, perhaps, is all that Phelps v. Abbott, 116 Mich. 624, is authority for.

What Constitutes Account—*Depends upon Intention of Parties.*—Whether several sales will be considered as a single account or as separate transactions depends upon the intention of the parties, as shown either by express contract, the circumstances of the sale, or the relations of the parties. Parks v. Oskamp, 97 Ga. 802; Alkire Grocer Co. v. Tagart, 60 Mo. App. 389; Gentles v. Finck, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 153.

Where the Sales Are Made at Different Times they will be considered as separate contracts, unless there is a contract, express or implied, to the contrary. Reid v. Ferris, 112 Mich. 693; Alkire Grocer Co. v. Tagart, 60 Mo. App. 389; Gentles v. Finck, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 153; Wren v. Winter, 6 Ohio Dec. 176.

The Presumption from a Continuous Dealing Between a Merchant and a Customer is that there is an agreement between them whereby the merchant is to furnish goods to the customer for a definite period or at the will of both parties, thus creating a running account which is indivisible for the purpose of suit. Parks v. Oskamp, 97 Ga. 802; Alkire Grocer Co. v. Tagart, 60 Mo. App. 389.

Credit.—The giving of different terms of credit on several items of an account, coupled with the fact that such items were made each at a different time, is sufficient to make the several items separate contracts which may be made the subjects of separate actions. McDole v. McDole, 106 Ill. 452; Reid v. Ferris, 112 Mich. 693.

Separate Accounts.—There may be several distinct accounts between the same parties. Where each item is sold on a different day upon stated credits each will afford a separate cause of ac-

tion, which may be commenced as soon as the term of credit expires. Furthermore, even after all of the credits have expired the causes of action still remain separate and distinct, being based upon separate and distinct contracts, and in this regard being different from the case where several instalments are payable at different times by virtue of a single contract. McDole v. McDole, 106 Ill. 452 [*distinguishing* Lucas v. Le Compte, 42 Ill. 303; Casselberry v. Forquer, 27 Ill. 170]; Wren v. Winter, 6 Ohio Dec. 176.

North Carolina.—Simpson v. Ellwood, 114 N. Car. 528. See also **AMOUNT IN CONTROVERSY.**

155. 1. Marshall v. John Grosse Clothing Co., 184 Ill. 421 [*citing* 1 ENCYC. OF PL. AND PR. 154]; Napa Valley Wine Co. v. Daubner, 63 Minn. 112; Van Keuren v. Miller, 78 Hun (N. Y.) 173, *affirmed* 149 N. Y. 583; Champagne v. Powell Medicine Co., 48 N. Y. App. Div. 344; Peurrung v. Carter-Crume Co., 110 Fed. Rep. 107, *affirmed* (C. C. A.) 99 Fed. Rep. 888.

Instalments Falling Due Pendente Lite need not be included in the action, and may be thereafter recovered. Carter-Crume Co. v. Peurrung, (C. C. A.) 99 Fed. Rep. 888. *Compare* Bracken v. Atlantic Trust Co., 167 N. Y. 510, wherein it was held that damages accruing *pendente lite* could not be made the subject of a subsequent action.

2. Reynolds v. Jones, 63 Ark. 259 [*quoting* 1 ENCYC. OF PL. AND PR. 155]; Barnes v. Black Diamond Coal Co., 101 Tenn. 354 [*citing* 1 ENCYC. OF PL. AND PR. 155]; Reynolds, etc., Constr. Co. v. Monroe, 47 La. Ann. 1289; Alkire Grocer Co. v. Tagart, 60 Mo. App. 389; Catawba Mills v. Hood, 42 S. Car. 203.

Where One Sues for Damages for breach of a contract whereby the defendant agreed to pay a certain sum in instalments, he cannot thereafter sue for instalments subsequently falling due, but must recover his entire damage in his first suit. Peurrung v. Carter-Crume Co., 110 Fed. Rep. 107.

3. Reynolds v. Jones, 63 Ark. 259 [*quoting* 1 ENCYC. OF PL. AND PR. 155]; Barnes v. Black Diamond Coal Co., 101 Tenn. 354 [*citing* 1 ENCYC. OF PL. AND PR. 150, note 3]; Marshall v. John Grosse Clothing Co., 184 Ill. 421; Mor-

- 156.** *e.* NOTES. — See note 1.
f. JUDGMENTS. — See JUDGMENTS.
157. *g.* SERVICES. — See note 1.
h. INSURANCE POLICIES. — See note 3.
i. INTEREST. — See INTEREST.
158. *j.* ASSIGNMENTS. — See note 2. See also EQUITABLE ASSIGNMENTS.
k. COLLATERAL SECURITIES. — See FORECLOSURE OF MORTGAGES; PLEDGES; SALES.
l. FRAUD. — See FALSE REPRESENTATIONS AND DECEIT.
159. 5. Torts. — See notes 1, 2.
160. See note 1.

risson v. De Donato, 76 Mo. App. 643;
Racke v. Anheuser-Busch Brewing Assoc., 17 Tex. Civ. App. 167.

Separate Pieces of Property. — Claims by one of two cotenants against the other for the former's part of the rents collected by the latter from different pieces of property constitute separate causes of action. *Gedney v. Gedney*, 160 N. Y. 471.

156. 1. *Wells v. Hickox*, 1 Kan. App. 485; *Fargo v. Vincent*, 6 S. Dak. 211.

Several Notes Falling Due upon Default as to One. — Where a contract, pursuant to which several notes are given, provides that upon the default in the payment of any one note the others shall become due, the holder of such notes may sue upon them as they fall due, regardless of the fact that, by virtue of the contract, he might sue upon all. *Starnes v. Mutual Loan, etc., Co.*, 102 Ga. 597.

157. 1. *Nelson v. Merced County*, 122 Cal. 644; *Olmstead v. Bach*, 78 Md. 132. See also MASTER AND SERVANT.

3. Single Policy on Different Kinds of Property. — All causes of action for losses under an insurance policy which have accrued at the time action is brought thereon must be included in such action, though the policy contains distinct and separate engagements as to different kinds of property. *Pettit v. American Cent. Ins. Co.*, 69 Mo. App. 317; *North British, etc., Ins. Co. v. Cohn*, 17 Ohio Cir. Ct. 185 [Gen. Digest (1899), p. 18].

Effect of Mortgage Clause. — Where a fire policy is payable to a mortgagee as his interest may appear, and there is a loss in excess of the debts secured by the mortgage, the mortgagor and mort-

gagee may maintain separate actions for their respective interests in the loss. *Capital City Ins. Co. v. Jones*, 128 Ala. 361, *overruling* *Fire Ins. Cos. v. Felrath*, 77 Ala. 194.

158. 2. **Subrogation.** — Compare *Hartford F. Ins. Co. v. Wabash R. Co.*, 74 Mo. App. 106.

159. 1. *Wheeler Sav. Bank v. Tracey*, 141 Mo. 252; *Reilly v. Sicilian Asphalt Paving Co.*, 31 N. Y. App. Div. 302; *Barnard v. Devine*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 182 all of which cases *cite* 1 ENCYC. OF PL. AND PR. 159. See also *Allen v. Macon, etc., R. Co.*, 107 Ga. 838; *Augusta v. Lombard*, 101 Ga. 724; *Atchison, etc., R. Co. v. Huitt*, 1 Kan. App. 788; *Gens v. Hargadine*, 56 Mo. App. 245; *International, etc., R. Co. v. Geiselman*, 12 Tex. Civ. App. 123; *St. Louis Southwestern R. Co. v. Moss*, 9 Tex. Civ. App. 6; *Porter v. Mack*, 50 W. Va. 581; *Hale v. Weston*, 40 W. Va. 313.

2. See *Southern R. Co. v. Brigman*, 95 Tenn. 624, *citing* 1 ENCYC. OF PL. AND PR. 159.

Test to Be Applied. — Injuries to a person and to his property by the same tortious act constitute a single cause of action, the two injuries being merely separate items of damage. *King v. Chicago, etc., R. Co.*, 80 Minn. 83. *Contra*, *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, *reversing* 31 N. Y. App. Div. 302. See *infra*, VII. 3. *Single Cause of Action*; VIII. 2. *b. Single Cause of Action*. See also PERSONAL INJURIES.

160. 1. The killing of two horses at the same time and place by the same negligence constitutes a single cause of action, which is indivisible. *St. Louis Southwestern R. Co. v. Moss*, 9 Tex. Civ. App. 6.

160. Fraud. — See note 2.

161. Seizing and Converting Chattels. — See note 1.

163. VII JOINDER OF ACTIONS AT COMMON LAW — 1. Common-law States. — See note 1.

164. 2. Joinder of Actions Dependent on Form. — See notes 1, 2.

A Single Injury to a Servant, caused by the master's negligence in permitting machinery to become defective and by the master's failure to keep his promise to repair such machinery after a notice of the defect, constitutes a single cause of action. *Swift v. Madden*, 165 Ill. 41.

Injuring a Person in His Business by various acts constitutes a single, indivisible cause of action. *Hall v. Weston*, 40 W. Va. 313.

160. 2. Fraud cannot be separated into two causes of action; and where a seller makes false representations whereby the buyer is induced to buy, the various statements so made afford but one cause of action. *Handy v. Waldron*, 18 R. I. 569.

161. 1. Barnard v. Devine, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 182 [*citing* 1 ENCYC. OF PL. AND PR. 161]; *Thisler v. Miller*, 53 Kan. 515; *Johnson v. Williams*, 115 N. Car. 33, *following* *Bell v. Howerton*, 111 N. Car. 69.

When Defendant Has Only Portion of Property in His Possession. — The rule against splitting causes of action does not apply where at the time of the first action the defendant has not all of the property in his possession, and another action may thereafter be brought to recover the balance when the defendant has such balance in his possession. *Reid v. Ferris*, 112 Mich. 693.

Action on Attachment Bond and Action for Wrongful Seizure. — A cause of action for the wrongful seizure of goods under an attachment is separate and distinct from a cause of action on the attachment bond, when there is nothing to show that the damages claimed for the wrongful seizure are identical with those claimed under the bond. *Gens v. Hargadine*, 56 Mo. App. 245.

163. 1. See *Knotts v. McGregor*, 47 W. Va. 566, wherein it was said that at p. 163 of 1 ENCYC. OF PL. AND PR. there is "an excellent discussion of joinder of causes of action."

164. 1. Under the common-law practice, joinder of actions is dependent on form. *Lee v. Springer*, 73 Vt. 183 [*citing* 1 ENCYC. OF PL. AND PR. 164]; *Louisville, etc., R. Co. v. Cofer*, 110 Ala. 491; *Trench v. Hardin County*

Canning Co., 168 Ill. 135; *Mexican Cent. R. Co. v. Gehr*, 66 Ill. App. 173; *Ballou v. Willey*, 180 Mass. 562; *Loudon v. Carroll*, (Mich. 1902) 89 N. W. Rep. 578; *Hallett v. Gordon*, 122 Mich. 573; *Drury v. Merrill*, 20 R. I. 2; *Bible v. Palmer*, 95 Tenn. 393; *Dean v. Cass*, 73 Vt. 314.

Distinctions Abolished by Statute. — Where the distinctions between several forms of action are abolished by statute, so that a cause of action formerly enforceable by one of such forms may be enforced by any one of the others, the several causes corresponding to the several forms may be joined in one action. *Chicago, etc., R. Co. v. Casazza*, 83 Ill. App. 421; *Mexican Cent. R. Co. v. Gehr*, 66 Ill. App. 173; *Moore v. Thompson*, 92 Mich. 498; *Grubb v. Burford*, 98 Va. 553.

2. The following cases support the rule set forth in the text: *Higdon v. Kennemer*, 120 Ala. 193; *Louisville, etc., R. Co. v. Cofer*, 110 Ala. 491; *Drury v. Merrill*, 20 R. I. 2; *Bull v. Mathews*, 20 R. I. 100.

Causes Must Be in Same Right. — A cause of action in an individual capacity cannot be joined with one in a representative capacity. *Merrihew v. Chicago City R. Co.*, 92 Ill. App. 346; *McVey v. Illinois Cent. R. Co.*, 73 Miss. 487; *Boubel v. Hatton*, 1 Dauphin Co. Rep. (Pa.) 84; *Waters v. Central Trust Co.*, 99 Fed. Rep. 894; *Whitney v. Fairbanks*, 54 Fed. Rep. 985.

Causes Must Affect All Parties. — *Separate Causes of Action in Favor of Different Plaintiffs* against the same defendant cannot be joined unless joint interests of the several plaintiffs are affected thereby. *Helmuth v. Bell*, 150 Ill. 263; *Yeager v. Fairmont*, 43 W. Va. 259.

Separate Causes of Action Against Separate Defendants, in favor of the same plaintiff, cannot be joined unless there is a joint liability on the part of all the defendants. *Sleeper v. World's Fair Banquet Hall Co.*, 166 Ill. 57; *Helmuth v. Bell*, 150 Ill. 263; *Wienskawski v. Wisner*, 114 Mich. 271; *Strawbridge v. Stern*, 112 Mich. 16; *Gilmore v. Christ Hospital*, (N. J. 1902)

165. 3. Single Cause of Action. — See note 1. See also *supra*, VI. 2. *What Constitutes an Entire Cause of Action*; and *infra*, VIII. 2. *a. Generally*.

166. 4. Inconsistent Counts. — See note 1. See also *infra*, VIII. 2. *b. Single Cause of Action*.

167. 5. Debt. — See DEBT.

168. 6. Trover and Case. — See TRESPASS ON THE CASE; TROVER AND CONVERSION.

169. 7. Assumpsit. — See notes 1, 2.

8. Trespass. — See note 3. See also TRESPASS.

170. 9. Actions ex Contractu and Actions ex Delicto. — See note 1.

52 Atl. Rep. 241; *Phenix Iron Foundry v. Lockwood*, 21 R. I. 556.

165. 1. Injury to Person and Property by Same Act. — *King v. Chicago*, etc., R. Co., 80 Minn. 83. See also *supra*, VI. 5. *Torts*; and *infra*, VIII. 2. *b. par. Person and Property Injured by Same Negligent Act*.

Single Cause Subject to Different Defenses. — The fact that different defenses may be pleaded to different parts of an entire claim does not establish that the claim itself is made up from different and independent causes of action. *Evans v. Durango Land, etc., Co.*, (C. A.) 80 Fed. Rep. 433.

Matters of Inducement will not render a complaint objectionable for misjoinder, though such matters, if properly pleaded, would constitute a distinct cause of action which could not be joined with the main cause sued on. *Royce v. Oakes*, 20 R. I. 252.

Incidental Matters. — In a suit for an accounting the court may determine the validity of a notice filed by the plaintiff in the land records, setting forth the filing and the nature of the bill, and attempting thus to obtain a lien upon the defendant's real estate, the determination of the validity of such notice being merely incidental to the suit for the accounting. *Campbell v. Metcalf*, 20 R. I. 352.

Method of Statement. — The fact that two counts are used is not conclusive that there are two causes of action, though each count states a complete cause of action. *Mead v. Randall*, 111 Mich. 268. See COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS.

166. 1. Fraud in Procurement and Rescission. — A cause of action for deceit in the procurement of a sale is not inconsistent with one for rescission and to recover the purchase money paid by

the plaintiff, since both counts treat the contract as voidable. *Loudon v. Carroll*, (Mich. 1902) 89 N. W. Rep. 578. See also RESCISSION, CANCELLATION, AND REFORMATION OF CONTRACTS.

Two Counts with Different Methods of Proof. — The fact that a statute making a railroad company liable for the killing of stock provides that an appraisal of the value of the stock shall be made, which appraisal shall be *prima facie* evidence of such value, does not render a count based on the statutory liability inconsistent with a common-law count for the killing of the same stock. *Campbell v. Louisville*, etc., R. Co., 98 Tenn. 148.

Recovery on One Count. — See COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS.

169. 1. Carland v. Western Union Tel. Co., 118 Mich. 369 [quoting 1 ENCYC. OF PL. AND PR. 169]; *Howison v. Oakley*, 118 Ala. 215; *Steiner v. Clisby*, 103 Ala. 181; *Trench v. Hardin County Canning Co.*, 168 Ill. 135; *Loudon v. Carroll*, (Mich. 1902) 89 N. W. Rep. 578; *Hallett v. Gordon*, 122 Mich. 573; *Rawlinson v. Shaw*, 117 Mich. 5; *Drury v. Merrill*, 20 R. I. 2.

2. Covenant and Assumpsit. — See COVENANT.

Tort and Assumpsit. — See TRESPASS; TRESPASS ON THE CASE.

Assumpsit and Trover. — See TROVER AND CONVERSION.

Warranty and Fraud. — See FALSE REPRESENTATIONS AND DECEIT.

Award, Assumpsit, and Covenant. — See COVENANT.

3. Lee v. Springer, 73 Vt. 183, citing 1 ENCYC. OF PL. AND PR. 169.

170. 1. Evans v. Southern R. Co., (Ala. 1902) 32 So. Rep. 138; *Morris v. Eufaula Nat. Bank*, 122 Ala. 580; *Weaver v. Shriver*, 79 Md. 530; *Green*

- 171. 10. Penalties.** — See PENALTIES AND PENAL ACTIONS.
173. 11. Touching Real Estate. — See note 1.
174. 12. Certiorari and Mandamus. — See MANDAMUS.
13. Replevin. — See REPLEVIN.
14. Slander and Malicious Prosecution. — See LIBEL AND SLANDER; MALICIOUS PROSECUTION.
15. Statement of Same Cause in Different Forms. — See COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS.
176. 16. Actions at Law and Suits in Equity. — See note 1.
17. Louisiana. — See notes 2, 3.
179. 18. Actions Brought in a Representative Capacity — Executors and Administrators. — See note 4. See also EXECUTORS AND ADMINISTRATORS.
180. 19. Joinder in Equity. — See MULTIFARIOUSNESS AND MISJOINDER (IN EQUITY).

VIII. JOINDER OF CAUSES OF ACTION UNDER THE CODES

- **1. Code States — Statutory Provisions.** — See note 3.

v. Patterson, 3 Pa. Super. Ct. 354; *Bull v. Mathews*, 20 R. I. 100; *Gary v. Abingdon Pub. Co.*, 94 Va. 775.

In *Massachusetts*, under the Practice Acts, counts *ex contractu* and *ex delicto* may be joined. *Central Vermont R. Co. v. Soper*, (C. C. A.) 59 Fed. Rep. 879.

173. 1. Forcible Entry and Detainer. — See FORCIBLE ENTRY AND DETAINER.

Land and Mesne Profits. — See EJECTMENT.

Suit in Equity to Recover Land. — See EQUITY PLEADING AND PRACTICE.

Bill to Set Aside Deed and for Rents and Profits. — See MULTIFARIOUSNESS AND MISJOINDER (IN EQUITY).

Ejectment and Specific Performance. — See EJECTMENT.

One Count. — See COVENANT.

Land Twice Demanded in Writ of Right. — See REAL ACTIONS.

Damages for Unlawful Foreclosure and for Trover. — See TRESPASS ON THE CASE; TROVER AND CONVERSION.

Common Counts and for Use and Occupation. — See *supra*, VII. 7. ASSUMPSIT.

Recovery of Land and Damages. — See EJECTMENT; FORCIBLE ENTRY AND DETAINER.

176. 1. Giesy v. Gregory, 15 App. Cas. (D. C.) 49; *Worthington v. Waring*, 157 Mass. 421; *Miner v. Nichols*, (R. I. 1902) 52 Atl. Rep. 893.

2. Actions Concurring to Same End. — Causes of action the enforcement of which would accomplish the same purpose may be cumulated. *Sentell v. Police Jury*, 48 La. Ann. 96. See also *Torian v. Weeks*, 46 La. Ann. 1502.

Causes of Action Need Not Accrue in Same Right. — One may sue individually and in a representative capacity in the same action where the causes of action have a common origin. *Williams v. Pope Mfg. Co.*, 51 La. Ann. 185.

Possessory Action. — *Hodge v. Monroe Mercantile Co.*, 105 La. 668, *distinguishing* *Gilkerson-Sloss Commission Co. v. Yale*, 47 La. Ann. 691, and *Gerson v. Jamar*, 30 La. Ann. 1294. *Gilkerson-Sloss Commission Co. v. Yale*, 47 La. Ann. 691, held simply that in an action for the recovery of personalty wrongfully seized, damages could not be recovered for its seizure, where the claimant's title was involved in the litigation or a doubt existed as to the reality of such title.

3. It is permissible to cumulate a revocatory action and one *en declaration de simulation* in the same petition, provided it is done by distinct alternative allegations; otherwise the two demands would be inconsistent. *Harrison v. Soulabere*, 52 La. Ann. 707.

179. 4. Knotts v. McGregor, 47 W. Va. 566, *citing* 1 ENCYC. OF FL. AND PR. 177.

180. 3. Different Code Provisions. — Most of the statutes of joinder consist of the same general provision authorizing the joinder of causes of action, whether legal or equitable, followed by various subdivisions classifying the matters out of which the causes must arise in order to authorize a joinder, as follows:

California. — Code Civ. Pro. Cal., § 427, subdiv. 1 ("contracts, express

or implied"). *Olmstead v. Dauphiny*, 104 Cal. 635. Subdiv. 7 provides that "the causes of action so united must all belong to one only of these classes;" which means that only those causes can be united which are included in a single one of the preceding subdivisions, the California statute having no provision authorizing the joinder of causes arising out of the same transaction. *Lamb v. Harbaugh*, 105 Cal. 680; *Thelin v. Stewart*, 100 Cal. 372.

Connecticut.—Gen. Stat. Conn., § 878, subdiv. 7 ("claims, whether in contract, or tort, or both, arising out of the same transaction or transactions connected with the same subject of action"). *Knapp v. Walker*, 73 Conn. 459; *Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551.

Missouri.—Rev. Stat. Mo. (1899), § 593 ("the same transaction or transactions connected with the same subject of action"). *Morrison v. Herrington*, 120 Mo. 665.

Nebraska.—Code Civ. Pro. Neb., § 87 ("the same transaction or transactions connected with the same subject of action"). *Ponca Mill Co. v. Mikesell*, 55 Neb. 98; *Dinges v. Riggs*, 43 Neb. 710.

New York.—Code Civ. Pro. N. Y., § 484, subdiv. 2 ("personal injuries, except libel, slander, criminal conversation, or seduction"), *Barkley v. Williams*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 687; *Thorpe v. Carvalho*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 554; subdiv. 6 ("injuries to personal property"), *Benedict v. Guardian Trust Co.*, 58 N. Y. App. Div. 302; subdiv. 9 ("claims arising out of the same transaction, or transactions connected with the same subject of action"). *De Wolfe v. Abraham*, 151 N. Y. 186 [reversing 6 N. Y. App. Div. 172, and citing with approval *Anderson v. Hill*, 53 Barb. (N. Y.) 238, which latter case was disapproved by the court below]; *Crowell v. Truesdell*, 67 N. Y. App. Div. 502; *Logan v. Moore*, (Supm. Ct. Spec. T.) 27 Civ. Pro. (N. Y.) 241; *Blanch v. Nelson*, 39 N. Y. App. Div. 21; *Olin v. Arendt*, 35 N. Y. App. Div. 529; *Corcoran v. Mannering*, 10 N. Y. App. Div. 516; *Letson v. Evans*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 437; *Barkley v. Williams*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 687; *Motley v. Pratt*, (C. Pl. Spec. T.) 13 Misc. (N. Y.) 758; *MacKenzie v. Hatton*, (C. Pl. Spec. T.) 6 Misc. (N. Y.) 153; *Allegany, etc., R. Co. v. Weidenfeld*, (Supm. Ct. Spec.

T.) 5 Misc. (N. Y.) 43. Subdiv. 9, in specifying "claims arising out of the same transaction," adds, "and not included within one of the foregoing subdivisions of this section." This provision should be construed as though the latter part read, "and not included within one only of the foregoing subdivisions;" so that causes of action falling within any two or more of the preceding subdivisions, 1-8, may be joined when they arise out of the same transaction or transactions connected with the same subject of action. *People v. Wells*, 52 N. Y. App. Div. 583; *Jackson v. Brown*, 74 Hun (N. Y.) 25; *Taylor v. Metropolitan El. R. Co.*, 55 N. Y. Super. Ct. 555; *Rosenberg v. Staten Island R. Co.*, (C. Pl. Spec. T.) 14 N. Y. Supp. 476. Subdiv. 10 provides that "it must appear on the face of the complaint that all the causes of action so united belong to one of the foregoing subdivisions of this action." *De Wolfe v. Abraham*, 151 N. Y. 186; *Perkins v. Slocum*, 82 Hun (N. Y.) 366. It seems, however, that this provision must be construed in connection with subdiv. 9, and hence that it does not forbid the joinder of causes included within two or more of the subdivisions 1-8, when they arise out of the same transaction or transactions connected with the same subject of action. *People v. Wells*, 52 N. Y. App. Div. 583. After section 484 had been divided into nine subdivisions, subdiv. 10 was adopted and added, providing for the joinder of actions for penalties incurred under the fisheries, game, and forest law. In view of the relative arrangement of subdivisions it has been held that causes of action arising under subdiv. 10 cannot be joined with any of the causes specified in the preceding subdivisions, though arising out of the same transaction, since subdiv. 10 follows subdiv. 9, containing the authority for joinder of causes arising out of the same transactions, and such authority applies only to causes of action embraced within some one or more of the subdivisions preceding subdiv. 9. *People v. Wells*, 52 N. Y. App. Div. 583. Subdiv. 10 also provides that the causes "must be consistent with each other," *People v. Wells*, 52 N. Y. App. Div. 583; *Porter v. International Bridge Co.*, (Supm. Ct. App. Div.) 60 N. Y. Supp. 819 [affirmed by 163 N. Y. 79]; *Logan v. Moore*, (Supm. Ct. Spec. T.) 27 Civ. Pro. (N. Y.) 241; *Perkins v. Slo-*

cum, 82 Hun (N. Y.) 366; *Olin v. Arendt*, 35 N. Y. App. Div. 529; *McClure v. Wilson*, 13 N. Y. App. Div. 274; *Barkley v. Williams*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 687; and that they must not require different places of trial, *Porter v. International Bridge Co.*, 45 N. Y. App. Div. 416.

North Carolina. — *Clark's Code Civ. Pro. N. Car.* (1900), § 267, subdiv. 1 ("the same transaction, or transaction connected with the same subject of action"). *Sloan v. Carolina Cent. R. Co.*, 126 N. Car. 487; *Daniels v. Baxter*, 120 N. Car. 14; *Cook v. Smith*, 119 N. Car. 350; *Benton v. Collins*, 118 N. Car. 196; *Caldwell v. Bates*, 118 N. Car. 323; *Solomon v. Bates*, 118 N. Car. 311; *Tate v. Bates*, 118 N. Car. 287; *Outland v. Outland*, 113 N. Car. 74. Section 267 also provides that the causes so joined must not require different places of trial. *Pretzfelder v. Merchants Ins. Co.*, 116 N. Car. 491.

North Dakota. — *Rev. Codes N. Dak.*, § 5291, provides that "the causes of action so united must all belong to one of these classes." Although subdiv. 1 of this section provides for the joinder of causes of action arising out of the same transaction, it seems that causes which are joined under subdiv. 1 must, by virtue of subdiv. 7, all belong to a single subdivision of the section. *Mares v. Wormington*, 8 N. Dak. 329.

Ohio. — *Bates's Annot. Stat. Ohio* (1897), § 5019, subdiv. 1 ("the same transaction, or transactions connected with the same subject of action"), *State v. Allen*, 6 Ohio Dec. 43; *Tobin v. Smith*, 1 Ohio Dec. 675; subdiv. 2 ("contracts, express or implied"), *Tobin v. Smith*, 1 Ohio Dec. 675; subdiv. 3 ("injuries to person and property, or to either"), *Snow v. Mast*, 65 Fed. Rep. 995; section 5020 ("the causes of action so united must not require different places of trial"), *State v. Allen*, 6 Ohio Dec. 43.

South Carolina. — *Code Civ. Pro. S. Car.*, § 188, subdiv. 1 ("the same transaction, or transactions connected with the same subject of action"). *Pollock v. Carolina Interstate Bldg., etc., Assoc.*, 48 S. Car. 65.

South Dakota. — *Comp. Laws Dak.*, § 4932, subdiv. 1 ("the same transaction, or transactions connected with the same subject of action"), *Davis v. Novotney*, 15 S. Dak. 118; *Tripp v. Yankton*, 10 S. Dak. 516; *Bush v. Froelick*, 8 S. Dak. 353; subdiv. 6 ("claims to recover real property, with

or without damages for the withholding thereof, and the rents and profits of the same, or for waste committed thereon"), *Campbell v. Equitable L. & T. Co.*, 14 S. Dak. 483.

Utah. — *Rev. Stat. Utah*, § 2961, subdiv. 1 ("the same transaction, or transactions connected with the same subject of action"). *Wilson v. Sullivan*, 17 Utah 341. Subdiv. 7 provides that "the causes of action so united must all belong to one of these [the foregoing] classes." This provision was formerly qualified by the provision (*Comp. Laws Utah* 1888, § 3220) that "an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to person." *Johnston v. Meagher*, 14 Utah 426.

Wisconsin. — *Stat. Wis.*, § 2647, subdiv. 1 ("the same transaction, or transactions connected with the same subject of action"), *Endress v. Shove*, 110 Wis. 133; *Alliance Elevator Co. v. Wells*, 93 Wis. 5; *Plankinton v. Hildebrand*, 89 Wis. 209; subdiv. 2 ("contract, express or implied"), *Reindl v. Heath*, 109 Wis. 570; subdiv. 4 ("injuries to character"), *Hellstern v. Katzer*, 103 Wis. 391. Section 2647 also provides that the causes of action so united must all belong to one of these classes, *Blakely v. Smock*, 96 Wis. 611; and must not require different places of trial, *Gunderson v. Thomas*, 87 Wis. 406.

Other code provisions are as follows:

Alabama. — *Civ. Code Ala.*, § 3292, provides that "all actions on contracts, express or implied, for the payment of money, whether under seal or not, may be united in the same action." *Hoffman v. Knight*, 127 Ala. 149; *Howison v. Oakley*, 118 Ala. 215; *Louisville, etc., R. Co. v. Cofer*, 110 Ala. 491. Section 3293 provides that "counts in trover, trespass, and trespass on the case may be joined when they relate to the same subject-matter." *Hoffman v. Knight*, 127 Ala. 149.

Under the Alabama codes preceding that of 1896 there was no provision as to joinder of separate torts, and the common-law rule prevailed. *Mecklin v. Deming*, 111 Ala. 159; *Louisville, etc., R. Co. v. Cofer*, 110 Ala. 491.

Colorado. — *Mills's Annot. Code Colo.* (1896), § 70, subdiv. 3: "All actions sounding only in damages, whether the same be for breach of contract, sealed or parol, express or implied, or for injuries to property, person, or

character, or for any two or more of these causes." *Crissey, etc., Lumber Co. v. Denver, etc., R. Co.*, (Colo. App. 1902) 68 Pac. Rep. 670.

Hawaii. — Civ. Laws Hawaii (1897), § 1259, provides that "the plaintiff in a civil suit may unite several causes of action in the same complaint when they all arise out—1. Contracts, express or implied." *Harrison v. Magoon*, 13 Hawaii 339.

Iowa. — Code Iowa (1873), § 2630 (Code Iowa 1897, § 3545), provides that "causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, if held by the same party, and against the same party, in the same rights, * * * may be joined in the same petition." *Carrier v. Bernstein*, 104 Iowa 572; *Jenks v. Lansing Lumber Co.*, 97 Iowa 342. It is also provided in the same section that causes of action which are joined must be triable in the same county. *Chambers v. Oehler*, 104 Iowa 278. Section 4164 (Code of 1897) provides that in actions of replevin there can be "no joinder of any cause of action not of the same kind." *Wedge-wood v. Parr*, 112 Iowa 514.

Kentucky. — Bullitt's Civ. Code Ky. (1895), § 83, provides that "several causes of action may be united * * * if all of them be brought—1. Upon contracts, express or implied." *Estep v. Hammons*, 104 Ky. 144. Subdiv. 6 relates to "injuries to person and property." *Clayton v. Henderson*, 103 Ky. 228.

Oregon. — Hill's Annot. Laws Oregon, § 93: "The plaintiff may unite several causes of action in the same complaint, when they all arise out of—1. Contract, express or implied. * * * But the causes of action so united must all belong to one only of these classes, * * * and not require different places of trial." *Sutton v. Victorian*, 26 Oregon 194.

England. — Supreme Ct. Rules 1883, Order 18, Rule 1, 1 Ann. Pr. 1900, p. 224: "Subject to the following rules of this order, the plaintiff may unite in the same action several causes of action; but if it appear to the court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the court or judge may order separate trials of any of such causes of action to be had, or may make any other such order as may be necessary or expedient for the separate disposal thereof." *Sadler v. Great*

Western R. Co., (1895) 2 Q. B. 688; *Smurthwaite v. Hannay*; (1894) A. C. 502; *Hannay v. Smurthwaite*, (1893), 2 Q. B. 412; *Booth v. Briscoe*, 2 Q. B. D. 496; *Burstall v. Beyfus*, 26 Ch. D. 35; *Gort v. Rowney*, 17 Q. B. D. 625; *Sandes v. Wildsmith*, (1893) 1 Q. B. 771.

The Common-law Procedure Act of 1852, § 41, provided that "causes of action of whatsoever kind, providing they be by and against the same parties and in the same rights, may be joined in the same suit." *Frean v. Watley*, 4 F. & F. 1038. This section has been modified and is now represented by Supreme Ct. Rules 1883, Order 18, Rule 1, 1 Ann. Pr. 1900, p. 224. *Hannay v. Smurthwaite*, (1893) 2 Q. B. 425.

Causes of Action Must Affect All Parties.

— Most of the codes provide that causes of action which are joined must affect all the parties to the action. See *infra*, VIII. 21. *Must Affect All Parties*.

Joinder of Equitable Causes. — A distinction is observed between legal and equitable causes of action as regards joinder, much greater liberality being allowed in the joinder of the latter than of the former.

New York. — *Dykman v. Keeney*, 154 N. Y. 483, reversing 21 N. Y. App. Div. 114; *O'Brien v. Fitzgerald*, 143 N. Y. 377, 6 N. Y. App. Div. 509, affirmed 150 N. Y. 572; *Empire State Sav. Bank v. Beard*, 151 N. Y. 638, reversing 81 Hun (N. Y.) 184; *Nash v. Hall Signal Co.*, 90 Hun (N. Y.) 355; *Sayles v. White*, 18 N. Y. App. Div. 590; *Corcoran v. Mannering*, 10 N. Y. App. Div. 516 [*distinguishing* *Keep v. Kaufman*, 56 N. Y. 332, and *Wiles v. Suydam*, 64 N. Y. 173]; *Thomas v. Thomas*, 9 N. Y. App. Div. 487; *Zoccolo v. Stern*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 246.

South Carolina. — *Wagner v. Sanders*, 49 S. Car. 192.

Joinder Not Compulsory. — Though one has several causes of action which may be joined, he may nevertheless enforce them in separate actions. Joinder is not compulsory. *Richardson v. Opelt*, 60 Neb. 180; *Van Keuren v. Miller*, 78 Hun (N. Y.) 173, affirmed 149 N. Y. 583; *Fox v. Phyfe*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 207; *Gentles v. Finck*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 153; *Scott v. Haines*, (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 153.

Causes with Different Limitations.

— The fact that several causes of action which are joined are subject to dif-

183. 2. Causes of Action Arising out of "Same Transaction" —
a. GENERALLY. — See note 1.

ferent limitations does not affect their joinder. *Porter v. International Bridge Co.*, 45 N. Y. App. Div. 416, *affirmed* 163 N. Y. 79.

Misjoinder Not Jurisdictional. — Misjoinder of causes of action is not jurisdictional, and must be objected to properly or it will be deemed to have been waived.

Colorado. — *Keys v. Morrison*, 3 Colo. App. 441; *Farncomb v. Stern*, 18 Colo. 279.

Hawaii. — *Carter v. Manhattan L. Ins. Co.*, 11 Hawaii 69.

Iowa. — *McDonald v. Nashua Second Nat. Bank*, 106 Iowa 517; *Keller v. Strong*, 104 Iowa 585.

Kentucky. — *Pepper v. Harper*, (Ky. 1898) 47 S. W. Rep. 620.

Missouri. — *Bogges v. Bogges*, 127 Mo. 305; *Sinclair v. Missouri, etc.*, R. Co., 70 Mo. App. 588.

Montana. — *Waite v. Vinson*, 14 Mont. 405.

Nebraska. — *Ponca Mill Co. v. Mike-sell*, 55 Neb. 98.

New York. — *Kelley v. Faulhaber*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 64.

Texas. — *Moore v. Waco Bldg. Assoc.*, 19 Tex. Civ. App. 68; *Killfoil v. Moore*, (Tex. Civ. App. 1897) 39 S. W. Rep. 646.

Wisconsin. — *Phillips v. Carver*, 99 Wis. 561.

183. 1. Single Contract. — *McFarland v. Holcomb*, 123 Cal. 84; *Brewer v. McCain*, 21 Colo. 382; *Gates v. Gates*, 34 N. Y. App. Div. 608; *Lyman v. Broadway Garden Hotel, etc.*, Co., 33 N. Y. App. Div. 130; *Downey v. Turner*, 28 N. Y. App. Div. 491; *Sigua Iron Co. v. Brown*, 19 N. Y. App. Div. 143; *Dougan v. Evansville, etc.*, R. Co., 15 N. Y. App. Div. 483; *Zrskowski v. Mach*, (Buffalo Super. Ct. Gen. T.) 15 Misc. (N. Y.) 234; *Northern Assur. Co. v. Hotchkiss*, 90 Wis. 415.

Breaches of Several Stipulations of a Single Contract, any one of which amounts to a breach of the whole contract, constitute a single cause of action. *People v. Dodge*, 11 Colo. App. 177; *Hardon v. Ongle Electric Co.*, 89 Hun (N. Y.) 487.

Obligations Arising from the Same Instrument may afford several causes of action, as there may be several distinct contracts created by the same instrument. *Nagel v. Lutz*, 41 N. Y. App.

Div. 193. See *supra*, VI. 3. *Contracts Generally*.

Promise to Marry and Give Sum of Money. — *Dalton v. Barchand*, 4 Ohio Dec. (Reprint) 375, 2 Cleve. L. Rep. 57. Compare *Frean v. Watley*, 4 F. & F. 1038.

The Violation of a Single Primary Right affords a single cause of action, no matter how many incidental matters may be connected therewith. *Howarth v. Howarth*, 67 N. Y. App. Div. 354; *Adkins v. Loucks*, 107 Wis. 587; *Gager v. Marsden*, 101 Wis. 598.

The Right May Consist of Various Items, all necessary to be adjudicated in order to enforce it; but if the right itself is single there is a single cause of action. *Bremner v. Leavitt*, 109 Cal. 130; *Chatterton v. Chatterton*, (Supm. Ct. App. Div.) 53 N. Y. Supp. 329; *Peck v. Richardson*, (Supm. Ct. Eq. T.) 12 Misc. (N. Y.) 310; *Lyman County v. State*, 11 S. Dak. 391.

The Right May Depend upon Several Contracts and still be single, affording a single cause of action. *Occidental Consol. Min. Co. v. Comstock Tunnel Co.*, 111 Fed. Rep. 135.

The Right May Depend upon Several Other Rights, each having a distinct and separate basis. *Hamilton v. Williams*, (Ky. 1897) 43 S. W. Rep. 430.

The Right May Depend upon Different Interests in a common subject-matter, such as the right of possession dependent upon a general and a special interest in personal property. *Russell First Nat. Bank v. Knoll*, 7 Kan. App. 352.

The Delict May Consist of Several Items, Acts, or Series of Acts; but if all the items or acts are conducive of and directed to the violation of a single primary right, there is only one delict, and one cause of action. *Trubody v. Trubody*, 137 Cal. 172; *Malsenbacker v. Society Concordia*, 71 Conn. 366; *Craft Refrigerating Mach. Co. v. Quin-nipiac Brewing Co.*, 63 Conn. 563; *Chesapeake, etc.*, R. Co. v. Hyde, (Ky. 1900) 56 S. W. Rep. 423; *Gunder v. Tibbitts*, 153 Ind. 591; *Chicago, etc.*, R. Co. v. Wolcott, 141 Ind. 267; *Covington, etc.*, El. R. Co. v. Kleymeier, 105 Ky. 609; *L. E. Waterman Co. v. Waterman*, 40 N. Y. App. Div. 530; *Peck v. Richardson*, (Supm. Ct. Eq. T.) 12 Misc. (N. Y.) 310; *Threatt v. Brewer*

Min. Co., 49 S. Car. 95; *Wilson v. Sullivan*, 17 Utah 341; *Hellstern v. Kaizer*, 103 Wis. 391; *Candrian v. Miller*, 98 Wis. 168; *Boyce v. Odell Commission Co.*, 107 Fed. Rep. 58; *Evans v. Durango Land, etc., Co.*, (C. C. A.) 80 Fed. Rep. 433.

Various Items of Damage flowing from a wrongful act or series of acts do not necessarily afford separate causes of action. If the right violated and the delict complained of are single, there is a single cause of action. *Procter v. Southern California R. Co.*, 130 Cal. 20; *Lothrop v. Golden*, (Cal. 1899) 57 Pac. Rep. 394; *Finken v. Elm City Brass Co.*, 73 Conn. 423; *Chicago, etc., R. Co. v. Kern*, 9 Ind. App. 505; *King v. Chicago, etc., R. Co.*, 80 Minn. 83; *Bahr v. Boley*, 85 Hun (N. Y.) 448; *Wood v. Harper*, 85 Hun (N. Y.) 457; *McKesson v. Russian Co.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 96, *affirmed* 42 N. Y. App. Div. 622; *Ohio Oil Co. v. Toledo, etc., R. Co.*, 2 Ohio Cir. Dec. 505; *Smith v. Smith*, 50 S. Car. 54; *Merriman v. McCormick Harvesting Mach. Co.*, 86 Wis. 142. *Compare* *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, *reversing* 31 N. Y. App. Div. 302.

Where Various Kinds of Relief Are Sought in order to accomplish a single object which is the main purpose of the suit, there is a single cause of action, whether such object is the enforcement of a single right or redress for the violation thereof. *Beronio v. Ventura County Lumber Co.*, 129 Cal. 232; *San Pedro Lumber Co. v. Reynolds*, 111 Cal. 588; *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549; *Brady v. Linehan*, (Idaho 1898) 51 Pac. Rep. 761; *Vermont L. & T. Co. v. McGregor*, (Idaho 1897) 51 Pac. Rep. 102; *Eagle Iron Works v. Des Moines Suburban R. Co.*, 101 Iowa 289; *German Ins. Co. v. Davis*, 6 Kan. App. 268; *Atchison, etc., R. Co. v. Huitt*, 1 Kan. App. 788; *L. D. Garrett Co. v. Astor*, 67 N. Y. App. Div. 595; *Jackson v. Brown*, 74 Hun (N. Y.) 25; *Turner v. Bayles*, (Supm. Ct. App. Div.) 39 N. Y. Supp. 518; *Fernandez v. Fernandez*, 15 N. Y. App. Div. 469; *Wagner v. Sanders*, 49 S. Car. 192; *Level Land Co. No. 3 v. Sivyler*, 112 Wis. 442; *Zinc Carbonate Co. v. Shullsburg First Nat. Bank*, 103 Wis. 125; *Gager v. Marsden*, 101 Wis. 598; *Gager v. Edgerton Bank*, 101 Wis. 593; *Herman v. Felthousen*, 114 Wis. 423.

The Titles and Disposition of Several

Pieces of Property Held by Several Different Parties may be involved in a single cause of action. Where an adjudication as to different titles, or the disposition of several pieces of property held by separate parties, is sought as the means of obtaining a single object or the enforcement of a single primary right, there is a single cause of action. *Porter v. International Bridge Co.*, 45 N. Y. App. Div. 416, *affirmed* 163 N. Y. 79; *Proctor v. Sidney Sash, etc., Co.*, 8 N. Y. App. Div. 42; *Sheppard v. Green*, 48 S. Car. 165; *Garret v. Weinberg*, 43 S. Car. 36.

Successive Violations of Single Right.—Many rights are of a continuous nature, such as property rights and the right to protection of the person or character. Several violations of such a right at different times, and without any common purpose or tendency in the acts constituting the violations, afford several causes of action. *Sinclair v. Missouri, etc., R. Co.*, 70 Mo. App. 588; *Bunten v. Chicago, etc., R. Co.*, 50 Mo. App. 414.

Separate Liabilities Based on Separate Grounds.—Where the liability upon several causes of action and the grounds of each are separate and distinct, and the evidence necessary to establish each is entirely dissimilar, there are several causes of action. *Crowell v. Truesdell*, 67 N. Y. App. Div. 502.

Single Cause Subject to Different Defenses.—The fact that different defenses may be pleaded to different parts of an entire claim does not establish that the claim itself is made up from different and independent causes of action. *Evans v. Durango Land, etc., Co.* (C. C. A.) 80 Fed. Rep. 433.

Fraud.—All the elements of a fraudulent scheme resulting in a single result are merely items of a single cause of action to undo the thing accomplished by the fraud or to evade the result thereof. *Gunder v. Tibbits*, 153 Ind. 591; *Washington Nat. Bank v. Woodrum*, 60 Kan. 34; *McQueen v. New*, 87 Hun (N. Y.) 206; *Bliss v. Winters*, 38 N. Y. App. Div. 174; *Barron v. Pittsburgh Plate Glass Co.*, 10 Ohio Dec. 114.

Negligence.—*All Acts of Negligence by the Same Party*, producing a single result, afford a single cause of action. *O'Neil v. Young, etc., Seed, etc., Co.*, 58 Mo. App. 628, wherein it was held that negligence in failing to comply with a city ordinance requiring the inspection of elevators and negligence in

183. b. SINGLE CAUSE OF ACTION — Inconsistent Causes of Action.
— See note 2.

permitting the elevator to be operated with an unsound cable constituted a single cause of action.

Joint Negligence resulting in a single injury affords a joint and several cause of action, and hence no question of joinder of causes of action can arise in a joint action against all the parties in fault. *Mancuso v. Kansas City*, 74 Mo. App. 138; *Stenberg v. Willcox*, 96 Tenn. 163; *Schwalbach v. Shinkle*, 97 Fed. Rep. 483.

Negligence by a Servant in the performance of his duties affords separate causes of action against him and his master. *Schwalbach v. Shinkle*, 97 Fed. Rep. 483. See MASTER AND SERVANT.

Joinder of Insufficient Causes of Action. — Nothing short of matter sufficient to constitute a good cause of action if it were made the subject of a separate action can raise any question of joinder. *Flint v. Hubbard*, (Colo. App. 1901) 66 Pac. Rep. 446; *Bryant v. Turner*, (Supm. Ct. App. Div.) 73 N. Y. Supp. 783; *Logan v. Moore*, (Supm. Ct. Spec. T.) 27 Civ. Pro. (N. Y.) 241; *Gates v. Gates*, 34 N. Y. App. Div. 608; *Horton v. Equitable L. Assur. Soc.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 495; *Getzelson v. Bernstein*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 627; *Times Pub. Co. v. Everett*, 9 Wash. 518; *North Hudson Mut. Bldg., etc., Assoc. v. Childs*, 86 Wis. 292. See also *Vaule v. Steenerson*, 63 Minn. 110.

The Prayer for Relief cannot create a misjoinder. Where the rest of the pleading shows that only one cause of action is relied on the prayer cannot create a misjoinder, even though it is for inconsistent relief or seems to be based upon a cause of action separate from the one indicated by the body of the complaint, and not joinable therewith. *Elias v. Schweyer*, 27 N. Y. App. Div. 69; *Logan v. Moore*, (Supm. Ct. Spec. T.) 27 Civ. Pro. (N. Y.) 241.

The Title of the Action cannot create a misjoinder where the body of the pleading shows a single cause of action. *Moss v. Cohen*, 158 N. Y. 240.

Matters of Description will not create a misjoinder, though such matter, if pleaded as such, might constitute a separate cause of action. *Kahului R. Co. v. Hawaiian Commercial, etc., Co.*,

11 Hawaii 739; *Doyle v. American Wringer Co.*, 60 N. Y. App. Div. 525.

Matters of Innuement cannot create a misjoinder. *Martens v. O'Connor*, 101 Wis. 18; *Miller v. Bayer*, 94 Wis. 123.

Incidental Relief Part of Main Cause. — Any relief properly incidental to a single cause of action, such, for example, as damages in an injunction suit, may be sought and granted in an action upon such cause, though the relief might constitute the basis of a separate action. *Woodworth v. Brooklyn El. R. Co.*, 29 N. Y. App. Div. 1. See also INJUNCTIONS.

Number of Causes Not Dependent upon Number of Defendants. — See *Pascekwitz v. Richards*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 250; *American Trading Co. v. Thomas Wilson Sons*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 76.

Method of Statement Not Conclusive. — Where there are allegations essential to two separate causes of action, the mere statement of them as one cause of action and the omission to state and number them separately are not conclusive as to whether or not there are two causes of action. *Crowell v. Truesdell*, 67 N. Y. App. Div. 502.

Judgment on One Count Bar to Judgment on Other. — Where there are two counts of such a nature that only one recovery can be had, and a judgment on one will be a bar to a judgment on the other, there is a single cause of action. *Knapp v. Walker*, 73 Conn. 459; *Craft Refrigerating Mach. Co. v. Quinpiac Brewing Co.*, 63 Conn. 551; *Horton v. Equitable L. Assur. Soc.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 495.

Assignment of Partial Interest in Single Cause. — An assignment of an interest in a single cause of action will not create two causes of action, and a joint suit by the assignor and the assignee will involve no question of joinder. *St. Louis, etc., R. Co. v. Miller*, (Tex. Civ. App. 1901) 66 S. W. Rep. 139.

For Further Rules and Illustrations of what constitutes a single cause of action see *supra*, VI. 2. *What Constitutes an Entire Cause of Action*; VII. 3. *Single Cause of Action*.

183. 2. *Taylor v. Blue Ridge Marble Co.*, 83 Hun (N. Y.) 30; *Olin v. Arendt*, 35 N. Y. App. Div. 529.

183. Two Kinds of Relief. — See note 3.

184. Person and Property Injured by Same Negligent Act. — See *supra*, VI. 5. *Torts*; VII. 3. *Single Cause of Action*. See also PERSONAL INJURIES.

185. *c.* MEANING OF THE TERM "TRANSACTION." — See note 1.

What Constitutes Inconsistency — No Satisfactory Definition of consistency seems to have been given; but where causes are clearly inconsistent they cannot be joined. *Conde v. Rogers*, 74 N. Y. App. Div. 147.

Causes of Action Requiring Contradictory Evidence. — Where the evidence necessary to sustain one cause of action necessarily disproves the grounds upon which another cause depends, the two causes are inconsistent. *Ansley v. Piedmont Bank*, 113 Ala. 467; *Vaule v. Steenerson*, 63 Minn. 110; *Seiter v. Bischoff*, 63 Mo. App. 157; *Barkley v. Williams*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 687; *McClure v. Wilson*, 13 N. Y. App. Div. 274. See also *People v. Wells*, 52 N. Y. App. Div. 583.

Causes of Action Requiring Different Forms of Judgment and Different Forms of Final Process for their enforcement are inconsistent. *Perkins v. Slocum*, 82 Hun (N. Y.) 366.

Inconsistency Must Be of Substantive Character. — Superficial inconsistency, dependent upon general rules or upon forms of action, is not sufficient to constitute a misjoinder. It must clearly appear that the proof of one cause would disprove the other. *French v. Smith*, 81 Minn. 341; *Willard v. Goddard*, (Tenn. Ch. 1898) 48 S. W. Rep. 397; *Johnson v. Stratton*, 6 Tex. Civ. App. 431; *Heinze v. Marx*, 4 Tex. Civ. App. 599. See also *Chittenden v. Crosby*, 5 Kan. App. 534.

Counts Seeking Alternative Relief are not inconsistent within the rule requiring consistency in causes of action which are joined. *Humphrey v. Ringler*, 94 Iowa 182; *Jenkins v. Taylor*, (Ky. 1900) 59 S. W. Rep. 853; *Schneider v. Sellers*, (Tex. Civ. App. 1900) 61 S. W. Rep. 541; *Harris v. Warlick*, (Tex. Civ. App. 1897) 42 S. W. Rep. 356.

Inconsistency in Details is insufficient to create a misjoinder. The inconsistency, to be fatal, must relate to the primary basis of the action. *Howarth v. Howarth*, 67 N. Y. App. Div. 354.

Judgment on One Count Bar to Judgment on Other. — The fact that a judg-

ment on one of two counts which are joined would be a bar to a judgment on the other does not render such counts inconsistent. *American Trading Co. v. Thomas Wilson Sons*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 76.

Rule Against Inconsistency Not Applicable. — Where the plaintiff has not an actual right of election between two causes of action he may join them, notwithstanding that they are inconsistent. *Glover v. Radford*, 120 Mich. 542.

183. 3. Failure to pay a note secured by a mortgage gives rise to a single cause of action with a twofold remedy, viz., a suit on the note and action to foreclose the mortgage, both of which may be sought in the same action; and a denial in such action of one of the remedies, such, for instance, as refusal to foreclose a mortgage on the ground that it is invalid, will not preclude a judgment on the note. *Moors v. Sanford*, 2 Kan. App. 243; *American Sav., etc., Assoc. v. Burghardt*, 19 Mont. 323.

The same act may give rise to two causes of action; thus, under the *Virginia* statute of insulting words (Code Va., § 2897) the same words may afford a cause of action which would also be sufficient to sustain an action for common-law slander, and the injured party may pursue either cause of action without raising any question of misjoinder where it plainly appears which one of the causes he is seeking to enforce. *Payne v. Tancil*, 98 Va. 262.

185. 1. *Tripp v. Yankton*, 10 S. Dak. 516, citing 1 ENCYC. OF PL. AND PR. 185, and supporting the text there written. And see generally the following cases:

Connecticut. — *Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551.

Idaho. — *Vermont L. & T. Co. v. McGregor*, (Idaho 1897) 51 Pac. Rep. 102.

Iowa. — *Devin v. Walsh*, 108 Iowa 428; *Jenks v. Lansing Lumber Co.*, 97 Iowa 342, *distinguishing* *Citizens' Bank v. Dows*, 68 Iowa 460, and *Crawford v. Nolan*, 70 Iowa 97.

186. d. DAMAGE TO LAND AND PERSONAL INJURY.—See PERSONAL INJURIES; TRESPASS.

e. INJURIES TO REAL PROPERTY AND OTHER CAUSES OF ACTION.—See TRESPASS.

187. f. EQUITABLE REMEDIES ASKED TOUCHING LAND.—See note i.

188. h. ASSAULT AND BATTERY AND SLANDER.—See ASSAULT AND BATTERY; LIBEL AND SLANDER.

189. i. FALSE IMPRISONMENT AND SLANDER.—See FALSE IMPRISONMENT; LIBEL AND SLANDER.

j. FALSE IMPRISONMENT AND MALICIOUS PROSECUTION.—See FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

k. WARRANTY AND FRAUD.—See FALSE REPRESENTATIONS AND DECEIT.

Kansas.—German Ins. Co. v. Davis, 6 Kan. App. 268.

Kentucky.—Owensboro, etc., Gravel Road Co. v. Coons, (Ky. 1899) 49 S. W. Rep. 966.

Michigan.—Clark v. Kent Circuit Judge, 125 Mich. 449.

Minnesota.—French v. Smith, 81 Minn. 341.

Missouri.—Spangler v. Kite, 47 Mo. App. 230.

Nebraska.—Scott v. Flowers, 60 Neb. 675; Dinges v. Riggs, 43 Neb. 710.

New York.—De Wolfe v. Abraham, 151 N. Y. 186 [reversing 6 N. Y. App. Div. 172, and citing with approval Anderson v. Hill, 53 Barb. (N. Y.) 238, which latter case was disapproved by the court below]; Blanck v. Nelson, 39 N. Y. App. Div. 21; Olin v. Arendt, 35 N. Y. App. Div. 529; Corcoran v. Mannering, 10 N. Y. App. Div. 516; Thomas v. Thomas, 9 N. Y. App. Div. 487; Doyle v. American Wringer Co., 60 N. Y. App. Div. 525 [following Mahler v. Schmidt, 43 Hun (N. Y.) 512, and distinguishing Mulligan v. Knickerbocker Ice Co., 109 N. Y. 657]; Letson v. Evans, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 437; Griffith v. Friendly, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 393 [affirmed Memo. Dec. 47 N. Y. App. Div. 635]; Barkley v. Williams, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 687; Pope v. Kelly, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 508; Motley v. Pratt, (C. Pl. Spec. T.) 13 Misc. (N. Y.) 758; Allegany, etc., R. Co. v. Weidenfeld, (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 43.

North Carolina.—Daniels v. Baxter, 120 N. Car. 14; Cook v. Smith, 119 N. Car. 350; Benton v. Collins, 118 N.

Car. 196; Outland v. Outland, 113 N. Car. 74.

Ohio.—State v. Allen, 6 Ohio Dec. 43; Tobin v. Smith, 1 Ohio Dec. 675.

South Carolina.—Pollock v. Carolina Interstate Bldg. Assoc., 48 S. Car. 65.

South Dakota.—Tripp v. Yankton, 10 S. Dak. 516; McHard v. Williams, 8 S. Dak. 381; Aultman Co. v. Ferguson, 8 S. Dak. 458; Bush v. Froelick, 8 S. Dak. 353.

Texas.—Cardwell v. Masterson, (Tex. Civ. App. 1902) 66 S. W. Rep. 1121; Coe v. Nash, (Tex. Civ. App. 1897) 40 S. W. Rep. 235; Hays v. Perkins, 22 Tex. Civ. App. 198; San Antonio, etc., R. Co. v. Griffin, 20 Tex. Civ. App. 91; Finegan v. Read, 8 Tex. Civ. App. 33; Johnson v. Stratton, 6 Tex. Civ. App. 431.

Trial Court's Discretion.—The joinder of causes of action as arising out of the same cause of action is in a large measure within the discretion of the trial court. Gulf, etc., R. Co. v. Browne, (Tex. Civ. App. 1902) 66 S. W. Rep. 341.

187. l. The following cases illustrate and support the text: Allegany, etc., R. Co. v. Weidenfeld, (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 43; Ingram v. Abbott, 14 Tex. Civ. App. 583; Menz v. Beebe, 95 Wis. 383; Hunt v. Worsfold, (1896) 2 Ch. 224.

For Specific Examples of the doctrine stated in the text, see MULTIFARIOUSNESS AND MISJOINDER (IN EQUITY); QUIETING TITLE—REMOVAL OF CLOUD; RESCISSION, CANCELLATION, AND REFORMATION OF CONTRACTS; SPECIFIC PERFORMANCE; and other specific heads.

189. l. PERSON AND PROPERTY INJURED BY SAME NEGLIGENT ACT. — See PERSONAL INJURIES.

190. m. MULTIFARIOUSNESS. — See note 1. See also MULTIFARIOUSNESS AND MISJOINDER (IN EQUITY).

n. TRANSACTION MUST GIVE CAUSES OF ACTION IN SAME RIGHT. — See note 2.

p. MISCELLANEOUS. — See note 4.

191. 3. Penalties. — See PENALTIES AND PENAL ACTIONS.

190. 1. Pittman v. Bentley, 102 Ga. 10; Foster v. Landon, 71 Minn. 494; Hastings First Nat. Bank v. Lambert, 63 Minn. 263; Daniels v. Baxter, 120 N. Car. 14; Peter v. Farrel Foundry, etc., Co., 53 Ohio St. 534; Harris v. Warlick, (Tex. Civ. App. 1897) 42 S. W. Rep. 356; Level Land Co. No. 3 v. Siver, 112 Wis. 442; Plankinton v. Hildebrand, 89 Wis. 209. See also Kellogg v. Siple, 11 N. Y. App. Div. 458, wherein it was held that if there is no misjoinder of causes of action, the determination of the question of multifariousness is within the discretion of the trial court.

Multifariousness Not Perfect Test. — Not every pleading which would be multifarious under the old system of pleading is objectionable as containing an improper joinder of actions under the codes. *Finegan v. Read*, 8 Tex. Civ. App. 33. See also *Kruger v. Walker*, 111 Ga. 383.

2. Parties Must Be Affected in Same Capacity — As to Plaintiff. — Causes of action which are joined must belong to the plaintiff in the same capacity. *Carrier v. Bernstein*, 104 Iowa 572; *Pabst Brewing Co. v. Small*, 83 Minn. 445; *Lilly v. Menke*, 126 Mo. 190; *Farrow v. Holland Trust Co.*, 74 Hun (N. Y.) 585; *Moss v. Cohen*, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 108.

As to Defendant. — Causes of action which are joined must affect the defendant in the same capacity. *U. S. v. McCoy*, 54 Fed. Rep. 107; *Insley v. Shire*, 54 Kan. 793; *Perkins v. Slocum*, 82 Hun (N. Y.) 366; *Brandt v. Siedler*, (N. Y. City Ct. Gen. T.) 10 Misc. (N. Y.) 234; *Crowley v. Hicks*, 98 Wis. 566.

Where There Is a Single Cause of Action the rule against joinder of causes in different capacities does not apply, the question being one of joinder of parties and not of joinder of causes. *Chatterton v. Chatterton*, (Supm. Ct. App. Div.) 53 N. Y. Supp. 329, 32 N. Y. App. Div. 633; *Budd v. Hardenbergh*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 90; *Wagner v. Sanders*, 49 S.

Car. 192; *Fisher v. Hopkins*, 4 Wyo. 379.

The Form of the Actions Is Not Controlling, as to whether the causes of action on which they are based are in different capacities, within the meaning of the rule. If the judgments to be rendered will affect the parties in the same capacity there is no misjoinder, though the several causes are pleaded as in different capacities. *Smith v. Ferguson*, 33 N. Y. App. Div. 561.

For Examples of Specific Applications of the Rules set forth in the text and in the preceding notes, see EXECUTORS AND ADMINISTRATORS; PARTNERSHIP; PENALTIES AND PENAL ACTIONS; TROVER AND CONVERSION; and other specific titles.

4. Action Against Stockholders. — The liability of corporate stockholders for subscriptions to stock may be enforced in the same action with their statutory liability as stockholders. *Peter v. Farrel Foundry, etc., Co.*, 53 Ohio St. 534; *Morris v. Collamer, etc., St. R. Co.*, 4 Ohio Dec. (Reprint) 543, 2 Cleve. L. Rep. 347. See STOCK AND STOCKHOLDERS; WINDING UP CORPORATIONS.

Action by Consignee Against Carrier. — A claim for damages for wrongfully allowing goods to be inspected and one for detaining the goods in the cars after they had reached their destination, without notifying the consignor and then compelling him to pay demurrage, may be joined as arising out of transactions connected with the same subject-matter of action. *Sloan v. Carolina Cent. R. Co.*, 126 N. Car. 487.

Loss of Bank Deposit and Fraud in Procuring Deposit. — A cause of action against bank directors for negligence resulting in the loss of the plaintiff's bank deposit, and one for fraud or deceit on the part of the defendants in inducing the plaintiff to make such deposit, may be joined as arising out of transactions connected with the same subject of action, to wit, the loss of the

193. 4. Judgments. — See note 2.

5. Injuries to Character. — See LIBEL AND SLANDER; MALICIOUS PROSECUTION.

194. 6. Causes of Action ex Delicto and ex Contractu — *a.* GENERALLY. — See note 1.

plaintiff's deposit. *Caldwell v. Bates*, 118 N. Car. 323; *Tate v. Bates*, 118 N. Car. 287; *Solomon v. Bates*, 118 N. Car. 311.

Application for Receiver and Foreclosure of Lien. — An application by a corporate stockholder for a receiver for the corporation on the ground of fraud on the part of the directors, and an application to foreclose a lien on the corporate property in favor of such stockholder for money which he has been compelled to pay for the benefit of the corporation by reason of such frauds of the directors, may be joined in the same action, both causes of action being deemed to have arisen out of the same transaction or transactions connected with the same subject-matter. *Ponca Mill Co. v. Mikesell*, 55 Neb. 98.

Breach of Contract and Fraud. — A cause of action for a breach of a contract for the exchange of personal property, and one for fraud in inducing the plaintiff to part with his property by means of false representations, will be deemed to have arisen out of the same transaction or transactions connected with the same subject of action, where the property with which the plaintiff has parted constitutes a part of the consideration of the contract alleged to have been broken. *Knapp v. Walker*, 73 Conn. 459.

Collision Between Trains Belonging to Different Companies. — Causes of action for injury from a railroad collision may be joined against two companies whose trains collided, both causes being deemed to have arisen out of the same transaction. *Laughlin v. Atlantic City R. Co.*, 80 Fed. Rep. 702. See PASSENGERS.

Annulment of Conveyance by Corporation and Statutory Liability of Directors. — See Code Civ. Pro. N. Y., § 1790; *Cummings v. American Gear, etc., Co.*, 87 Hun (N. Y.) 598.

Unlawful Withholding of Realty and Personalty and Conversion of Personalty. — A cause of action for damages for the unlawful withholding of the possession of realty by a tenant after the expiration of his lease, and one arising out of the tenant's failure to deliver

up certain personalty of which he had obtained possession by reason of the lease, and for the conversion of such personalty by the tenant, may be all joined in one action. *Alliance Elevator Co. v. Wells*, 93 Wis. 5, *overruling Lane v. Cameron*, 38 Wis. 603, in so far as that case is inconsistent with the one under consideration. See also *Collins v. Morrison*, 91 Wis. 324; *Van Oss v. Synon*, 85 Wis. 661; *Gilbert v. Loberg*, 83 Wis. 189, 86 Wis. 661. See also TROVER AND CONVERSION.

193. 2. Harrison v. Magoon, 13 Hawaii 339, *citing* 1 ENCYC. OF PL. AND PR. 193. See also JUDGMENTS.

194. 1. Arkansas. — *Conant v. Storthz*, 69 Ark. 209.

Connecticut. — *Knapp v. Walker*, 73 Conn. 459; *Malsenbacker v. Society Concordia*, 71 Conn. 369; *Craft Refrigerating Mach. Co. v. Quinipiac Brewing Co.*, 63 Conn. 551.

New York. — *Corcoran v. Mannering*, 10 N. Y. App. Div. 516; *Mackenzie v. Hatton*, (C. Pl. Spec. T.) 6 Misc. (N. Y.) 153.

North Carolina. — *Daniels v. Baxter*, 120 N. Car. 14; *Cook v. Smith*, 119 N. Car. 350; *Caldwell v. Bates*, 118 N. Car. 323; *Solomon v. Bates*, 118 N. Car. 311; *Tate v. Bates*, 118 N. Car. 287.

Ohio. — *Murphy v. Cincinnati*, 10 Ohio Dec. 541.

South Carolina. — *Long v. Hunter*, 58 S. Car. 152; *Pollock v. Carolina Interstate Bldg., etc., Assoc.*, 48 S. Car. 65.

Texas. — *Frey v. Ft. Worth, etc., R. Co.*, 86 Tex. 465; *Cardwell v. Master-son*, (Tex. Civ. App. 1902) 66 S. W. Rep. 1121; *Skipwith v. Hutt*, (Tex. Civ. App. 1900) 58 S. W. Rep. 192.

Implied Contract. — A cause of action for a tort and one on an implied contract may be joined when they both arise out of the same transaction or transactions connected with the same subject-matter. *Devin v. Walsh*, 108 Iowa 428.

Tort and Contract Not Joinderable. — In some states causes of action arising out of tort and out of contract cannot be joined, though arising out of the

195. b. COMPLAINT TO BE DRAWN UPON DEFINITE THEORY. — See notes 1, 2. See also DEFINITENESS AND CERTAINTY IN PLEADINGS.

c. CASES INVOLVING CONVERSION OF PROPERTY. — See TROVER AND CONVERSION.

196. d. MISCELLANEOUS. — See note 1.

198. 7. Causes of Action Arising ex Contractu. — See note 1.

same transaction. See *supra*, VIII. 1. *Code States—Statutory Provisions.* And see the following cases:

Alabama. — *Evans v. Southern R. Co.*, (Ala. 1902) 32 So. Rep. 138; *Morris v. Eufaula Nat. Bank*, 122 Ala. 580; *Higdon v. Kennemer*, 120 Ala. 193; *Louisville, etc., R. Co. v. Brinkerhoff*, 119 Ala. 528; *Tallassee Falls Mfg. Co. v. Western R. Co.*, 117 Ala. 520; *Baldwin v. Kansas City, etc., R. Co.*, 111 Ala. 515; *Gurley v. McNally*, 109 Ala. 359.

Arkansas. — *Fordyce v. Nix*, 58 Ark. 136, which seems to hold that actions *ex delicto* and *ex contractu* cannot be joined. But see *Conant v. Storthz*, 69 Ark. 209.

Georgia. — The joinder of tort and contract is expressly forbidden by the Georgia Code. *Allen v. Macon, etc., R. Co.*, 107 Ga. 838; *Augusta v. Lombard*, 101 Ga. 724.

Hawaii. — It seems that in Hawaii tort and contract cannot be joined. *Hong Kim v. Hapai*, 12 Hawaii 185; *Carter v. Manhattan L. Ins. Co.*, 11 Hawaii 69.

Indiana. — See *Indiana Natural, etc., Gas Co. v. Anthony*, 26 Ind. App. 307.

Nebraska. — *Commercial Union Assur. Co. v. Shoemaker*, (Neb. 1901) 88 N. W. Rep. 156.

New York. — *Zrskowski v. Mach*, (Buffalo Super. Ct. Gen. T.) 15 Misc. (N. Y.) 234. But see *Corcoran v. Mannering*, 10 N. Y. App. Div. 516; *MacKenzie v. Hatton* (C. Pl. Spec. T.) 6 Misc. (N. Y.) 153. See also *supra*, VIII. 1. *Code States—Statutory Provisions*, note *New York*, as to the construction of the provision allowing causes of action to be joined when arising out of the same transaction, and the provisions requiring the causes which are joined to belong to the same class.

195. 1. Hagen v. Gilbertson, 10 N. Dak. 546, *citing* 1 ENCYC. OF PL. AND PR. 194, 195.

2. Hagen v. Gilbertson, 10 N. Dak. 546 [*citing* 1 ENCYC. OF PL. AND PR. 194,

195]; *De Forest v. Andrews*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 145; *Stafford v. Azbell*, (C. Pl. Gen. T.) 6 Misc. (N. Y.) 89.

Necessary to Set Out Distinctly Only Facts Relied Upon. — See *Barto v. Nix*, 15 Wash. 563.

196. 1. Action Against Constable and His Sureties for Wrongful Seizure. — A cause of action against a constable and his sureties on his bond for damages for the wrongful attachment and seizure of the plaintiff's property is not subject to the objection that it joins a cause of action against the constable for a tort with one against the sureties for breach of contract. *Bell v. Peck*, 104 Cal. 35; *Sam Yuen v. McMann*, 99 Cal. 497, both cases *distinguishing* *Ghiradelli v. Bourland*, 32 Cal. 585. See also OFFICIAL BONDS; SHERIFFS AND CONSTABLES.

198. 1. York Mfg. Co. v. Bessemer Ice Mfg., etc., Co., 111 Ala. 332; *Treadwell v. Tillis*, 108 Ala. 262; *Howard v. Shirley*, 75 Mo. App. 150; *Roth v. American Piano Mfg. Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 509; *Waggy v. Scott*, 29 Oregon 386; *Gunderson v. Thomas*, 87 Wis. 406.

Two Claims, One Held under Assignment. — A cause of action *ex contractu* accruing directly to a party may be joined with another cause of action *ex contractu* which he holds by assignment. *Harris v. Pacific Express Co.*, 67 Mo. App. 175.

Express and Implied Contracts. — A cause of action on an express contract may be joined with one on an implied contract. *Olmstead v. Dauphiny*, 104 Cal. 635; *Estep v. Hammons*, 104 Ky. 144; *Childs v. Crithfield*, 66 Mo. App. 422, 2 Mo. App. Rep. 1351; *Fort v. Penny*, 122 N. Car. 230; *Gunderson v. Thomas*, 87 Wis. 406.

Account and Note Indorsed as Collateral Security. — *McDaniel v. Chinski*, 23 Tex. Civ. App. 504.

Actions ex Contractu with Incidental Relief. — The fact that relief not based on contract is sought as incidental to

199. 8. Divorce Proceedings. — See DIVORCE.

9. Injuries to Property. — See note 2. See also EMINENT DOMAIN; NUISANCES; RAILROADS; TRESPASS; TRESPASS ON THE CASE; and other specific titles.

200. 10. Actions to Recover Real Property. — See EJECTMENT; FORCIBLE ENTRY AND DETAINER; QUIETING TITLE — REMOVAL OF CLOUD; RESCISSION, CANCELLATION, AND REFORMATION OF CONTRACTS; TRESPASS TO TRY TITLE.

202. 11. Partition. — See PARTITION.

203. 12. Foreclosure. — See FORECLOSURE OF MORTGAGES.

204. 13. Torts. — See note 1. For applications of the general principles see ASSAULT AND BATTERY; FALSE IMPRISONMENT; MALICIOUS PROSECUTION; MASTER AND SERVANT; PERSONAL INJURIES; RAILROADS; TRESPASS; TROVER AND CONVERSION; and other specific titles.

the enforcement of a cause of action *ex contractu* will not prevent the joinder of such cause with another cause. *Reindel v. Heath*, 109 Wis. 570.

Stipulated Damages and Breach of Contract. — A claim for stipulated damages may be joined with a cause of action for unliquidated damages for breach of contract. *Watson v. DeWitt County*, 19 Tex. Civ. App. 150.

199. 2. See *supra*, VIII. 1. *Code States — Statutory Provisions.*

What Is Injury to Personal Property — *New York.* — An injury to property within the meaning of Code Civ. Pro. N. Y., § 484, subdiv. 6, is "an actionable act whereby the estate of another is lessened, other than a personal injury or the breach of a contract." See Code Civ. Pro. N. Y., § 3343, subdiv. 10. *Benedict v. Guardian Trust Co.*, 58 N. Y. App. Div. 302; *Barkley v. Williams*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 687.

Ohio. — See *Snow v. Mast*, 65 Fed. Rep. 995, wherein it was held that an infringement of a copyright was an injury to property within the Ohio statute.

Injury to Property and Person. — See PERSONAL INJURIES; TRESPASS; TRESPASS ON THE CASE.

204. 1. *Watterson v. Saldunbehere*, 101 Cal. 107.

Causes of Action Must Belong to Same Class. — In most of the code states, subject to a provision authorizing the joinder of causes arising from the same transaction, causes of action for torts which are not included within a single subdivision of the respective statutes providing for the joinder of

causes of action cannot be joined. *Lamb v. Harbaugh*, 105 Cal. 680; *Thelin v. Stewart*, 100 Cal. 372; *Sinclair v. Missouri*, etc., R. Co., 70 Mo. App. 588; *De Wolfe v. Abraham*, 151 N. Y. 186; *Perkins v. Slocum*, 82 Hun (N. Y.) 366; *Pollock v. Carolina Interstate Bldg.*, etc., Assoc., 48 S. Car. 65; *Johnston v. Meagher*, 14 Utah 426. See *supra*, VIII. 1. *Code States — Statutory Provisions.*

Torts Arising Out of Same Transaction. — Causes of action for torts arising out of the same transaction, or transactions connected with the same subject of action, may be joined, although not included in a single subdivision of the statute of joinder.

Colorado. — *Crissey*, etc., *Lumber Co. v. Denver*, etc., R. Co., (Colo. App. 1902) 68 Pac. Rep. 670.

Missouri. — *Morrison v. Herrington*, 120 Mo. 665; *Jones v. St. Louis*, etc., R. Co., 89 Mo. App. 653.

Nebraska. — *Ponca Mills Co. v. Mike-sell*, 55 Neb. 98; *Dinges v. Riggs*, 43 Neb. 710.

New York. — *Crowell v. Truesdell*, 67 N. Y. App. Div. 502; *People v. Wells*, 52 N. Y. App. Div. 583; *Jackson v. Brown*, 74 Hun (N. Y.) 25; *Taylor v. Metropolitan El. R. Co.*, 55 N. Y. Super. Ct. 555; *Rosenberg v. Staten Island R. Co.*, (C. Pl. Spec. T.) 14 N. Y. Supp. 476.

North Carolina. — *Sloan v. Carolina Cent. R. Co.*, 126 N. Car. 487; *Cook v. Smith*, 119 N. Car. 350; *Daniels v. Baxter*, 120 N. Car. 14; *Caldwell v. Bates*, 118 N. Car. 323; *Benton v. Collins*, 118 N. Car. 196; *Solomon v. Bates*, 118 N. Car. 311; *Tate v. Bates*, 118 N.

205. 14. Mechanic's Lien. — See MECHANICS' LIENS.

15. Replevin. — See REPLEVIN.

206. 16. Forcible Entry and Detainer. — See FORCIBLE ENTRY AND DETAINER.

17. Certiorari. — See CERTIORARI.

18. Mandamus. — See MANDAMUS.

19. Full Relief — *a.* GENERALLY. — See note 4. See also BAIL AND RECOGNIZANCE; CREDITORS' BILLS; DETINUE; EXECUTORS AND ADMINISTRATORS; FORECLOSURE OF MORTGAGES; INJUNCTIONS; LANDLORD AND TENANT; LIENS; MULTIFARIOUSNESS AND MISJOINDER (IN EQUITY); NUISANCES; REPLEVIN; SETTLEMENT OF DECEDENTS' ESTATES; TAXATION; TROVER AND CONVERSION; and other specific titles.

208. b. LEGAL AND EQUITABLE RELIEF ASKED. — See note 1.

Car. 287; *Outland v. Outland*, 113 N. Car. 74.

Ohio. — *State v. Allen*, 6 Ohio Dec. 43.
South Carolina. — *Pollock v. Carolina Interstate Bldg., etc., Assoc.*, 48 S. Car. 65.

See also *supra*, VIII. 1. *Code States* — *Statutory Provisions*; 6. *Causes of Action ex Delicto and ex Contractu*.

Common-law and Statutory Liabilities. — Where common-law and statutory liabilities all arise out of the same transaction, they may all be enforced in a single action. *Crissey, etc., Lumber Co. v. Denver, etc., R. Co.*, (Colo. App. 1902) 68 Pac. Rep. 670; *Colorado Coal, etc., Co. v. Carpita*, 6 Colo. App. 248; *Southern R. Co. v. Horner*, 115 Ga. 381. See also *Birmingham v. Coleman*, 111 Ala. 407; *Missouri, etc., R. Co. v. Byrne*, (C. C. A.) 100 Fed. Rep. 359.

206. 4. Bremner v. Leavitt, 109 Cal. 130; *State v. Peckham*, 136 Ind. 198; *American Sav., etc., Assoc. v. Burghardt*, 19 Mont. 323; *Springer v. Sheets*, 115 N. Car. 370; *Peter v. Farrel Foundry, etc., Co.*, 53 Ohio St. 534; *Wagner v. Sanders*, 49 S. Car. 192; *Tripp v. Yankton*, 10 S. Dak. 516; *Milam v. Hill*, (Tex. Civ. App. 1902) 69 S. W. Rep. 447; *Gulf, etc., R. Co. v. Browne*, (Tex. Civ. App. 1902) 66 S. W. Rep. 341; *Wilson v. Pecos, etc., R. Co.*, 23 Tex. Civ. App. 706.

208. 1. Arizona. — *Pringle v. Hall*, (Ariz. 1899) 56 Pac. Rep. 740.

California. — *Watterson v. Saldunbehere*, 101 Cal. 107.

Georgia. — *Swanson v. Kirby*, 98 Ga. 586.

Indiana. — *Field v. Brown*, 146 Ind. 293.

Iowa. — *Watson v. Bartholomew*, 106 Iowa 576.

Kansas. — *German Ins. Co. v. Davis*, 6 Kan. App. 268.

Missouri. — *Morrison v. Herrington*, 120 Mo. 665.

Montana. — *American Sav., etc., Assoc. v. Burghardt*, 19 Mont. 323.

New York. — *Porter v. International Bridge Co.*, 45 N. Y. App. Div. 416, affirmed 163 N. Y. 79; *Witherbee v. Meyer*, 84 Hun (N. Y.) 146; *Whiting v. Elmira Industrial Assoc.*, 45 N. Y. App. Div. 349; *Olin v. Arendt*, 35 N. Y. App. Div. 529; *Van Deventer v. Van Deventer*, 32 N. Y. App. Div. 578; *Toplitz v. Bauer*, 26 N. Y. App. Div. 133; *Green v. Stewart*, 19 N. Y. App. Div. 202; *Loomis v. Decker*, 4 N. Y. App. Div. 409.

North Carolina. — *Howard v. Mutual Reserve Fund L. Assoc.*, 125 N. Car. 49; *Daniels v. Baxter*, 120 N. Car. 14; *Cook v. Smith*, 119 N. Car. 350; *Benton v. Collins*, 118 N. Car. 196; *Solomon v. Bates*, 118 N. Car. 311; *Outland v. Outland*, 113 N. Car. 74.

Ohio. — *Murphy v. Cincinnati*, 10 Ohio Dec. 541; *Kennedy v. Dodge*, 10 Ohio Cir. Dec. 360.

South Carolina. — *Long v. Hunter*, 58 S. Car. 152; *Threat v. Brewer Min. Co.*, 49 S. Car. 95.

Texas. — *Heinze v. Marx*, 4 Tex. Civ. App. 599.

Wisconsin. — *Endress v. Shove*, 110 Wis. 133; *Kruczynski v. Neuendorf*, 99 Wis. 264.

In Federal Courts — *Original Jurisdiction.* — Legal and equitable causes of action cannot be joined in actions brought originally in the federal courts.

200. 20. Causes of Action Must Exist at Time of Commencement of Suit. — See note 1.

21. Must Affect All Parties — *a. GENERALLY.* — See note 2.

See *supra*, VII. 16. *Actions at Law and Suits in Equity.*

On Appeal from a State Court, the practice of the state from which the appeal comes is followed. *Glasier v. Nichols*, 112 Fed. Rep. 877.

One Cause of Action Triable by Court and Another by Jury. — The fact that equitable causes are triable by the court and legal causes are triable by a jury does not prevent their joinder. *Field v. Brown*, 146 Ind. 293; *Baylis v. Bullock Electric Mfg. Co.*, 59 N. Y. App. Div. 576.

Limitations as to Joinder of Legal and Equitable Causes of Action. — *The Causes Must Belong to the Same Class* or subdivision of the statute of joinder, unless they arise out of the same transaction; otherwise they cannot be joined. *Mares v. Wormington*, 8 N. Dak. 329; *Blakely v. Smock*, 96 Wis. 611.

Causes Must Be Consistent. — Causes of action entirely separate in their origin, one being legal and the other equitable, and each requiring a different method of trial in a different branch of the court, so that a single judgment embracing each cause would have to be enforced in a different way and by a different process, cannot be joined. *Conde v. Rogers*, 74 N. Y. App. Div. 147. See COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS.

Causes Must Be Distinctly Stated and not mingled together. *Mallon v. Luden*, 91 Iowa 743.

200. 1. New England Water Works Co. v. Farmers' L. & T. Co., 23 N. Y. App. Div. 571.

2. Sleeper v. World's Fair Banquet Hall Co., 166 Ill. 57; *McDaniel v. Chinski*, 23 Tex. Civ. App. 504, both cases *citing* 1 ENCYC. OF PL. AND PR. 209, and supporting the text there written. See also the following cases, which likewise support the text:

Georgia. — *Renfroe v. Shuman*, 94 Ga. 153.

Idaho. — *Brady v. Linehan*, (Idaho 1898) 51 Pac. Rep. 761.

Indiana. — *Boos v. Brown*, 15 Ind. App. 459.

Montana. — *Waite v. Vinson*, 14 Mont. 405.

New York. — *Cummings v. American Gear, etc., Co.*, 87 Hun (N. Y.) 598;

Elias v. Schweyer, 27 N. Y. App. Div. 69; *Adams v. Stevens*, (C. Pl. Spec. T.) 7 Misc. (N. Y.) 468.

North Carolina. — *Cook v. Smith*, 119 N. Car. 350; *Benton v. Collins*, 118 N. Car. 196; *Pretzfelder v. Merchants' Ins. Co.*, 116 N. Car. 491.

Ohio. — *State v. Allen*, 6 Ohio Dec. 43.

South Carolina. — *Pollock v. Carolina Interstate Bldg., etc., Assoc.*, 48 S. Car. 65.

England. — *Sandes v. Wildsmith*, (1893) 1 Q. B. 771.

Compare *Storrie v. Hamilton*, (Tex. Civ. App. 1897) 42 S. W. Rep. 235.

Separate Torts. — Separate causes of action for tort against separate parties cannot be joined. *Hagen v. Gilbertson*, 10 N. Dak. 546 [*citing* 1 ENCYC. OF PL. AND PR. 209]; *Henry v. Carlton*, 113 Ala. 636; *Chandler v. Western Union Tel. Co.*, 94 Ga. 442; *Bonte v. Postel*, (Ky. 1900) 58 S. W. Rep. 536; *Heitkamp v. La Motte Granite Co.*, 59 Mo. App. 244; *Nash v. Hall Signal Co.*, 90 Hun (N. Y.) 354; *Zeigler v. Ashley*, 5 Ohio Dec. 163.

Separate Torts Concurring to a Single Result do not necessarily authorize a joinder of the causes of action against the several tortfeasors. Unless there is co-operation or a community of purpose between the tortfeasors, it seems that the torts will be deemed several, and hence not joinable. *People v. Oakland Water Front Co.*, 118 Cal. 234; *Gower v. Couldridge*, (1898) 1 Q. B. 348; *Sadler v. Great Western R. Co.*, (1895) 2 Q. B. 688.

Conspiracy to Defraud. — Causes of action arising out of a conspiracy to defraud one of his property may be joined in a single suit by such party to recover the property from the several parties to the conspiracy, though each party's interests in the fruits of their fraud are separate and distinct.

Georgia. — *Kruger v. Walker*, 111 Ga. 383; *Conley v. Buck*, 100 Ga. 187; *Bowden v. Achor*, 95 Ga. 243.

Iowa. — *Farmer v. Brokaw*, 102 Iowa 246.

Minnesota. — *Whiting v. Clugston*, 73 Minn. 6.

Missouri. — *Bogges v. Bogges*, 127 Mo. 305.

New York. — *Zoccolo v. Stern*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.)

246; *Gray v. Fuller*, 17 N. Y. App. Div. 29; *Thomas v. Thomas*, 9 N. Y. App. Div. 487; *Wood v. Sidney Sash, etc., Co.*, 92 Hun (N. Y.) 22.

North Carolina. — *Daniels v. Baxter*, 120 N. Car. 14 [*citing* *Bedsole v. Monroe*, 5 Ired. Eq. (N. Car.) 313]; *Heggie v. Hill*, 95 N. Car. 303; *King v. Farmer*, 88 N. Car. 22; *Young v. Young*, 81 N. Car. 91; *Hamlin v. Tucker*, 72 N. Car. 503.

Texas. — *Hays v. Perkins*, 22 Tex. Civ. App. 198; *Ney v. Ladd*, (Tex. Civ. App. 1902) 68 S. W. Rep. 1014.

Not Every Fraudulent Combination Will Justify a Joinder of the several causes of action against the conspirators arising therefrom. There must be co-operative or joint purpose directed to the accomplishment of the matters complained of and constituting the causes of action sought to be joined, and these causes must themselves be connected as parts of a single scheme. *Jones v. Procter*, 5 Ohio Dec. 416. See also *Pittman v. Bentley*, 102 Ga. 10.

Maker and Guarantor. — See PRINCIPAL AND SURETY OR GUARANTOR.

Neither Defendant Interested in Cause Against Other. — *Sleeper v. World's Fair Banquet Hall Co.*, 166 Ill. 57, *citing* 1 ENCYC. OF PL. AND PR. 209. See also the following cases:

Colorado. — *Faust v. Smith*, 3 Colo. App. 505.

Georgia. — *Sims v. Clark*, 91 Ga. 302.

Iowa. — *Prader v. National Acc. Assoc.*, 107 Iowa 431.

Nebraska. — *Barry v. Wachosky*, 57 Neb. 534.

New York. — *Dykman v. Keeney*, 154 N. Y. 483; *Kent v. West*, 33 N. Y. App. Div. 112, *affirming* (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 403, appeal dismissed 163 N. Y. 589; *Goldmark v. Magnolia Anti-Friction Metal Co.*, 30 N. Y. App. Div. 580; *Harris v. Elliott*, 29 N. Y. App. Div. 568; *Morgan v. Hedstrom*, 25 N. Y. App. Div. 547, *affirmed* 164 N. Y. 224; *Straus v. Hoadley*, 23 N. Y. App. Div. 360; *Hunt v. American Radiator Co.*, 2 N. Y. App. Div. 34; *Southmavd v. Jackson*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 476.

Ohio. — *Jones v. Procter*, 5 Ohio Dec. 416.

South Dakota. — *Davis v. Novotney*, 15 S. Dak. 118.

Texas. — *Hays v. Perkins*, 22 Tex. Civ. App. 198; *Dunson v. Nacogdoches County*, 15 Tex. Civ. App. 9.

Washington. — *Willey v. Nichols*, 18 Wash. 528.

Wisconsin. — *Blakely v. Smock*, 96 Wis. 611.

Cause of Action Against One and Cause of Action Against Both Defendants. — *McDaniel v. Chinski*, 23 Tex. Civ. App. 504, *citing* 1 ENCYC. OF PL. AND PR. 209. See also the following cases:

Colorado. — *Du Bois v. Bowles*, (Colo. 1902) 69 Pac. Rep. 1067.

Georgia. — *Willis v. Galbreath*, 115 Ga. 793.

Kentucky. — *Clayton v. Henderson*, 103 Ky. 228.

Minnesota. — *Anderson v. Scandia Bank*, 53 Minn. 191.

Missouri. — *Beattie Mfg. Co. v. Gerardi*, 166 Mo. 142; *Jamison v. Culigan*, 151 Mo. 410.

New York. — *Bryant v. Turner*, (Supm. Ct. App. Div.) 73 N. Y. Supp. 783; *Cleghorn v. Cleghorn*, (Supm. Ct. Gen. T.) 29 N. Y. Supp. 432; *Benton v. Winner*, 69 Hun (N. Y.) 494; *Olin v. Arendt*, 35 N. Y. App. Div. 529; *Kent v. West*, 33 N. Y. App. Div. 112; *McKenzie v. Hatton*, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 16.

North Carolina. — *Gattis v. Kilgo*, 125 N. Car. 133.

Washington. — *Times Pub. Co. v. Everett*, 9 Wash. 518.

Wisconsin. — *Plankinton v. Hildebrand*, 89 Wis. 209.

Neither Plaintiff Interested in Cause of Action Against Other. — Where neither of the plaintiffs is interested in the cause of action in favor of the other, there is a misjoinder. *Behlow v. Fischer*, 102 Cal. 208; *Sturtevant-Larrabee Co. v. Mast, etc., Co.*, 66 Minn. 437; *Nagel v. Lutz*, 41 N. Y. App. Div. 193; *Jacobson v. Brooklyn El. R. Co.*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 281; *Morton v. Western Union Tel. Co.*, 130 N. Car. 299; *Cromartie v. Parker*, 121 N. Car. 198.

Cause of Action in Favor of One Plaintiff, and One in Favor of Both. — A cause of action in favor of one alone cannot be joined with a cause in his favor and also in favor of another. *Lathrope v. Flood*, 135 Cal. 458; *Citizens' State Bank v. Frazee*, 8 Kan. App. 638; *Missouri, etc., R. Co. v. Starr*, 22 Tex. Civ. App. 353; *Hawarden v. Youghiogheny, etc., Coal Co.*, 111 Wis. 545; *Hughes v. Hunner*, 91 Wis. 116.

Required to Elect. — *Clark's Code* Civ. Pro. N. Car. (1900), § 272, permits

a division of causes of action which are misjoined; but where a misjoinder is due to the lack of a common interest between the parties no division can be had, and the case must be dismissed. *Cromartie v. Parker*, 121 N. Car. 198.

Against Obligor and Guarantor.—See PRINCIPAL AND SURETY OR GUARANTOR.

Causes of Action in Favor of Several Parties Assigned to One.—Where causes arising out of the same transaction, but in favor of different parties, are all assigned to one party, they may be joined. *Davis v. Mills*, 83 Fed. Rep. 982; *Benedict v. Guardian Trust Co.*, 58 N. Y. App. Div. 302.

Mutual Assignments of Partial Interests in Several Causes of Action.—Mutual assignments between several parties of partial interests in their respective causes of action give to all of them a sufficient interest in all the causes to justify a joinder thereof. *Gulf, etc., R. Co. v. Jagoe*, (Tex. Civ. App. 1895) 32 S. W. Rep. 1061.

Parties Need Not Be Affected to Same Extent.—All the parties on any one side need not be affected to the same extent or in the same manner. It is sufficient if they all have a common interest centering on the point at issue in the action.

Indiana.—*State v. Peckham*, 136 Ind. 198.

Kentucky.—*Rodgers v. Rodgers*, (Ky. 1895) 31 S. W. Rep. 139.

Minnesota.—*Foster v. Landon*, 71 Minn. 494.

New York.—*Doyle v. American Wringer Co.*, 60 N. Y. App. Div. 525; *Wood v. Sidney Sash, etc., Co.*, 92 Hun (N. Y.) 22 [following *Reed v. Stryker*, (Ct. App.) 12 Abb. Pr. (N. Y.) 47]; *Kellogg v. Siple*, 11 N. Y. App. Div. 458.

North Carolina.—*Pretzfelder v. Merchants' Ins. Co.*, 116 N. Car. 491; *Peebles v. Boone*, 116 N. Car. 57.

South Carolina.—*Sheppard v. Green*, 48 S. Car. 165; *Pollock v. Carolina Interstate Bldg., etc., Assoc.*, 48 S. Car. 65.

Texas.—*Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 88 Tex. 468; *Parlin, etc., Co. v. Miller*, (Tex. Civ. App. 1901) 60 S. W. Rep. 881; *Muncy v. Matfield*, (Tex. Civ. App. 1897) 40 S. W. Rep. 345; *Coe v. Nash*, (Tex. Civ. App. 1897) 40 S. W. Rep. 235; *Killfoil v. Moore*, (Tex. Civ. App. 1897) 39 S. W. Rep. 646; *Finegan v. Read*, 8 Tex. Civ. App. 33; *McCormick v. Blum*, 4 Tex. Civ. App. 9.

Wisconsin.—*Grady v. Maloso*, 92 Wis. 666.

Where It Is Impossible to Determine Interests of Several Defendants Except by Action Against All.—Where a corporate officer gives several bonds with different sureties during his tenure of office, a joint action may be maintained against all of the sureties upon the several bonds, if it appears that their principal's liability, if any, grows out of many items of complicated book accounts in the conduct of such principal's management of the corporation's business, and that it is impossible to determine accurately the extent of the liability of each set of sureties until there is full settlement and complete inquiry into the conduct of the business conducted by such officer for his full term of office. *Moore v. Waco Bldg. Assoc.*, 19 Tex. Civ. App. 68.

Where there Is Single Cause of Action.—Where it appears that there is only one cause of action sought to be enforced against several defendants, the case is not one for application of the rules governing joinder of actions, but rather one for the application of the rules as to joinder of parties. *Wit v. Day* 112 Iowa 110; *Bostick v. Barnes*, 59 S. Car. 22.

Who Can Object.—A defendant interested in all the causes of action which are joined cannot complain that one of his codefendants is not so interested. *Bogges v. Boggess*, 127 Mo. 305; *Zoccolo v. Stern*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 246.

Joinder of Equitable Causes of Action.—The rule as to the extent to which several equitable causes of action must affect the parties, in order to authorize a joinder, is more liberal than in the case of legal causes. Equitable causes in favor of several defendants may often be joined when the respective interests of the parties would not justify a joinder if the causes were legal. *Whiting v. Elmira Industrial Assoc.*, 45 N. Y. App. Div. 349; *Taylor v. Blue Ridge Marble Co.*, 83 Hun (N. Y.) 30; *Zoccolo v. Stern*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 246; *Dykman v. Keeney*, 21 N. Y. App. Div. 114; *O'Brien v. Kursheedt*, 79 Hun (N. Y.) 615, 29 N. Y. Supp. 973. See also *O'Brien v. Kursheedt*, 79 Hun (N. Y.) 616, 29 N. Y. Supp. 975; *Bauer v. Platt*, 72 Hun (N. Y.) 326.

Statutory Exceptions to Rule as to Interest of Parties.—See PARTIES TO ACTIONS.

210. b. HUSBAND AND WIFE. — See **HUSBAND AND WIFE.**
c. REPRESENTATIVE CAPACITY. — See **EXECUTORS AND ADMINISTRATORS.**

Indiana. — See *State v. Parsons*, 147 Ind. 579; *McIntosh v. Zaring*, 150 Ind. 301.

Kansas. — See *Russell First Nat. Bank v. Knoll*, 7 Kan. App. 352.

New York. — See Code Civ. Pro. N. Y., § 1790; *Bagley v. Lennig*, 61 N. Y. App. Div. 26.

Code Civ. Pro. N. Y., § 454, provides that two or more persons severally liable upon the same written instrument may all or any part of them be included as defendants in the same action. *Roehr v. Liebmann*, 9 N. Y. App. Div. 247; *Southmayd v. Jackson*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 476. Under this provision, each defendant must be severally liable for the whole amount, in order to author-

ize the joinder. *Straus v. Hoadley*, 23 N. Y. App. Div. 360, *distinguishing* *Isear v. Daynes*, 1 N. Y. App. Div. 557. *Compare* *Isear v. McMahon*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 95.

Ohio. — Bates's Annot. Stat. Ohio (1897), § 5009, provides that "one or more of the persons severally liable on an instrument may be included in the same action thereon." It has been held that under this statute parties severally liable for a portion of a single debt due under a single written instrument might be joined in a single action. *Burnap v. Sylvania Butter Co.*, 1 Ohio Dec. 110.

Wyoming. — See Rev. Stat. Wyo., § 2395; *Fisher v. Hopkins*, 4 Wyo. 379.

ADDITIONAL ALLOWANCES OF COSTS.

212. I. GENERAL PRINCIPLES. — See note 2.

213. II. PROVISIONS OF THE CODE — Allowances as a Matter of Right.

— See notes 3, 6, 7.

214. See note 1.

215. Discretionary Allowances. — See notes 1, 2, 3, 4, 5, 6, 7.

212. 2. Intendment of Statute. — The allowances are intended as indemnity for actual expenses of the suit. *Seagrist v. Sigrist*, 20 N. Y. App. Div. 336.

They are intended as compensation for the expenses of litigation not covered by ordinary costs. *Kilmer v. Evening Herald Co.*, 70 N. Y. App. Div. 291.

They are intended as attorney's fees. *Perkins v. Heert*, (N. Y. Super. Ct. Spec. T.) 14 Misc. (N. Y.) 425.

In Surrogates' Courts. — See the following cases based on Code Civ. Pro. N. Y., §§ 2557-2567: *Matter of Richmond*, 63 N. Y. App. Div. 488; *Matter of Bogart*, 46 N. Y. App. Div. 240; *Matter of Hitchler*, (Surrogate Ct.) 25 Misc. (N. Y.) 369; *Matter of Ruppaner*, 7 N. Y. App. Div. 11. And see also COSTS; PROBATE AND CONTEST OF WILLS.

213. 3. Adjudication upon Written Instrument. — The defendant in a suit to construe a will is not entitled to an additional allowance. *Hafner v. Hafner*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 99; *Matter of Robinson*, 40 N. Y. App. Div. 30.

6. Hafner v. Hafner, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 99; *Matter of Robinson*, 40 N. Y. App. Div. 30.

7. Recovery of Judgment Necessary. — A result of the litigation which, under Code Civ. Pro. N. Y., §§ 3228, 3229, entitles the defendant to costs has been held to be a sufficient recovery to entitle him to an additional allowance. *United Press v. New York Press Co.*, 164 N. Y. 406. See also *infra*, IV. *Where Allowance May Be Granted or Refused*, notes 1, 2.

214. 1. Allowance Additional Only. — *Hascall v. King*, 54 N. Y. App. Div. 441. See also *infra*, IV. *Where Allowance May Be Granted or Refused*, note 1.

In Case of New Trial. — *Meeker v. C. R. Remington, etc., Co.*, 62 N. Y. App. Div. 476.

215. 1. Foreclosure Cases. — A leasehold estate in realty is not real property within the statute. *Barnes v. Meyer*, (Supm. Ct. Spec. T.) 25 Civ. Pro. (N. Y.) 372.

2. Suits for Partition. — Code Civ. Pro. N. Y., § 3261, provides that the article of which it and also section 3253 are parts shall not affect other provisions whereby the amount of costs is otherwise "specially fixed." Section 1579 relates to costs in partition, but does not specially fix them; and section 1559 provides for the awarding and enforcement of the plaintiff's costs in partition cases, including extra allowances, but does not specially fix them, and makes no mention of the defendant's costs. It has been held that section 3253 is not affected or limited by sections 1559 and 1579, and hence that additional allowances may be awarded to a defendant in partition where he succeeds in preventing a sale and secures actual partition instead. *Crossman v. Wyckoff*, 64 N. Y. App. Div. 554, *overruling Sprague v. Engelbrecht*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 464, and *Davis v. Davls*, (Supm. Ct. Spec. T.) 3 N. Y. St. Rep. 163, and *disapproving Weed v. Paine*, 31 Hun (N. Y.) 10, in so far as the latter case suggests that an additional allowance cannot be granted to the defendant in the event of actual partition.

The Amendment of 1898 prohibited a

216. III. THE APPLICATION — 1. When Made. — See notes 1, 2.**217. Notice.** — See note 1.

greater allowance than two hundred dollars in a partition suit unless a defense was interposed therein. *Defendorf v. Defendorf*, 42 N. Y. App. Div. 166, *affirming* 26 Misc. (N. Y.) 677. It was also held in this case that the amendment under consideration was retroactive.

215. 3. See *infra*, IV. 6. *What Are Difficult and Extraordinary Cases.*

4. What Amounts to Defense. — "The courts do not seem to have interpreted the word 'defense' in section 3253 in the scientific and accurate sense which it has and always has had in pleading. They interpret it, strangely enough, to mean 'answer,' or even 'demurrer.' * * * They do not even interpret it to mean the contest or opposition which a defendant makes on a trial, and which laymen call a defense, for an allowance is habitually allowed, in the first and second judicial departments, at least, where the complaint is dismissed for the plaintiff's default, or a judgment is taken against the defendant on his default, when the cause is reached for trial." *Strauss v. Union Cent. L. Ins. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 571, in which case it was held that an answer containing denials only, or a general denial, interposes a defense within the meaning of the statute.

A defense, within the meaning of the statute, must tend to defeat, in whole or in part, the relief against which it is interposed. *Defendorf v. Defendorf*, 42 N. Y. App. Div. 166, *affirming* 26 Misc. (N. Y.) 677.

A demurrer is a defense. *Winne v. Fanning*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 410.

The Fact that a Defense Was Interposed Must Appear as a condition precedent for the allowance. *Barnes v. Meyer*, (Supm. Ct. Spec. T.) 25 Civ. Pro. (N. Y.) 372.

5. The Action May Be Legal or Equitable. — In equitable actions additional allowances may be made independently of section 3253, and in excess of the limits therein prescribed. *Stevens v. Central Nat. Bank*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 344; *Roberts v. New York El. R. Co.*, (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 345. But see *Matter of Robinson*, 40 N. Y. App. Div. 30, wherein it was held that the

limit of additional allowances prescribed by section 3253 cannot be exceeded in equitable cases.

6. Party Must Be Successful. — See *infra*, IV. *Where Allowance May Be Granted or Refused*, note 1.

7. Waterbury v. Tucker, etc., *Cordage Co.*, 152 N. Y. 610.

216. 1. A Second Motion for an additional allowance, after denial of a former motion, cannot be made without leave of court. *Manhattan R. Co. v. Klipstein*, 84 Hun (N. Y.) 579.

2. After Trial. — *Under General Practice Rule 45*, the motion must be made before the adjustment of the final costs, *i. e.*, those costs which are incorporated in the final judgment. *Winne v. Fanning*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 410.

This rule does not prevent one in whose favor costs are taxed under an interlocutory judgment from thereafter applying, before final judgment, for an additional allowance. *Abbey v. Wheeler*, 57 N. Y. App. Div. 417. See also *Harlem Bridge, etc., R. Co. v. Westchester*, 143 N. Y. 59, *reversing* 76 Hun (N. Y.) 286, wherein it was held that where, pursuant to stipulation, a discontinuance is entered without prejudice to a motion for an additional allowance, such allowance may thereafter be granted.

217. 1. Necessity for Formal Notice. — *Where the Application Is Made After the Trial*, notice must be given. *Bush v. O'Brien*, 52 N. Y. App. Div. 452; *Moskowiz v. Hornberger*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 558, *reversing* (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 429; *Toch v. Toch*, 9 N. Y. App. Div. 501; *Griggs v. Brooks*, 79 Hun (N. Y.) 394. But see *Mautner v. Pike*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 500, *affirming* (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 745, and *citing Mitchell v. Hall*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 490, holding that if the application is made to the trial judge at the same term at which trial is had, no notice is necessary.

Where there Are Several Parties to a suit, notice of a motion for an additional allowance to one must be given to all the others. *Bush v. O'Brien*, 52 N. Y. App. Div. 452.

Waiver of Notice. — Where no notice is given of an application for an allow-

217. 2. To What Court Made. — See note 2.

218. Where the Trial Is Before a Referee. — See note 2.

4. Appeal from Order Granting or Refusing Additional Allowance — [Appellate Division. — By an amendment of the New York Constitution in 1894, jurisdiction previously existing in the General Term to review orders made on an application for an additional allowance was conferred on the Appellate Division. See note 4a.]

ance, the defect cannot be cured by a waiver of notice filed on a motion for a resettlement of the order granting the allowance. *Bush v. O'Brien*, 52 N. Y. App. Div. 452.

217. 2. Application to Trial Court. — Under the Supreme Court Rules (now General Practice Rule 45) the application must be made to the court or judge who tried the case. *Toch v. Toch*, 9 N. Y. App. Div. 501; *Wiley v. Long Island R. Co.*, 88 Hun (N. Y.) 177.

Waiver. — This requirement may be waived, and hence the objection that it was not complied with cannot be made for the first time on appeal. *Wilber v. Williams*, 4 N. Y. App. Div. 444; *Wiley v. Long Island R. Co.*, 88 Hun (N. Y.) 177.

Obvious Purpose of Rule. — *Wilber v. Williams*, 4 N. Y. App. Div. 444; *Meyer Rubber Co. v. Lester Shoe Co.*, 86 Hun (N. Y.) 473.

218. 2. Trial Before Referee. — The application cannot be made to a referee. *Pinsker v. Pinsker*, 44 N. Y. App. Div. 501.

4a. Jurisdiction of Appellate Division. — Const. N. Y., art. 6, § 2. See also *Harlem Bridge, etc., R. Co. v. Westchester*, 143 N. Y. 59; *Abbey v. Wheeler*, 57 N. Y. App. Div. 417; *Preston v. Howk*, 3 N. Y. App. Div. 43; *People v. Coler*, 58 N. Y. App. Div. 347; *People v. Hertle*, 46 N. Y. App. Div. 505; *Matter of Grade Crossing Com'rs*, 20 N. Y. App. Div. 271.

What Is a Sufficient Basis for an allowance was considered in the following cases: *Opitz v. Hammen*, 41 N. Y. App. Div. 468; *Husted v. Thomson*, 38 N. Y. App. Div. 315; *Black v. Brooklyn Heights R. Co.*, 32 N. Y. App. Div. 468; *Rochester, etc., R. Co. v. Rochester*, 17 N. Y. App. Div. 257; *Proctor v. Soulier*, 8 N. Y. App. Div. 69; *Godley v. Kerr Salt Co.*, 3 N. Y. App. Div. 17; *Heert v. Cruger*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 508; *De Long v. De Long Hook, etc., Co.*, 89 Hun (N. Y.) 399; *Smallwood v. Schwietering*, (N. Y.

Super. Ct. Spec. T.) 10 Misc. (N. Y.) 103; *Schneider v. Rochester*, 50 N. Y. App. Div. 22.

Whether there Was a Sufficient Basis Shown for an additional allowance was considered in the following cases: *Volger v. Force*, 63 N. Y. App. Div. 122; *Deuterman v. Gainsborg*, 54 N. Y. App. Div. 575; *Genet v. Delaware, etc., Canal Co.*, 49 N. Y. App. Div. 645, 63 N. Y. Supp. 230; *Werner v. Franklin Nat. Bank*, 49 N. Y. App. Div. 423; *People v. Page*, 39 N. Y. App. Div. 110; *Patish v. New York Produce Exch.*, 54 N. Y. App. Div. 323; *Laird v. Littlefield*, 34 N. Y. App. Div. 43; *Black v. Brooklyn Heights R. Co.*, 32 N. Y. App. Div. 468; *Kochler v. Brady*, 22 N. Y. App. Div. 624, 47 N. Y. Supp. 984; *Arthur v. Dalton*, 14 N. Y. App. Div. 115; *Proctor v. Soulier*, 8 N. Y. App. Div. 69; *Hayden v. Mathews*, 4 N. Y. App. Div. 338; *Preston v. Howk*, 3 N. Y. App. Div. 43; *Hart v. Ogdensburg, etc., R. Co.*, 89 Hun (N. Y.) 316; *De Long v. De Long Hook, etc., Co.*, 89 Hun (N. Y.) 399.

What Is the Proper Basis for the Computation of the allowance was considered in the following cases: *Seifter v. Brooklyn Heights R. Co.*, 53 N. Y. App. Div. 443; *Bates v. Fish Bros. Wagon Co.*, 50 N. Y. App. Div. 38; *Woodbridge v. Saratoga Springs First Nat. Bank*, 45 N. Y. App. Div. 166; *Mills v. Ross*, 39 N. Y. App. Div. 563; *Laird v. Littlefield*, 34 N. Y. App. Div. 43; *Commercial Nat. Bank v. Hand*, 27 N. Y. App. Div. 145; *Parish v. New York Produce Exch.*, 54 N. Y. App. Div. 323.

At What Stage of an Action an Allowance May Be Granted will be considered on appeal. *New York, etc., Cement Co. v. Keator*, 62 N. Y. App. Div. 577; *Abbey v. Wheeler*, 57 N. Y. App. Div. 417; *Rawlinson v. Brainerd, etc., Co.*, 53 N. Y. App. Div. 147; *Hackett v. Equitable L. Assur. Soc.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 530; *Hascall v. King*, 54 N. Y. App. Div. 441.

219. Court of Appeals, — See note 2.

Whether a Case Is Difficult and Extraordinary is a question which will be considered. *Lozier v. Saratoga Gas, etc., Co.*, 59 N. Y. App. Div. 390; *Angier v. Hager*, 51 N. Y. App. Div. 171; *Citizens' Nat. Bank v. Lilienthal*, 40 N. Y. App. Div. 609, 57 N. Y. Supp. 567; *Allen v. Albany R. Co.*, 22 N. Y. App. Div. 222; *Seagrist v. Sigrist*, 20 N. Y. App. Div. 336; *Gillespy v. Bilbrough*, 15 N. Y. App. Div. 212; *Hart v. New York*, 16 N. Y. App. Div. 227.

Review of Discretion. — The discretion of the trial as to when an allowance should be granted or refused was reviewed in *Maher v. Garry*, 3 N. Y. App. Div. 480.

As to Amount of Allowance. — The discretion of the trial court as to the amount of the allowance is reviewable by the Appellate Division. *Seagrist v. Sigrist*, 20 N. Y. App. Div. 336; *Hart v. New York*, 16 N. Y. App. Div. 227; *Gordon v. Strong*, 15 N. Y. App. Div. 519; *People v. Rochester Dime Sav., etc. Assoc.*, 7 N. Y. App. Div. 350; *Hagenbuehle v. Schultz*, 69 Hun (N. Y.) 183.

Abuse of Discretion. — The action of the trial court in awarding additional allowances will not be disturbed by the Appellate Division unless there has been an abuse of discretion. *Woodbridge v. Saratoga Springs First Nat. Bank*, 166 N. Y. 238; *Delmar v. Delmar*, 65 N. Y. App. Div. 582; *Brewster v. Hornellsville*, 35 N. Y. App. Div. 626, 54 N. Y. Supp. 915; *Liebetrut v. Gaskin*, 35 N. Y. App. Div. 626; 54 N. Y. Supp. 909; *Seagrist v. Sigrist*, 20 N. Y. App. Div. 336; *Proctor v. Soulier*, 8 N. Y. App. Div. 69; *Wilber v. Williams*, 4 N. Y. App. Div. 444; *Preston v. Howk*, 3 N. Y. App. Div. 43; *Eames Vacuum Brake Co. v. Prosser*, 88 Hun (N. Y.) 343; *Meyer Rubber Co. v. Lester Shoe Co.*, 86 Hun (N. Y.) 473.

Whether an Award of an Additional Allowance as a Condition of the Right to Discontinue was justified by the facts was reviewed in *Peet v. Kimball*, 58 N. Y. App. Div. 329.

Where the Appeal Book Does Not Contain All the Proceedings had on the trial, the Appellate Division will not review the exercise of the trial court's discretion in the matter of an additional allowance. *Meyer Rubber Co. v. Lester Shoe Co.*, 86 Hun (N. Y.) 473.

Effect of Improper Allowance on Judgment. — An improper allowance is not ground for modifying the judgment where it does not appear that such allowance was included in the costs which were taxed. *Koehler v. Brady*, 22 N. Y. App. Div. 624, 47 N. Y. Supp. 984, *affirmed* 163 N. Y. 565.

Laches, such as allowing an order for an additional allowance to stand for ten years, will bar the right to relief from the payment of the allowance, though the court which imposed it was without authority to do so. *Griggs v. Brooks*, 79 Hun (N. Y.) 394.

Remitting Case Back. — When the trial court has denied an allowance for want of power, upon reversal the application will be remitted to such court for determination on the merits. *Crossman v. Wyckoff*, 64 N. Y. App. Div. 534.

219. 2. Jurisdiction of Court of Appeals. — The Court of Appeals may, on appeal from the Appellate Division, review the question of the trial court's authority to make the allowance of which complaint is made. *Woodbridge v. Saratoga Springs First Nat. Bank*, 166 N. Y. 238, wherein the question reviewed was whether there was sufficient evidence of the amount involved to justify the trial court in exercising its discretion in the matter of awarding allowances; *The United Press v. New York Press Co.*, 164 N. Y. 406, wherein the question was the power of the trial court to grant an additional allowance where the plaintiff recovers less than fifty dollars, and the defendant recovers ordinary costs pursuant to Code Civ. Pro. N. Y., §§ 3228, 3229; *Mauer of Brooklyn*, 148 N. Y. 107, wherein the question reviewed was whether the proceeding was one in which an allowance could be granted; *Harlem Bridge, etc., R. Co. v. Westchester*, 143 N. Y. 59, wherein it was intimated that if the point had been presented properly, the court would have reviewed the question as to whether there was any subject-matter involved which was shown to have value. See also *Stevens v. Central Nat. Bank*, 168 N. Y. 560.

The Discretion of the Trial Court, when its exercise is authorized, will not be controlled by the Court of Appeals. *Woodbridge v. Saratoga Springs First Nat. Bank*, 166 N. Y. 238.

220. IV. WHERE ALLOWANCE MAY BE GRANTED OR REFUSED.
 — 1. In General. — See notes 1, 2, 3.

Where the Allowance Is Granted Against the Wrong Party, the Court of Appeals may modify the order so as to require the proper party to pay the allowance. *Roberts v. New York El. R. Co.*, 155 N. Y. 31, wherein the Court of Appeals required a plaintiff who had brought in unnecessary parties defendant to pay an allowance awarded by the trial court to such parties against their codefendants.

Remitting Case Book. — *Harlem Bridge, etc., R. Co. v. Westchester*, 143 N. Y. 59.

Allowance Subsequent to Appeal. — *In an Action at Law* wherein the decision of the trial court is reversed by the Court of Appeals, with direction to enter judgment for the appellant, the trial court may, before entering judgment on the remittitur, hear and grant an application for an additional allowance to the appellant without any special direction to that effect from the Court of Appeals, this practice not being open to the objection that it allows an addition to the judgment of the Court of Appeals, since in actions at law that court has nothing to do with the discretion of the trial court in the matter of additional allowances. *Hascall v. King*, 54 N. Y. App. Div. 441, wherein the above principle was announced by the court in distinguishing the case under consideration from *Parrott v. Sawyer*, 26 Hun (N. Y.) 466. In the latter case the trial court held that the allowance could not be granted, on the ground that it would be an addition to the judgment of the Court of Appeals, which decision was reversed by the General Term, 26 Hun (N. Y.) 466.

In an Equitable Action each court through which the case passes has discretion as to costs; and hence where the Court of Appeals, in reversing the decision of the trial court in such a suit, passes upon the question of costs in all the lower courts, the trial court, in entering judgment for the appellant upon the remittitur, cannot, in the absence of the special direction of the Court of Appeals, hear an application for an additional allowance, since an allowance without the permission of the Court of Appeals would be an addition to the judgment of that court. *Hascall v. King*, 54 N. Y. App. Div.

441, *distinguishing* *Barnard v. Hall*, 143 N. Y. 339; *Brown v. Farmers' L. & T. Co.*, (Supm. Ct.) 24 Abb. N. Cas. (N. Y.) 160, and *Parrott v. Sawyer*, 26 Hun (N. Y.) 466. See also *Barnard v. Hall*, 143 N. Y. 339, wherein it was held that as the Court of Appeals did not pass upon the costs in the trial court, the latter court, in entering judgment upon the remittitur, might grant an additional allowance to the successful appellant.

Where a Decision Is Partially Reversed without disturbing the judgment for costs rendered in favor of the appellee by the trial court, such court, in entering judgment upon the remittitur, cannot grant an additional allowance to the appellant. *Stevens v. Central Nat. Bank*, 168 N. Y. 560.

Supreme Court, Appellate Term. — Final exercise of discretion as to additional allowances lies with the General Term of the New York City Court, and cannot be reviewed by the Appellate Term of the Supreme Court. *Petty v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 517; *Carney v. Reilly*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 11.

220. 1. Recovery of Ordinary Costs Essential. — *Brewster v. Hornellsville*, 35 N. Y. App. Div. 626, 54 N. Y. Supp. 915; *Kahn v. Schmidt*, 83 Hun (N. Y.) 541.

Allowances Follow Ordinary Costs. — *The Applicant Need Not Be the Prevailing Party*, but it is sufficient if he recovers ordinary costs. The *United Press v. New York Press Co.*, 164 N. Y. 406, wherein it was held that an additional allowance may be granted to a defendant who recovers ordinary costs under Code Civ. Pro. N. Y., §§ 3228, 3229, because the plaintiff recovers less than fifty dollars.

An Additional Allowance Against an Administrator may be granted where he is liable for ordinary costs. *Richards v. Stillman*, 57 N. Y. App. Div. 182.

Additional Allowances Not Included in Term "Costs." — The allowance is additional only, and hence an award by the Court of Appeals, in remanding an equity case, of "costs to the appellants in all courts" does not authorize the trial court to grant to the successful appellant an additional allowance upon the amount of the judgment entered

221. See note 2.

2. Subject-matter Must Possess Pecuniary Value.— See note 3.

upon the remittitur. *Hascall v. King*, 54 N. Y. App. Div. 441.

220. 2. The Litigation Must Be Ended.—The order granting an additional allowance cannot be made until all the issues have been disposed of; and hence where there are several defendants, an allowance granted when the issue as to one of them is still undetermined is unauthorized. *Bush v. O'Brien*, 52 N. Y. App. Div. 452.

Upon Interlocutory Judgment.— No allowance can be granted upon an interlocutory judgment. *Abbey v. Wheeler*, 57 N. Y. App. Div. 417.

3. Wood v. Hubbard, 29 N. Y. App. Div. 166.

Reconsideration of Order Granting Allowance.— Where an allowance is granted, the amount thereof to be thereafter determined, the authority of the court in the premises is not exhausted, and it may thereafter refuse to grant any allowance at all. *Rawlinson v. Brainerd, etc., Co.*, 53 N. Y. App. Div. 147.

Retrials.— *An Additional Allowance May Be Granted to an Appellant* where the judgment against him, including an additional allowance to the appellee, is reversed, and, pursuant to the order of remand, judgment is entered in the appellant's favor. *Stevens v. Central Nat. Bank*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 344.

An Allowance Granted to a Plaintiff on a First Trial cannot be taxed on a second, though the plaintiff again prevails and recovers more than before; since if an allowance on a first trial were allowed on a second, it might result, in the event of a smaller recovery on the second trial, in the granting of an allowance in excess of five per cent. on the recovery. *Meeker v. C. R. Remington, etc., Co.*, 62 N. Y. App. Div. 476.

221. 2. Demurrer.— An allowance may be awarded on a judgment upon a demurrer. *Winne v. Fanning*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 410.

Dismissal for Want of Jurisdiction is not such a disposition of the case as will authorize an additional allowance. *Toch v. Toch*, 9 N. Y. App. Div. 501. See also *Opitz v. Hammen*, 41 N. Y. App. Div. 468.

3. Injunction Suits.— *Where the Sub-*

ject-matter of an Injunction Suit Is Not Susceptible to a Money Valuation, and no damages are claimed, no additional allowance can be granted. *Schneider v. Rochester*, 50 N. Y. App. Div. 22, wherein it was held that no allowance could be granted to a plaintiff who secured a judgment restraining the common council of a city from ordering a reappraisal of damages in condemnation proceedings, on the ground that the order setting aside the former appraisal was void as having been entered without a hearing; since the council's right to set aside such appraisal after a proper hearing being left unadjudicated, there was no subject-matter in the suit susceptible to a money valuation; *Husted v. Thomson*, 38 N. Y. App. Div. 315, wherein an injunction and general relief was sought in regard to a purported release; *Godley v. Kerr Salt Co.*, 3 N. Y. App. Div. 17, wherein the pollution of a stream was sought to be enjoined.

Where Damages Are Claimed but Not Allowed in a simple injunction suit, an additional allowance cannot be granted to the plaintiff. *Volger v. Force*, 63 N. Y. App. Div. 122, wherein the infringement of a trademark was enjoined, but the damages claimed were disallowed. But see *Perkins v. Heert*, (N. Y. Super. Ct. Spec. T.) 14 Misc. (N. Y.) 425, wherein it was held that in a suit to enjoin the infringement of a trademark, the value of the trademark is a sufficient basis for an additional allowance.

Where there Is No Proof of the Value of the subject-matter of a simple injunction, no allowance can be granted. *People v. Page*, 39 N. Y. App. Div. 110; *Koehler v. Brady*, 22 N. Y. App. Div. 624, 47 N. Y. Supp. 984; *De Long v. De Long Hook, etc., Co.*, 89 Hun (N. Y.) 399; *Smallwood v. Schwietering*, (N. Y. Super. Ct. Spec. T.) 10 Misc. (N. Y.) 103.

Where the Subject-matter Has a Money Value and there Is Evidence thereof, an additional allowance may be granted in an injunction suit, as in other cases. *New York, etc., Cement Co. v. Keator*, 62 N. Y. App. Div. 577; *Chase v. Syracuse*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 144, both cases being for an injunction to restrain the issue of

223. 3. Where Court May Exercise Discretion. — See note 1.

municipal bonds; *Freeman v. Brooks*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 450, wherein the payment of a fixed sum of money was sought to be enjoined; *Hart v. New York*, 16 N. Y. App. Div. 227; *Gordon v. Strong*, 15 N. Y. App. Div. 519, both cases being suits to restrain waste of public funds. See also *Empire City Subway Co. v. Broadway, etc., R. Co.*, 87 Hun (N. Y.) 279, *affirmed* 159 N. Y. 555; *Harlem Bridge, etc., R. Co. v. Westchester*, 143 N. Y. 59; *Hudson River Telephone Co. v. Watervliet Turnpike, etc., Co.*, 135 N. Y. 394, *reversing* 61 Hun (N. Y.) 140; *Rochester, etc., R. Co. v. Rochester*, 17 N. Y. App. Div. 257.

Other Actions Where Subject-matter Has No Pecuniary Value. — In a suit for *Mere Reformation of a Contract*, no allowance can be granted. *Heert v. Cruger*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 508; *Christopher, etc., St. R. Co. v. Twenty-third St. R. Co.*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 556.

In a Suit to Reinstate an Insurance Policy, the value of the policy not being shown, no allowance can be granted. *Strauss v. Union Cent. L. Ins. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 571.

In a Suit to Establish an Interest in Land, where the value of the land is not shown, no allowance can be made. *Deuterman v. Gainsborg*, 54 N. Y. App. Div. 575.

Reference to Determine Value. — Where, after an order of reference to determine the plaintiff's damages and for an additional allowance to him, the amount thereof to be determined on the confirmation of the referee's report, the plaintiff elects not to go to a reference, and moves for the allowance upon affidavits of the value of the subject-matter involved, the court may refuse to grant any allowance at all. *Rawlinson v. Brainerd, etc., Co.*, 53 N. Y. App. Div. 147.

Partnership Actions. — An Allowance May Be Granted to the Plaintiff in an action between partners for an accounting, wherein he recovers assets of value from the defendant. *Hagenbuehle v. Schultz*, 69 Hun (N. Y.) 183; *Hasbrouck v. Marks*, 58 N. Y. App. Div. 33, *affirmed* 170 N. Y. 594.

An Allowance May Be Granted to the Defendant in an action between partners for an accounting wherein the plaintiff seeks to recover valuable as-

sets from the defendant, but fails. *Proctor v. Soulier*, 8 N. Y. App. Div. 69. See also *Dorsett v. Ormiston*, 53 N. Y. App. Div. 629, 65 N. Y. Supp. 931.

Suit to Dissolve Corporation. — In a suit to dissolve a corporation, the value of the franchise is involved and may form the basis for an additional allowance. *People v. Rochester Dime Sav., etc., Assoc.*, 7 N. Y. App. Div. 350.

223. 1. Discretion of Court. — *The Situation of the Defeated Party* will be considered by the court in the exercise of its discretion in the matter of additional allowances. *Stevens v. Central Nat. Bank*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 344.

Where an Allowance Would Diminish a Fund already insufficient to pay all parties entitled to be paid therefrom, it will be refused. *Kelly v. Chenango Valley Sav. Bank*, (Supm. Ct. Spec. T.) 45 N. Y. Supp. 658, wherein an allowance was refused in an action against a bank to recover deposits, the assets of the bank being insufficient to pay all the depositors in full.

Where the Judgments of the State Courts Are Reversed by a Federal Court, the trial court will not refuse an allowance to the appellant merely because he has succeeded against the views of the state courts. *Stevens v. Central Nat. Bank*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 344.

Hardship. — An allowance will not be granted where it will be a special hardship upon the defeated party to pay it. *Maier v. Garry*, 3 N. Y. App. Div. 480.

Punishment. — *Where the Plaintiff's Conduct Has Misled the Defendant*, thus causing the latter to interpose a defense, no allowance will be granted to the former. *Kelly v. Chenango Valley Sav. Bank*, (Supm. Ct. Spec. T.) 45 N. Y. Supp. 658.

A Plaintiff Who Brings in Unnecessary Parties Defendant should be required to pay out of his recovery any additional allowance granted to such parties because of their success against their codefendants. *Roberts v. New York El. R. Co.*, 155 N. Y. 31, *modifying* (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 345.

Imposing Terms. — An additional allowance conditioned upon the contingency of an appeal by the defeated

224. See note 1.

225. 4. Special Proceedings. — See note 1.

226. 5. Where Defendant Is Entitled. — See note 1.

6. What Are Difficult and Extraordinary Cases. — See note 2.

party is improper as being a restriction upon the right of appeal. *Thames L. & T. Co. v. Hagemeyer*, 38 N. Y. App. Div. 449.

The payment of an allowance may be imposed as a condition of the right to discontinue. See *infra*, IV. 7. On *Discontinuance*, note *Terms*.

224. 1. *The Fact that the Plaintiff Recovers Much Less than His Claim* may properly influence the court in determining whether to grant an additional allowance to the plaintiff. *Meyer Rubber Co. v. Lester Shoe Co.*, 86 Hun (N. Y.) 473.

225. 1. *Special Proceedings Are Defined by Code Civ. Pro. N. Y., § 3334*, as proceedings other than ordinary prosecution by one against another, and costs in such proceedings are controlled by section 3240, and do not include additional allowances. *Matter of Grade Crossing Com'rs*, 20 N. Y. App. Div. 271, citing *Matter of Holden*, 126 N. Y. 589, and *Matter of Brooklyn*, 148 N. Y. 107. See also *Matter of Taxpayers*, 157 N. Y. 78.

Condemnation Proceedings — Under *Code Civ. Pro. N. Y., § 3372*. — Additional allowances of five per cent. upon the amount of the award may be granted in condemnation proceedings when the plaintiff therein has made no offer to purchase or where the award exceeds an offer which has been refused. *St. Johnsville v. Cronk*, 55 N. Y. App. Div. 633, 67 N. Y. Supp. 419.

Condemnation Proceedings under Special Statutes are not within the scope of section 3372, and the additional allowance provided in this section cannot be granted in such proceedings, the only proceedings to which the section is applicable being condemnation proceedings under the general law. *Matter of Grade Crossing Com'rs*, 20 N. Y. App. Div. 271, reversing 19 Misc. (N. Y.) 230; *Brooklyn v. Long Island Water Supply Co.*, 148 N. Y. 107, affirming 88 Hun (N. Y.) 176, 25 Civ. Pro. (N. Y.) 14, which reversed 10 Misc. (N. Y.) 650, 24 Civ. Pro. (N. Y.) 117.

Where the Defendant Is under Legal Disability and cannot convey, the failure to make an offer of purchase be-

fore instituting condemnation proceedings will not render the petitioner therein liable for an additional allowance. *Manhattan R. Co. v. McKee*, 1 N. Y. App. Div. 488.

Section 3372 Is Not Limited by Section 3253, and additional allowances may be granted in condemnation proceedings, though the case is neither difficult nor extraordinary. The nature of the case should, nevertheless, be considered by the court in determining the amount of an allowance. *Matter of Grade Crossing Com'rs*, 19 Misc. (N. Y.) 230.

Mandamus. — The special proceedings in which additional allowances under section 3253, as amended, may be granted being limited by such section to special proceedings by certiorari, no additional allowance can be granted in mandamus proceedings. *People v. Coler*, 58 N. Y. App. Div. 347, reversing 33 Misc. (N. Y.) 351; *People v. Hertle*, 46 N. Y. App. Div. 505, reversing 28 Misc. (N. Y.) 37.

226. 1. Allowance Refused. — Where the plaintiff's suit for an accounting and for an indeterminate amount of royalties as damages was dismissed on the merits, and there was no independent proof of the value of his claim, it was held that no allowance would be granted to the defendant, especially as the case was dismissed upon a ground not presented by the original answer, but by an amendment. *Genet v. Delaware, etc., Canal Co.*, 49 N. Y. App. Div. 645, 63 N. Y. Supp. 230.

Allowances Against Codefendants. — Where parties not necessary to the proceedings refuse to join therein as plaintiffs, and are thereupon, at the instance of the plaintiff, made codefendants, additional allowances against their codefendants should not be allowed to them. *Roberts v. New York El. R. Co.*, 155 N. Y. 31.

Allowance to a Defeated Defendant. — See *supra*, IV. 1. In General, note *Allowances Follow Ordinary Costs*.

2. Not All Litigated Cases Are Difficult and Extraordinary. — There must be something unusual in a case, something different from the plain, everyday

227. See note 1.

No General Rule. — See note 2.

228. 7. On Discontinuance. — See note 1.

lawsuit. *Gillespy v. Bilbrough*, 15 N. Y. App. Div. 212. See also *Lozier v. Saratoga Gas, etc., Co.*, 59 N. Y. App. Div. 390; *Citizens' Nat. Bank v. Lilienthal*, 40 N. Y. App. Div. 609, 57 N. Y. Supp. 567; *Alien v. Albany R. Co.*, 22 N. Y. App. Div. 222. But see the next succeeding note.

227. 1. The Statute Should Receive a Fair and Even Liberal Construction, and in an important and substantial litigation a proper allowance should be awarded. *Stevens v. Central Nat. Bank*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 344.

The Style of the Action Is not Determinative of whether it is difficult and extraordinary; and where it is otherwise difficult and extraordinary, the fact that the style thereof is a common one will not defeat an allowance. *National Lead Co. v. Dauchy*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 372.

2. Discretion of Court. — The determination of what is a difficult and extraordinary case is largely within the discretion of the trial court. *Seagrist v. Sigrist*, 20 N. Y. App. Div. 336; *Proctor v. Soulier*, 8 N. Y. App. Div. 69; *Meyer Rubber Co. v. Lester Shoe Co.*, 86 Hun (N. Y.) 473.

This discretion is reviewable for abuse. See *supra*, III. 4. *Appeal from Order Granting or Refusing Additional Allowance.*

Long Trial. — The length of a trial is a proper element to be considered in determining whether a case is difficult and extraordinary. *Dorsett v. Ormiston*, 53 N. Y. App. Div. 629, 65 N. Y. Supp. 931; *Hallinan v. Ft. Edward*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 422.

The Amount Involved may properly be considered upon the question of the difficult and extraordinary nature of the case. *Hallinan v. Ft. Edward*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 422.

Referee's Certificate. — The referee's certificate that a case referred to him is difficult and extraordinary will be considered in determining the nature of the case. *National Lead Co. v. Dauchy*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 372.

In a Case Taken on a Contingent Fee, the difficult and extraordinary features

should be very apparent in order to justify an allowance in addition to a large recovery. *Allen v. Albany R. Co.*, 22 N. Y. App. Div. 222.

Time for Ascertaining Nature of Case.

— The time to ascertain whether a case is difficult and extraordinary is when the right to the allowance becomes perfect. *Angier v. Hager*, 51 N. Y. App. Div. 171, reversing 45 N. Y. App. Div. 32, and holding that where the only matters rendering a case difficult and extraordinary arose upon the defendant's motion to set aside an order for a discontinuance, in which motion she was unsuccessful, no additional allowance could be granted to her.

228. 1. Kilmer v. Evening Herald Co., 70 N. Y. App. Div. 291; *Angier v. Hager*, 51 N. Y. App. Div. 171; *Proctor v. Soulier*, 8 N. Y. App. Div. 69.

Terms. — *As a Condition of the Right to Discontinue* the court may require the party desiring to discontinue to pay an additional allowance to the other party. *Kilmer v. Evening Herald Co.*, 70 N. Y. App. Div. 291.

The Allowance of a Discontinuance Without Costs Depends upon a sufficient excuse for instituting the suit, or the subsequent occurrence of circumstances equitably entitling the plaintiff to discontinue. *Petty v. Metropolitan St. R. Co.*, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 738, wherein it was held that a reduced financial condition of the plaintiff, which existed at the time of the bringing of the action, was insufficient to entitle him to dismiss without the payment of costs. See also *Peet v. Kimball*, 58 N. Y. App. Div. 329, wherein it was held that where, in a suit to enjoin the assignment of certain contracts, the plaintiff was forced to discontinue because the defendant had already assigned them, an additional allowance against the plaintiff was unjustified.

After an Ex Parte Order of Discontinuance on the payment of costs, the defendant may apply for an additional allowance. *Angier v. Hager*, 51 N. Y. App. Div. 171.

After Discontinuance. — Where, pursuant to a stipulation of the parties, a discontinuance is entered without prejudice to a motion for an additional allowance, such motion may thereafter

229. 8. Only One Allowance. — See note 2.

230. V. HOW ALLOWANCE COMPUTED — 1. Basis of Allowance.
— See notes 1, 2, 3, 4.

be heard and an allowance be granted. *Harlem Bridge, etc., R. Co. v. Westchester*, 143 N. Y. 59, *reversing* 76 Hun (N. Y.) 286.

229. 2. Interlocutory Judgment. — No allowance can be granted upon an interlocutory judgment sustaining a demurrer, with leave to plead over. *Abbey v. Wheeler*, 57 N. Y. App. Div. 417; *Hackett v. Equitable L. Assur. Soc.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 530.

230. 1. Limits of Allowance. — *Where Several Parties on the Same Side Appear by Separate Attorneys*, the limit of allowance prescribed by the statute cannot be exceeded by awarding separate allowances to each of the several parties. *New York Breweries Co. v. Nichols*, (Supm. Ct. Gen. T.) 25 N. Y. Supp. 425.

Allowance on Second Trial. — See *supra*, IV. 1. *In General*, note 3.

Where the Limit Is Exceeded, the Appellate Division will compel the return of the excess. *Cooper v. Cooper*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 595.

2. Kahn v. Lichtenstein, 28 N. Y. App. Div. 211.

Matters Considered by the Court in Exercising Its Discretion in regard to the amount of an allowance are as follows:

The Importance and Difficulty of the Case, and eminence and ability of the counsel employed. *Stevens v. Central Nat. Bank*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 344.

The Length of the Trial. *Gordon v. Strong*, 15 N. Y. App. Div. 519.

The Amount Necessary to Compensate Counsel with a reasonable and moderate attorney's fee. *Perkins v. Heert*, (N. Y. Super. Ct. Spec. T.) 14 Misc. (N. Y.) 425.

3. Where the Plaintiff's Claim Is Less than the Fund Involved in the suit and out of which payment of the claim is sought, the proper basis of an allowance to the defendant is the amount of the claim, not the amount of the fund. *Mills v. Ross*, 39 N. Y. App. Div. 563, *affirmed* 168 N. Y. 673.

4. In Injunction Suits not involving specific sums of money, the subject-matter the value of which forms the basis of additional allowances is the

right or privilege sought to be protected. *Harlem Bridge, etc., R. Co. v. Westchester*, 143 N. Y. 59; *Hudson River Telephone Co. v. Watervliet Turnpike, etc., Co.*, 135 N. Y. 394, *reversing* 61 Hun (N. Y.) 140; *People v. Page*, 39 N. Y. App. Div. 110; *Rochester, etc., R. Co. v. Rochester*, 17 N. Y. App. Div. 257; *Empire City Subway Co. v. Broadway, etc., R. Co.*, 87 Hun (N. Y.) 279, *affirmed* 159 N. Y. 555.

In a Taxpayer's Action to Restrain Waste of public funds, additional allowances may be granted, the basis of allowance being the amount of the funds sought to be protected. *Hart v. New York*, 16 N. Y. App. Div. 227; *Gordon v. Strong*, 15 N. Y. App. Div. 519, *affirmed* 160 N. Y. 659. See also *Freeman v. Brooks*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 450, wherein it was held that the fact that the claimants of the funds, the waste of which was sought to be enjoined, were not parties to the action did not deprive the court of the power to grant an allowance based on the amount of such funds.

In a Suit to Restrain the Issue of Municipal Bonds, the basis of allowance is the amount of the bonds. *New York, etc., Cement Co. v. Keator*, 62 N. Y. App. Div. 577; *Chase v. Syracuse*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 144.

Proof of Value. — *The Value of the Subject-matter Will Not Be Presumed*, but must be shown either by the pleadings or the evidence; otherwise no allowance can be granted. *Strauss v. Union Cent. L. Ins. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 571; *Deuterma v. Gainsborg*, 54 N. Y. App. Div. 575; *Werner v. Franklin Nat. Bank*, 49 N. Y. App. Div. 423, *affirmed* 166 N. Y. 619; *Opitz v. Harmen*, 41 N. Y. App. Div. 468; *People v. Page*, 39 N. Y. App. Div. 110; *Black v. Brooklyn Heights R. Co.*, 32 N. Y. App. Div. 468; *Koehler v. Brady*, 22 N. Y. App. Div. 624 47 N. Y. Supp. 984, *affirmed* 163 N. Y. 565; *De Long v. De Long Hook, etc., Co.*, 89 Hun (N. Y.) 399; *Parish v. New York Produce Exch.*, 54 N. Y. App. Div. 323.

Affidavits Are Admissible, on a motion for an additional allowance, to show the amount involved where such amount does not otherwise appear.

232. See notes 1, 2.

Hayden *v.* Mathews, 4 N. Y. App. Div. 338, *affirmed* 158 N. Y. 735; Preston *v.* Howk, 3 N. Y. App. Div. 43, *affirmed* 154 N. Y. 734.

Trademark.—Where an injunction is granted against the infringement of a trademark, but there is no evidence of any special damages to the plaintiff, and no damages are awarded to him, he cannot recover an additional allowance, though there is evidence of the value of the trademark, and of the amount of the plaintiff's trade in the subject thereof. Volger *v.* Force, 63 N. Y. App. Div. 122. But see Perkins *v.* Heert, (N. Y. Super. Ct. Spec. T.) 14 Misc. (N. Y.) 425, wherein it was held, *following* Munro *v.* Smith, (Supm. Ct. Gen. T.) 23 Abb. N. Cas. (N. Y.) 275, 6 N. Y. Supp. 426, that the value of the trademark the infringement of which is sought to be enjoined may be taken into consideration in computing the amount of an additional allowance.

Proper Basis.—Husted *v.* Thomson, 38 N. Y. App. Div. 315; Laird *v.* Littlefield, 34 N. Y. App. Div. 43, *affirmed* 164 N. Y. 597; Rochester, etc., R. Co. *v.* Rochester, 17 N. Y. App. Div. 257, *affirmed* 163 N. Y. 608; Schneider *v.* Rochester, 50 N. Y. App. Div. 22. See also Parish *v.* New York Produce Exch., 54 N. Y. App. Div. 323, wherein it was held that in a suit to prevent the immediate distribution of a gratuity fund made up of subscriptions by the plaintiff and others, the proper subject-matter was the plaintiff's interest in the fund, and not the whole fund, the latter being only incidentally involved.

In a Suit to Dissolve a Corporation, the value of the franchise is the subject-matter involved. People *v.* Rochester Dime Sav., etc., Assoc., 7 N. Y. App. Div. 350.

In a Suit to Reinstate a Life Insurance Policy, the value of the policy is the subject-matter involved. Strauss *v.* Union Cent. L. Ins. Co., (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 571.

Accounting.—*The Basis of an Allowance to the Plaintiff* in an action for an accounting is the amount found due to him from the defendant. Hagenbuchle *v.* Schultz, 69 Hun (N. Y.) 183; Hasbrouck *v.* Marks, 58 N. Y. App. Div. 33, *affirmed* 170 N. Y. 594.

The Basis of Allowance to the Defendant in an action for an accounting is

the amount sought to be recovered by the plaintiff. Proctor *v.* Soulier, 8 N. Y. App. Div. 69.

Where the Plaintiff's Claim Is Indeterminate, the Basis of Allowance to the Defendant is the value of such claim as shown by the evidence. Woodbridge *v.* Saratoga Springs First Nat. Bank, 45 N. Y. App. Div. 166, *affirmed* 166 N. Y. 238. See also Genet *v.* Delaware, etc., Canal Co., 49 N. Y. App. Div. 645, 63 N. Y. Supp. 230.

In a Suit to Annul a Will, the basis is the value of the property disposed of by the will. Seagrist *v.* Sigrist, 20 N. Y. App. Div. 336.

232. 1. Amount Recovered.—*Whether the Interest on Damages* allowed by Code Civ. Pro. N. Y., § 1904, in an action for death may be added to the recovery to form the basis of an additional allowance was left undecided in the case of Seifter *v.* Brooklyn Heights R. Co., 53 N. Y. App. Div. 443, in which case it was held simply that in the absence of an express order of the trial court to that effect, the interest could not be taken into account.

Where the Defendant Is Partly Successful as to the defenses interposed, the plaintiff is nevertheless entitled to an allowance on the amount of his recovery. State Bank *v.* Smith, 85 Hun (N. Y.) 200.

The Fee Damages awarded in an action against a railroad for injury to a freehold constitute a sufficient basis for an additional allowance. Dode *v.* Manhattan R. Co., 140 N. Y. 637, *affirming* 70 Hun (N. Y.) 374; Roberts *v.* New York El. R. Co., (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 345, *affirmed* 155 N. Y. 31.

2. Amount Claimed.—*The Amount Sought to Be Recovered* by the plaintiff is the proper basis for an allowance to the defendant. Proctor *v.* Soulier, 8 N. Y. App. Div. 69; Hart *v.* Ogdensburg, etc., R. Co., 89 Hun (N. Y.) 316.

Where a Creditor Sues for Himself and All Other Creditors who will join in the suit, but no others join, an allowance to the defendant must be computed upon the amount of the plaintiff's claim, and not upon the whole fund out of which the plaintiff seeks to have his claim paid. Mills *v.* Ross, 39 N. Y. App. Div. 563, *affirmed* 168 N. Y. 673.

233. See note 1.

2. Subject-matter Involved. — See note 3.

In an Action to Recover Money Received to the Plaintiff's Use, the amount which the plaintiff claims to have been so received by the defendant is the proper basis of an allowance to the latter. *Abbey v. Wheeler*, 57 N. Y. App. Div. 417.

Where the Defendant's Answer in an Injunction Suit Denies the Plaintiff's Allegation of Damages, the damages claimed cannot form the basis of an allowance to the defendant, but such allowance, if granted, must be computed upon the damage claim involved as shown by the evidence. *Israel v. Metropolitan R. Co.*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 722, citing *Hanover F. Ins. Co. v. Germania F. Ins. Co.*, 138 N. Y. 252.

Where a Damage Claim in a Suit in Equity Is Tacitly Abandoned by the party asserting it, it cannot form the basis of an allowance to the opposite party. *Deuterman v. Gainsborg*, 54 N. Y. App. Div. 575.

233. 1. Amount of Counterclaim. — *Where the Defendant Prevails as to a Portion of His Counterclaim*, the portion disallowed cannot be added to the

plaintiff's recovery to form the basis of the plaintiff's allowance. *Bates v. Fish Bros. Wagon Co.*, 50 N. Y. App. Div. 38, affirmed 169 N. Y. 587.

Where the Defendant Admits the Plaintiff's Claim and then sets up a counterclaim, the latter is the only amount involved, and the plaintiff cannot have an allowance on the difference between his claim and the amount allowed on the counterclaim. *Commercial Nat. Bank v. Hand*, 27 N. Y. App. Div. 145.

3. *De Lancey v. Piepgras*, 76 Hun (N. Y.) 70. See also *Hayden v. Matthews*, 4 N. Y. App. Div. 338, affirmed 158 N. Y. 735; *Deuterman v. Gainsborg*, 54 N. Y. App. Div. 575.

Where the Mere Right of Possession of Land Is Involved, the basis of allowance is the value of the possession. *Kochler v. Brady*, 22 N. Y. App. Div. 624, affirmed 163 N. Y. 565.

In a Suit to Establish a Lien on Land, the amount of the lien, and not the value of the property, is the subject-matter involved for the purpose of computing additional allowance. *T. New Mfg. Co. v. Galway*, (Supm. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 239.

ADDRESS.

235. I. IN CHANCERY PRACTICE — Address of Complainants. — See note 1.

Remedy for Failure. — See note 3.

236. II. UNDER CODE PRACTICE — New York Code. — See note 1.
[**Moving Affidavit.** — In a moving affidavit for an order based upon advice of counsel, the name and address of such counsel must be given. See note 3a.]

Compelling Attorney to Disclose Address. — See note 4.

237. [Amendment as to Address. — Where a civil action is begun by a bill addressed to the judge of the superior court by name, and also to the superior court of the county, praying for subpoena instead of process, the plaintiff will be allowed, in order to conform to the requirements of a statute, to amend by striking out the address of the judge and changing the word "orator" to "petitioner," and changing the prayer for subpoena to one for process; also, to amend the process which was addressed to the defendant by adding an address to the sheriff of the county. See note 1a.]

235. 1. Liddell v. Carson, 122 Ala. 518.

Residence of All Parties. — The bill must, under U. S. Equity Rule 20, set out the residences of all the parties plaintiff and defendant. *Harvey v. Richmond, etc., R. Co.*, 64 Fed. Rep. 19.

3. In Liddell v. Carson, 122 Ala. 518, it was held that failure to state the plaintiff's residence in the bill was ground for demurrer.

Amendment. — In *Harvey v. Richmond, etc., R. Co.*, 64 Fed. Rep. 19, it was held that failure to state the residences of plaintiffs and defendants did not require a demurrer, but that the amendment might be made on motion.

236. 1. In Feist v. New York, 15 N. Y. App. Div. 495, the court held that where the office address of the defendant's attorney had been given on his notice of appearance it need not be given on the answer also.

3a. Sidney B. Bowman Cycle Co. v. Dyer, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 620.

4. Address Requested for Ulterior Motive. — In *Drake v. New York Iron Mine*, 75 Hun (N. Y.) 539, 27 N. Y. Supp. 489, it was held that where it appears from the evidence that the information is not requested for purposes of the suit, but from some ulterior motive, an order requiring the plaintiff's attorney to disclose to the attorney for the defendant the plaintiff's address and occupation ought not to be allowed.

When Address Has Not Been Requested from Attorney. — The court should not hear a motion to require a plaintiff to furnish his address to the defendant except upon proof that the information had been requested from the plaintiff's attorney and refused. *Goodness v. Metropolitan St. R. Co.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 11.

237. 1a. Savannah, etc., R. Co. v. Atkinson, 94 Ga. 780, which case was decided under 2 Code Ga. (1895), §§ 4960, 4974.

ADJOURNMENTS.

238. I. DEFINITION. — See note 1.

239. II. COURTS OF RECORD — 1. Power to Adjourn — Inherent Power. — See note 1.

Statutes. — See note 2.

240. 2. Length of Adjournment. — See notes 1, 2, 3.

238. 1. Postponement of Business. — An adjournment is a postponement of the business before the court. *Walkley v. State*, (Ala. 1902) 31 So. Rep. 854. See also *Kingsley v. Bagby*, 2 Kan. App. 23; *Irwin v. Irwin*, 2 Okla. 180.

Special Term and Adjourned Term Distinguished. — A special term is a separate and independent term, while an adjourned term is a continuation — part of the same regular term. *Matter of Dossett*, 2 Okla. 369.

239. 1. Walkley v. State, (Ala. 1902) 31 So. Rep. 854; *White v. Brown*, 1 Indian Ter. 98; *State v. Van Auken*, 98 Iowa 674; *Green v. Morse*, 57 Neb. 391; *State v. McBain*, 102 Wis. 431.

2. Lake Fork Ditch Co. v. Haley, 28 Colo. 513; *National Bank v. Gilmer*, 116 N. Car. 684; *Cumberland First Nat. Bank v. Parsons*, 45 W. Va. 688; *State v. McBain*, 102 Wis. 431. See also *Wayne Borough*, 12 Pa. Super. Ct. 363.

Statute Not Mandatory. — Code Civ. Pro. N. Y., § 580, providing for the justification of sureties in an action to recover a chattel, and that an adjournment, if made, must be to the next judicial day, unless by the consent of the parties, is directory and not mandatory, and does not render a reasonable adjournment beyond the first judicial day illegal to the extent of impairing the proceedings. *Troy Carriage Works v. Muxlow*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 561, *affirming* (N. Y. City Ct. Spec. T.) 15 Misc. (N. Y.) 696.

240. 1. Mansfield v. Mutual Ben. L. Ins. Co., 63 Conn. 579; *Com. v. Thompson*, 18 Pa. Co. Ct. 487. See also *Com. v. Howard*, (Ky. 1896) 36 S. W. Rep. 557.

"Term" and "Session" — See TERMS AND SESSIONS OF COURT.

2. Hays v. Ahlrichs, 115 Ala. 239; *Walkley v. State*, (Ala. 1902) 31 So. Rep. 854; *Cochran v. State*, 113 Ga. 726; *Richie v. Peiper*, 99 Ky. 194; *Green v. Morse*, 57 Neb. 391; *Matter of Taylor*, (Supm. Ct.) 8 Misc. (N. Y.) 159; *State v. McBain*, 102 Wis. 431.

Adjournment to Suit Convenience of Court. — In the absence of a statute to the contrary, the court in its discretion may adjourn over an intervening obstacle, such as a term held at another place in the same district. *White v. Brown*, 1 Indian Ter. 98; *State v. Van Auken*, 98 Iowa 674; *Kingsley v. Bagby*, 2 Kan. App. 23; *Matter of Dossett*, 2 Okla. 369; *In re McDonald*, 4 Wyo. 150; *Florida v. Charlotte Harbor Phosphate Co.*, (C. C. A.) 70 Fed. Rep. 883.

Adjournment from Day to Day — Sunday. — *Cross v. Cross*, (Ky. 1897) 41 S. W. Rep. 272.

Beyond Day for Commencement of Subsequent Term. — An adjournment may be to a day beyond the day for the commencement of a subsequent term. *State v. Van Auken*, 98 Iowa 674; *State v. Rogers*, 56 Kan. 362.

Colorado Statute. — An adjournment from March 10 until the last Monday in June is authorized under *Mills's Annot. Stat. Colo.* (1891), § 1040, notwithstanding an entry in the clerk's minutes stating that the adjourned session is a special term, but also stating that it is convened pursuant to adjournment. *Lake Fork Ditch Co. v. Haley*, 28 Colo. 513.

Indiana Statute. — A judge is authorized by *Burns's Rev. Stat. Ind.* (1901), § 1443, to adjourn court to any time in vacation, and at such adjourned term to proceed with the business as a part of the same regular term at which the adjournment was ordered. *Wheeler v. State*, (Ind. 1902) 63 N. E. Rep. 975.

240. 3. Who May Order the Adjournment. — See note 4.

241. See note 2.

Statutory Provisions. — See note 3.

242. Liberally Construed. — See note 1.

Missouri Statute. — The proceedings of the probate court at an adjourned term within the time fixed by Rev. Stat. Mo. (1889), § 3401 (Rev. Stat. 1899 § 1757) as a term are regular and valid. *Aull v. St. Louis Trust Co.*, 149 Mo. 1.

North Carolina Statute. — A judge has power to continue a special term by adjournment from time to time for the purpose of receiving the verdict, under Code N. Car. (1883), § 1229, as amended by Laws N. Car. 1893, c. 226, even though he is engaged in holding a regular term at the same time. *National Bank v. Gilmer*, 116 N. Car. 684.

West Virginia Statute. — Under Code W. Va., c. 114, § 2, a Circuit Court may continue a term by adjournment in one county even though another term is being held at the same time in another county. *Cumberland First Nat. Bank v. Parsons*, 45 W. Va. 688.

Adjournment for Settling Bill of Exceptions. — *District of Columbia.* — Rule 2 of the Supreme Court of the District of Columbia provides that the May term of the Supreme Court shall not extend beyond the second Saturday in July, but under Rule 62 the court may grant an adjournment beyond the beginning of the succeeding September term for the purpose of settling a bill of exceptions. *Hume v. Bowie*, 148 U. S. 245.

240. 3. Conway v. Grimes, 46 Neb. 288.

4. Matter of McClasky, 52 Kan. 34.

Entry by Clerk under Wisconsin Statute. — Stat. Wis., § 2573, authorizing the clerk to enter final adjournment of the court for the term when the judge does not attend at the time fixed for the opening of the term and for three consecutive days thereafter, gives no power to the clerk to make such an entry at any time when a court is simply held open. *State v. McBain*, 102 Wis. 431.

241. 2. Matter of Terrill, 52 Kan. 29; *Matter of McClasky*, 52 Kan. 34; *Holman v. Hogg*, 83 Mo. App. 370; *Matter of McClasky*, 2 Okla. 568.

3. Louisiana Statute. — Under Wolff's Rev. Laws La. (1897), § 1934, the sheriff can adjourn court on an order

given by the judge for that purpose. *State v. Reed*, 49 La. Ann. 704.

Missouri Statute. — Under Rev. Stat. Mo. (1899), § 1603, which provides that if the court shall not be held on the first day of the term it shall stand adjourned from day to day until the evening of the third day [unless the judge shall make his appearance before the expiration of such period], a proclamation of the sheriff that the court shall stand adjourned from the first to the third day and afterwards to the fourth day, such proclamation being unauthorized by any notice or direction from the judge, is void, and cannot be validated by the appearance of the judge on the fourth day. *Holman v. Hogg*, 83 Mo. App. 370.

When Commencement is Adjourned, Day Adjourned to Is "First Day" of Term. — A term of the Supreme Court adjourned without session is, when held, the same term, with reference to filing process. *Hodnett v. Stone*, 93 Ga. 645.

242. 1. Provisions Held to Be Directory. — Under Pub. Stat. N. H. (1891), c. 207, § 3, as amended by Laws 1895, c. 56 (Pub. Stat. N. H. 1901, c. 207, § 3), providing for the adjournment of the court to another place in the county for one or more days when such course would promote the public interest, by an order published for the prescribed length of time, etc., it was held that the publishing of such notice was unnecessary as to parties having actual and seasonable notice thereof. *State v. Moore*, 69 N. H. 102.

Substantial Compliance Sufficient. — *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545; *McDonald v. McDonald*, 142 Ind. 55.

Time of Signing Minutes. — Although Gen. Stat. Ky. (1888), c. 28, art. 17, §§ 6, 7, provided that before the adjournment of a County Court the minutes of the proceedings should be read and signed by the judge, it was held that the entire session might be treated as one day, and the minutes for each calendar day might be read and signed by the judge at the end of the entire session. *Com. v. Howard*, 99 Ky. 542; *Com. v. Howard*, (Ky. 1896) 36 S. W. Rep. 557.

243. 4. Place of Adjournment. — See note 1.

5. The Consequence of Adjournment — Distinction Between Adjournment *Sine Die* and Adjournment to a Day Certain. — See note 2.

244. See note 1.

245. Existence of Court During Adjournment. — See notes 1, 2, 4.

Order by Telephone or Telegraph. — Under Rev. Stat. U. S., § 672, requiring a "written order" to adjourn a Circuit Court, an order of adjournment cannot be made by telephone, though a telegram may be a sufficient writing. *Schofield v. Horse Springs Cattle Co.*, 65 Fed. Rep. 433.

243. 1. Funk v. Carroll County, 96 Iowa 158.

Harmless Error. — Under Stat. Wis., § 2829, the error of adjourning to a place outside of the county-seat where the holding of court is authorized, unless for special reasons it may be adjourned to another place in the county, may be disregarded if it does not affect the substantial rights of a party. *Selleck v. Janesville*, 100 Wis. 157.

Discretion as to Place. — Under Rev. Stat. Wis. (1878), § 2471, the decision of the county judge is final as to the necessity of adjourning a term of the County Court to his office or other suitable place when for any cause it cannot be conveniently held at the court house. *Cody v. Cody*, 98 Wis. 445.

2. Irwin v. Irwin, 2 Okla. 180. See also *Anderson v. Hulet*, 4 Colo. App. 418, holding that Civ. Code Colo., § 194 (Mills's Annot. Code Colo. 1896, § 194), provides for the return of a sealed verdict to the court only in case the jury agreed during a recess or adjournment from day to day.

Where all the judges of the Court of Common Pleas adjourn the separate sessions of such court *sine die* on the same day, and there is no subsequent convening in joint session or otherwise, as a court, the day on which they all adjourned must be held to be the last day of the term. *Paris v. Coppock*, 4 Ohio Cir. Dec. 654.

Term Cannot Be Reopened After Final Adjournment. — The regular judge has no power to reopen a special term after it has been adjourned by a special judge to the next term. *State v. Ross*, 118 Mo. 23; *Holman v. Hogg*, 83 Mo. App. 370.

Omission to Adjourn from Day to Day. previous to a final adjournment, will

not end the term under Stat. Wis., § 2572. *State v. McBain*, 102 Wis. 431.

Presumptions of Final Adjournment. — The lapse of twenty-three days between the sessions of the court will not raise a presumption of final adjournment. *Hyde v. Kent*, 47 Neb. 26.

A court not convening from October 14 until the following July 23 will be presumed to have adjourned *sine die*. *Conway v. Grimes*, 46 Neb. 288.

Necessity for Formal Order Where Term Lapses. — The court does not lose jurisdiction of a pending cause which has not been called for trial when the term lapses, although there is no formal order adjourning such cause over to the next term. *State v. Wells*, 54 Kan. 161.

244. 1. Walkley v. State, (Ala. 1902) 31 So. Rep. 854; *Richter v. Koopman*, 131 Ala. 399; *Hays v. Ahlrichs*, 115 Ala. 239; *Cochran v. State*, 113 Ga. 726; *King v. Sears*, 91 Ga. 577; *Wheeler v. State*, (Ind. 1902) 63 N. E. Rep. 975; *White v. Brown*, 1 Indian Ter. 98; *State v. Van Auker*, 98 Iowa 674; *Kingsley v. Bagby*, 2 Kan. App. 23; *Palmer v. State*, 73 Miss. 780; *Green v. Morse*, 57 Neb. 391; *Matter of Taylor*, (Supm. Ct.) 8 Misc. (N. Y.) 159; *Matter of Dossett*, 2 Okla. 369; *Cumberland First Nat. Bank v. Parsons*, 45 W. Va. 688; *State v. McBain*, 102 Wis. 431; *Florida v. Charlotte Harbor Phosphate Co.*, 70 Fed. Rep. 883, 30 U. S. App. 535.

Adjourned Term and New Special Term. — Where, on March 10, a court ordered an adjournment until the last Monday in June, at which time the court convened, the clerk's minutes reciting that it so convened "pursuant to adjournment," but also that the session was a "special term," it was held to be an adjourned term and not a new special term, especially when there was no order made for, or notice given of, a special term. *Lake Fork Ditch Co. v. Haley*, 28 Colo. 513.

245. 1. National Bank v. Gilmer, 116 N. Car. 684; *Matter of Dossett*, 2 Okla. 369; *Matter of Patswald*, 5 Okla. 789.

2. Matter of Dossett, 2 Okla. 369;

245. Power over Record of Past Business. — See note 5.

247. Waiver of Irregularities. — See note 1.

IV. REFEREES AND ARBITRATORS. — See notes 2, 4.

248. Supervision by the Court of Referee's Action. — See notes 1, 2.

V. QUASI-JUDICIAL OFFICERS. — See notes 4, 5, 6, 9, 11,

12, 16.

Schofield v. Horse Springs Cattle Co., 65 Fed. Rep. 433. *Contra*, *Streett v. Reynolds*, 63 Ark. 1.

245. 4. May Meet Before Day to Which Adjourned. — *State v. Nash*, 83 Mo. App. 509; *Green v. Morse*, 57 Neb. 391.

5. *White v. Brown*, 1 Indian Ter. 98; *Aull v. St. Louis Trust Co.*, 149 Mo. 1; *Hyde v. Kent*, 47 Neb. 26; *Com. v. Thompson*, 18 Pa. Co. Ct. 487.

247. 1. Irregularity Held to Be Waived. — In *State v. Kavanaugh*, 133 Mo. 452, it was held that where a defendant goes to trial at a special term, of the calling of which he had no notice, without asking for a continuance or saving an exception, he waives the irregularity.

2. See REFERENCES.

Where a referee gives notice that he will be in his office at a specified time on the same day, such notice is held to be equivalent to an adjournment to that time. *Matter of Ferrigan*, 42 N. Y. App. Div. 1, *affirmed* 160 N. Y. 689.

4. Reasonable notice of adjournments and hearings by a referee must always be given to the parties in interest. In case such notice is not given, and it is not waived by appearance or otherwise, the proceedings are irregular. *Le Baron v. Overstreet*, 39 Fla. 628; *Rice v. Schofield*, 9 N. Mex. 314.

248. 1. *Tacoma Grocery Co. v. Draham*, 8 Wash. 263; *Philadelphia Third Nat. Bank v. National Bank*, (C. A.) 86 Fed. Rep. 852.

2. *Pettee v. Pettee*, 77 Hun (N. Y.) 595, *affirmed* 148 N. Y. 735.

4. *Issenhuth v. Baum*, 11 S. Dak. 223, *citing* 1 ENCYC. OF PL. AND PR. 248; *State v. Cronan*, 23 Nev. 437.

5. *State v. Cronan*, 23 Nev. 437; *Com. v. McCarty*, 9 Pa. Dist. 555. See also *O'Neil v. Tyler*, 3 N. Dak. 47.

6. In *Nevada*, a board of county commissioners which has adjourned *sine die* cannot reconvene before the next regular meeting, unless it complies with the provisions of Gen. Stat. Nev. (1885), § 1045 (Comp. Laws Nev. 1900, § 2107), providing for the calling of meetings, giving notice, etc. *State v. Washoe County Com'rs*, 22 Nev. 15.

9. If for a good and sufficient reason a primary town meeting or caucus called for one day is unable to perform and complete the duties for which it was called, it may properly adjourn to another day. *Matter of Broat*, (Supm. Ct. Spec. T.) 6 Misc. (N. Y.) 445.

11. Code Civ. Pro. Cal., § 1121, limiting adjournments of special sessions of a court trying election contests from day to day, or not exceeding twenty days on the application of either party, on good cause shown, does not confine the court to such time, but a reasonable adjournment beyond is permissible. *Falltrick v. Sullivan*, 119 Cal. 613.

12. *Cross v. Cross*, (Ky. 1897) 41 S. W. Rep. 272; *Owens v. Peyton*, 70 Mo. App. 50. Compare *Matter of Green*, 86 Mo. App. 216.

16. Unreasonable and Irregular Adjournments. — *Gill v. Oakland*, 124 Cal. 335; *Liggett v. Bates*, 24 Colo. 314; *State v. Cronan*, 23 Nev. 437; *Com. v. McCarty*, 9 Pa. Dist. 555.

ADMIRALTY.

251. II. ADMIRALTY COURTS — 1. District Courts. — See note 3.

252. III. DIFFERENT KINDS OF ADMIRALTY SUITS. — See note 4.

253. Suit in Rem. — See note 1.

IV. THE LIBEL. — See note 2.

254. See note 1.

Form and Contents. — See note 4.

251. 3. District Courts. — Rev. Stat. U. S., § 566, applies only to vessels engaged in commerce and navigation between places in different states. The City of Toledo, 73 Fed. Rep. 220.

Verdict Advisory Merely. — When, in admiralty cases arising on the Great Lakes, parties demand a trial by jury of issues of fact under authority of Rev. Stat. U. S., § 566, the verdict is merely advisory to the court, who is solely responsible for the judgment rendered. The City of Toledo, 73 Fed. Rep. 220, *per* Ricks, J.

252. 4. Treating In Rem Proceeding as One In Personam. — An appearance by attorney to answer a libel *in rem* does not give to the court jurisdiction to render a judgment *in personam* against a shipowner on a libel filed against both ship and owner, but which contains no prayer for personal judgment, there being neither personal service nor any voluntary appearance to answer the libel *in personam*. The Ethel, (C. C. A.) 66 Fed. Rep. 340.

253. 1. Maritime Liens as Basis of Suit. — Procedure to enforce maritime lien for subfreight. See American Steel Barge Co. *v.* Chesapeake, etc., Coal Agency Co., (C. C. A.) 115 Fed. Rep. 669. And see generally the title MARITIME LIENS, 19 Am. and Eng. Encyc. of Law (2d ed.) 1079.

2. Laidlaw v. Oregon R., etc., Co., (C. C. A.) 81 Fed. Rep. 876, holding that a suit in admiralty is always deemed begun upon the filing of the libel, and that the rule cannot be affected by state statutes regarding the commencement of actions.

Technical Rules of Common-law Pleading. — Admiralty will not allow a mere technical variance between the pleadings and the proof to defeat the action,

and the court should, in a meritorious case, allow the pleadings to be amended to conform to the facts proved. Davis *v.* Adams, (C. C. A.) 102 Fed. Rep. 520.

Where Several Parties Are Interested. — Where two persons have similar claims against the same *res*, one may assign his claim to the other and the assignee may bring one action for the benefit of both. The Prussia, 100 Fed. Rep. 484.

Time of Filing Libel. — The fact that a libel to enforce a maritime lien is filed before the indebtedness matures is not ground for dismissal. The objection that it was premature should be met by a provision of costs or other terms to protect the adverse party. Clark *v.* Five Hundred and Five Thousand Feet Lumber, (C. C. A.) 65 Fed. Rep. 236.

Libel of Review — When Lien. — Hall *v.* Chisholm, (C. C. A.) 117 Fed. Rep. 807; The Columbia, 100 Fed. Rep. 890; Munks *v.* Jackson, (C. C. A.) 66 Fed. Rep. 571, *affirming* 58 Fed. Rep. 596; and see *infra*, XV. **Trial — Court Reserving Decision.**

254. 1. Misjoinder of Parties. — The misjoinder of separate claims against different defendants may be waived. Merritt, etc., Derrick, etc., Co. *v.* Chubb, (C. C. A.) 113 Fed. Rep. 173.

4. Form of Libel. — A libel *in rem* should state the nationality of the vessel proceeded against unless the libellant alleges that he is a citizen of the United States. The Falls of Keltie, 114 Fed. Rep. 357.

Facts as to Lien. — A libel *in rem* must allege facts showing the existence of a lien and the right of the libellant to the relief demanded. Dunwoody *v.* The Campbell, (C. C. A.) 106 Fed. Rep. 542.

Facts as to Collision. — A libel for

255. Verification. — See note 4.

256. V. INTERROGATORIES — By Defendant. — See note 2.

VI. AMENDMENTS — Matters of Form. — See note 3.

Matters of Substance. — See note 4.

257. VII. LIBELANT'S STIPULATION FOR COSTS. — See note 2.

VIII. JOINDER OF REM AND PERSONAM PROCEEDINGS —

Right to Join. — See note 3.

damages resulting from a collision alleged to have been caused by the negligent handling of a ship must set out the facts constituting the negligence and state specifically the injuries sustained. *Jacobsen v. Dalles, etc.*, Nav. Co., 93 Fed. Rep. 975.

A Libel in Rem for Personal Injuries must specifically allege the responsibility of the ship and the circumstances of the accident, and must not leave facts essential to the maintenance of the action to be inferred by the court. *The Conde Wifredo*, (C. C. A.) 77 Fed. Rep. 324.

A Libel in Rem for Breach of a Towage Contract must point out the manner in which the alleged damages arose with sufficient distinctness to enable the respondent to meet the claim at the trial. *The Oscoda*, 66 Fed. Rep. 347.

Libel by Subrogated Insurance Company. — An insurance company which, by the payment of insurance, has become subrogated to a right of action against the wrongdoer that occasioned the loss may enforce such right by an action in its own name when the amount paid is equal to the loss sustained, but when less, the action must be in the name of the insured. *Fairgrieve v. Marine Ins. Co.*, (C. C. A.) 94 Fed. Rep. 686.

255. 4. *The Marion*, 79 Fed. Rep. 104, holding that under Rules 3 and 5 of the District Court for the Southern District of New York, adopted for the Northern District of California, an amended libel which neither prays for an attachment nor requires an answer under oath need not be verified.

256. 2. *The Mexican Prince*, 70 Fed. Rep. 246, holding that when a libel is evasive the defendant may annex interrogatories to bring out the essential elements of the controversy.

3. *Davis v. Adams*, (C. C. A.) 102 Fed. Rep. 520, wherein the libelant, having mistaken the nature of his case, alleged a tort in the nature of false imprisonment; the facts showing him to be entitled to recover on a contract

for services, it was held that having a meritorious case he should be allowed to amend his pleading to conform to the facts proved. And see generally AMENDMENTS.

4. *O'Connell v. One Thousand and Two Bales Sisal Hemp*, 75 Fed. Rep. 408, holding that amendments in the pleadings, even in matters of substance, may be allowed at any time until the determination of the cause, but that they should not be allowed in cases where the rights of the opposite party would be prejudiced thereby.

Where there is no equity in the application for leave to amend pleadings it should be denied. *The Horace B. Parker*, (C. C. A.) 74 Fed. Rep. 640.

An Amendment Setting Up a New and Distinct Claim not germane to the subject of the original libel should not be allowed. *The Iona*, (C. C. A.) 80 Fed. Rep. 933.

After a Case Has Been Remanded for further consideration upon a particular point, an amendment should not be allowed which again brings before the court in a different form a matter which was finally settled by the appellate court. *Burrill v. Crossman*, 111 Fed. Rep. 192.

257. 2. *When Not Required.* — To enable a personal representative to maintain an action *in forma pauperis* to recover damages for wrongful death, it should appear by affidavit that all the persons interested in the decree are unable to furnish the stipulation. *Raymond v. La Compagnie Generale, etc.*, 90 Fed. Rep. 105.

3. *The Ethel*, (C. C. A.) 66 Fed. Rep. 340, holding that proceedings *in rem* and *in personam* can be joined except in those cases specified in the admiralty rules, and that under Rule 13 a vessel and her owner cannot be joined in a suit for mariners' wages.

Where a libel *in rem* contains claims that can be litigated only in a suit *in personam*, but contains other allegations stating a cause of action *in rem*, the misjoinder is not fatal and the

258. See note 1.

261. X. MESNE PROCESS. — See note 2.

Duty of Marshal. — See note 3.

263. XII. RETURN OF PROCESS — 2. Contents. — See note 6.

264. 3. Appearance and Default. — See note 1.

265. 6. Stipulations for Release. — See note 1.

Form of Undertaking. — See note 2.

claims improperly joined may be disregarded as surplusage. *The Falls of Keltie*, 114 Fed. Rep. 357.

258. 1. *The Planet Venus*, 113 Fed. Rep. 387; *The Thomas P. Sheldon*, 113 Fed. Rep. 779, *per Brown, J.*

261. 2. *The F. W. Vosburgh*, 93 Fed. Rep. 481, holding that on a libel against two joint and several wrongdoers the libellant may elect to issue process against either one or both.

Warrant of Arrest. — A court of admiralty may issue a warrant of arrest of the person as process for compelling a defendant to respond to a claim for unliquidated damages, which is not a debt within the meaning of Rev. Stat. U. S., § 990, abolishing imprisonment for debt on process issuing from United States courts in jurisdictions where it has been abolished by the state law. *Bolden v. Jensen*, 69 Fed. Rep. 745.

3. See *Doe v. Springfield Boiler, etc., Co.*, (C. C. A.) 104 Fed. Rep. 684, wherein it was said *obiter* that service of monition according to the provisions of a state statute regulating the mode of service in actions at law and in equity is valid in admiralty. And see SERVICE OF PROCESS AND PAPERS.

Constructive Levy. — The receipt by a marshal, with intent to make a levy, of a warrant of arrest for a vessel already in his custody by virtue of a warrant in another action operates as a constructive levy, which becomes absolute on the dismissal of the prior suit. *The Haytian Republic*, 60 Fed. Rep. 292.

263. 6. *The Lindrup*, 70 Fed. Rep. 718, holding that an unnecessary statement in the marshal's return as to the place of seizure is not conclusive of the court's jurisdiction over the vessel seized. And see generally RETURNS.

264. 1. See *Cape Fear Towing, etc., Co. v. Pearsall*, (C. C. A.) 90 Fed. Rep. 435, *citing* Admiralty Rules 29 and 40 for procedure for relief against decrees entered by default.

265. 1. *In All Proper Cases of Seizure.* — It is within the discretion of the

court to release vessels on bond in all cases, including seizures for forfeiture for violation of revenue laws. *The Three Friends*, 78 Fed. Rep. 173, *reversed* 166 U. S. 1, where the Supreme Court seriously questioned this construction given by the court below to Rev. Stat. U. S., § 941, but based the reversal upon an improvident use of the court's discretion in the particular case.

Effect of Giving Bond. — Where one not a party to the original libel appears, claiming to be the owner of a vessel and giving a bond for her release, he thereby becomes a party to the controversy and liable for any judgment thereafter rendered in accordance with the conditions of the bond. *Briggs v. Taylor*, (C. C. A.) 84 Fed. Rep. 681.

Waiver of Defects. — The giving of a stipulation for release is a waiver of all defects in the service of process. *The Frank Vanderkerchen*, 87 Fed. Rep. 763; *Briggs v. Taylor*, (C. C. A.) 84 Fed. Rep. 681.

The giving of a stipulation for release waives the claimant's right to have the suit commenced in the division of the district where he resides. *The Willamette*, (C. C. A.) 70 Fed. Rep. 874.

Vessel Never in Custody. — *The Frank Vanderkerchen*, 87 Fed. Rep. 763.

In Possessory Suits. — Under Rev. Stat. U. S., § 941, the right of the owner of a vessel to secure her release by giving bond applies to possessory as well as to other actions. *The Ponoket*, 61 Fed. Rep. 106.

2. *Stone v. Murphy*, 86 Fed. Rep. 158, holding that a defendant in admiralty, under Admiralty Rule 47 and Rev. Stat. U. S., §§ 990, 991, cannot be required to give a bond conditioned for the payment of the money awarded by the final decree, but only to render himself amenable to the process of the court, where such is the state law regarding the procedure in its courts.

266. Ordinary Penal Bond. — See note 1.

7. The Stipulation for Value. — See note 2.

267. Judgment Against Sureties. — See note 4.

268. Increasing or Reducing Security. — See notes 1, 2, 3.

269. 9. Tender. — See note 1.

270. XIII. RESPONDENT'S PLEADINGS. — 1. Exceptions to Libel — The Peremptory Exception. — See note 1.

266. 1. *Munks v. Jackson*, (C. C. A.) 66 Fed. Rep. 571, holding that an ordinary common-law bond, signed by a surety knowing that it was intended for the release of a vessel, was a valid release bond under Rev. Stat. U. S., § 941, and this notwithstanding it was given before the actual seizure of the vessel.

Substitutes for Property. — The bond given for the release of property in admiralty becomes a substitute for the thing itself. *The New York*, (C. C. A.) 113 Fed. Rep. 810; *Fairgrieve v. Marine Ins. Co.*, (C. C. A.) 112 Fed. Rep. 364; *The Fred M. Lawrence*, (C. C. A.) 94 Fed. Rep. 1017; *The Frank Vanderkeichen*, 87 Fed. Rep. 763.

A stipulation is a substitute for the thing itself only for the purposes of the original action, or where it is a stipulation for the appraised value of the vessel, where it stands as security for any claim filed up to the amount of the stipulation. *The Oregon*, 158 U. S. 186, reversing 45 Fed. Rep. 62.

2. Amount of Stipulation. — A surety cannot be compelled to pay more than the amount expressed in his stipulation. *Munks v. Jackson*, (C. C. A.) 66 Fed. Rep. 571.

267. 4. Rights and Liabilities of Sureties. — A stipulation for the release of a vessel upon the original libel does not bind the sureties in respect to claims set up by intervening petitions filed after the vessel's release. *The Oregon*, 158 U. S. 186; *Hawgood, etc., Transit Co. v. Dingman*, (C. C. A.) 94 Fed. Rep. 1011; *The Willamette*, (C. C. A.) 70 Fed. Rep. 874.

The Substitution of One Libelant for Another, or other amendment which the court has power to make, where the cause of action remains practically the same and the liability of the surety is not increased, will not avoid the stipulation. *The Beaconsfield*, 158 U. S. 303; *Fairgrieve v. Marine Ins. Co.*, (C. C. A.) 112 Fed. Rep. 364; *The Livingstone*, 104 Fed. Rep. 918.

268. 1. *The Fred M. Lawrence*,

(C. C. A.) 94 Fed. Rep. 1017, affirming 88 Fed. Rep. 910.

After a Vessel Has Been Released on Stipulation the court will not require the claimant to furnish any further security where there is no rule of court requiring it. *The Mutual*, 78 Fed. Rep. 144.

2. *The Iris*, (C. C. A.) 100 Fed. Rep. 104, holding that an excessive release bond given through misapprehension should be reduced where no injustice will result, and that the failure of the claimant to have the vessel appraised should not defeat his application for reduction.

3. Rescission of Property. — In the absence of fraud or mistake a vessel once released on stipulation cannot be arrested a second time for the same cause of action. *The Cleveland*, 98 Fed. Rep. 631.

There can be no rearrest after judgment, even in cases of fraud. *The Hattie Bell*, 65 Fed. Rep. 119.

A vessel may be rearrested on a new and distinct cause of action, even where such cause of action existed at the time of the first libel and might have been included therein. *The Haytian Republic*, 154 U. S. 118.

269. 1. *The Glencairn*, 78 Fed. Rep. 379, holding that the libellant must pay costs accruing after payment of money into court, in case of failure to recover more than the amount tendered.

Docket Fee. — A tender and deposit made at the time of filing answer need not include a docket fee which is taxable only on a final hearing. *Merritt, etc., Derrick, etc., Co. v. Catskill, etc., Steamboat Co.*, 112 Fed. Rep. 442.

270. 1. Practice to Unite with Answer. — *The Lindrup*, 70 Fed. Rep. 718, per Nelson, J.

Failure to Except — Waiver. — Failure to except to the joinder of separate claims against different defendants in the same libel waives the objection. *Merritt, etc., Derrick, etc., Co. v. Chubb*, (C. C. A.) 113 Fed. Rep. 173.

271. 2. Petition under Rule 59. — See note 1.

Other Cases than Collision. — See note 2.

3. Answer — Contents. — See note 4.

272. 4. Counterclaim — Cross-libel. — See note 3.**273.** See note 1.

When Cross-libel Necessary. — See note 2.

Security. — See note 3.

271. 1. Independent Action for Contribution. — Where one vessel is outside of the jurisdiction and cannot be brought into the original action by a petition under Rule 59, the vessel which has paid the damage is subrogated to the right of action of the injured party and may afterwards maintain an independent action for contribution against the other vessel. *The Mariska*, (C. C. A.) 107 Fed. Rep. 989. See also *The Argus*, 71 Fed. Rep. 891, where the principle was recognized but not applied, as the vessel proceeded against had not been in fault.

2. *The Barnstable*, 181 U. S. 464, holding that where only one vessel is liable it is within the spirit of Rule 59 to allow the owner to call in the charterer to show cause why he should not be held liable for the damages from a collision.

4. *Fairgrieve v. Marine Ins. Co.*, (C. C. A.) 94 Fed. Rep. 686, holding that the right of a libellant to sue can be raised in admiralty only by answer, and not by demurrer or plea in abatement.

Requisites and Sufficiency of Answers. — The strict formalities in pleading required at common law or in equity are not demanded. But particular matters of defense should be presented by proper averments in the answer, which should set out clearly and explicitly the facts relied on, and the proofs should correspond substantially with the allegations. *The Alexandra*, 104 Fed. Rep. 904.

A Denial of an Anticipatory Allegation in the Libel is equivalent to an affirmative averment of the fact in question. *Burrill v. Crossman*, (C. C. A.) 69 Fed. Rep. 747.

272. 3. The Edward H. Blake, (C. C. A.) 92 Fed. Rep. 202, *per* Pardee, J., *citing* 1 ENCYC. OF PL. AND PR. 272, 273.

Independent Transaction. — Admiralty has no jurisdiction of a set-off arising out of a transaction or cause of action independent of that set forth in the libel. *Anderson v. Pacific Coast Co.*,

99 Fed. Rep. 109; *The Frank Gilmore*, 73 Fed. Rep. 686.

273. 1. On What Founded. — *The Highland Light*, 88 Fed. Rep. 296.

The Words "Same Cause of Action" should be construed broadly as equivalent to "same transaction, dispute, or subject-matter," so as to allow all matters of dispute necessary to the final determination of the original action to be disposed of in one suit. *The Highland Light*, 88 Fed. Rep. 296; *Genthner v. Wiley*, 85 Fed. Rep. 797.

2. *The Edward H. Blake*, (C. C. A.) 92 Fed. Rep. 202, *per* Pardee, J., *citing* 1 ENCYC. OF PL. AND PR. 272, 273.

3. *Old Dominion Steamship Co. v. Kufahl*, 100 Fed. Rep. 331, holding that the requirement that the respondent on a cross-libel must give security cannot be defeated by one who is individually unable to give security bringing the action in behalf of himself and the other parties interested.

Unreasonable Delay. — The court may refuse to require the respondent on a cross-libel to give security when he has been allowed to proceed, and the demand for security is made only after an unreasonable delay. *Franklin Sugar-Refining Co. v. Funch*, 66 Fed. Rep. 342, *affirmed* (C. C. A.) 73 Fed. Rep. 844.

An Appeal from an Order Refusing to Require Security on a cross-libel does not suspend proceedings in the original suit. *Franklin Sugar-Refining Co. v. Funch*, (C. C. A.) 73 Fed. Rep. 844.

Suits in Personam. — In *Franklin Sugar Refining Co. v. Funch*, 66 Fed. Rep. 342, Butler, J., said: "It seems to me doubtful whether Rule 53 contemplates a case where the original libel is *in personam*; * * * its terms do not seem applicable to such a case." The question, however, was not decided. In *Lochmore Steamship Co. v. Hagar*, 78 Fed. Rep. 642, the same judge, still without deciding the point, said: "It is thus seen that the language of the rule applies to all cases of cross-libel." *Quoted* as authority in *Genthner v. Wiley*, 85 Fed. Rep. 797.

974. XV. TRIAL — Court Reserving Decision. — See note 4.

975. XVI. INTERLOCUTORY DECREE AND REFERENCE — 1. Generally. — See note 2. And see also REFERENCES.

976. Commissioner's Report. — See note 1.

2. Exceptions to Report. — See note 2.

977. XVIII. FINAL DECREE, WHAT IS. — See note 1.

Performance by Stipulators. — See note 2.

974. 4. New Trial — Rehearing, Etc. — A *Libel of Review* may be filed even after the term, where the decree shows fraud or its equivalent upon the rights of the petitioner so as to require remedial action upon principles of justice. *Hall v. Chisholm*, (C. C. A.) 117 Fed. Rep. 807; *Munks v. Jackson*, (C. C. A.) 66 Fed. Rep. 571.

A libel of review will lie where there has been fraud or collusion in the original action, and the application for such relief should not be barred by any technical limitation of time. *The Columbia*, 100 Fed. Rep. 890, wherein the court *obiter* enumerated other grounds on which bills of review have been allowed in admiralty, and cited with approval 3 ENCYC. OF PL. AND PR. 570-600.

A Petition or Motion to Amend a Final Decree must be made at the same term at which the decree is enrolled. *Pettit v. One Steel Lighter*, 104 Fed. Rep. 1002.

The Setting Aside or Reopening of a Default Decree is permissible in admiralty, but is entirely within the discretion of the court. *Cape Fear Towing, etc., Co. v. Pearsall*, (C. C. A.) 90 Fed. Rep. 435, *per* Simonton, J. And see OPENING, AMENDING, AND VACATING JUDGMENTS.

975. 2. The William H. Bailey, 103 Fed. Rep. 799, *affirmed* (C. C. A.) 111 Fed. Rep. 1006, holding that the finding of the commissioner is not invalidated by the fact that he sat outside the territorial jurisdiction of the court.

976. 1. Principles on Which Damages Are Assessed. — The fact that a decree for unliquidated damages is taken *pro confesso* does not affect the amount, for the damages must always be estimated from the evidence and not from the allegations of the libel. *Cape Fear Towing, etc., Co. v. Pearsall*, (C. C. A.) 90 Fed. Rep. 435.

Adoption by Court. — The *John McDermott*, 109 Fed. Rep. 90; *The Ohio*, (C. C. A.) 91 Fed. Rep. 547.

2. The William H. Bailey, 103 Fed.

Rep. 799. And see generally EXCEPTIONS AND OBJECTIONS.

Making Objection Before Commissioner.

— The exception must be based on matter which was objected to at the hearing before the commissioner. *The William H. Bailey*, 103 Fed. Rep. 799; *The Bulgaria*, 83 Fed. Rep. 312.

Objections on Appeal. — Exceptions to the findings of a commissioner will not be heard for the first time in an appellate court; they should be objected to before the commissioner and exceptions made in the court below. *The Eliza Lines*, (C. C. A.) 114 Fed. Rep. 307; *Brauer v. Campania Nav. La. Flecha*, (C. C. A.) 66 Fed. Rep. 776.

977. 1. The Albert Dumois, 177 U. S. 240, holding that the allowance of interest is discretionary and not reviewable on appeal except in a very clear case of abuse of discretion.

Interest on Demurrage may be allowed as part of the damage. *The Natchez*, (C. C. A.) 78 Fed. Rep. 183.

2. Decree Against Principal and Sureties. — *The Columbia*, (C. C. A.) 109 Fed. Rep. 660.

When Damages Are Divided Between Two Vessels. — If the innocent sufferer cannot collect the one-half due from one vessel, the other may be compelled to pay the whole amount. *The Job T. Wilson*, 84 Fed. Rep. 204, *per* Morris, J.

Act of February 13, 1893. — The limitation of liability as provided for by Act Cong. Feb. 13, 1893, § 3, has been held to apply only to the relations between the vessel and her cargo and their respective owners, and not to affect the relation of colliding vessels to each other, or to alter the established rules by which claims in such cases are divided where the vessels are mutually in fault, or the rule for diminishing the net damage by recoupment. *The Delaware*, 161 U. S. 459; *The Chattahoochee*, (C. C. A.) 74 Fed. Rep. 899, *affirmed* 173 U. S. 540. And see also *The George W. Roby*, (C. C. A.) 111 Fed. Rep. 601.

278. XIX. SUMMARY JUDGMENT AND EXECUTION. — See note 1.

Sale of Property and Distribution of Proceeds. — See notes 3, 4.

XX. APPEALS — 1. Generally. — See note 5. And see

APPEALS.

279. See note 1.

278. 1. *Smith v. Pendergast*, 82 Fed. Rep. 504, wherein Brown, J., said: "In the admiralty practice, proceedings upon bonds or stipulations have always differed from the proceedings on bonds in the common-law courts in being summary; and in this country these proceedings have usually been upon order to show cause. * * * Under this order to show cause every defense, legal or equitable, is ordinarily available to the sureties that they might obtain in the defense of a plenary suit on the bond."

3. Sale of Property. — The court may, on motion of the claimant, where the libellant does not object, order a sale of the libeled vessel before final decree. *The Nevada*, 85 Fed. Rep. 681.

4. Distribution of Proceeds — *What Claims Recognized.* — The court, though in possession of the fund, is not in the position of a receiver for the benefit of creditors in general, and in distributing a surplus takes cognizance only of specific liens upon the fund. *The Alliance*, 65 Fed. Rep. 245, *affirming The Advance*, 63 Fed. Rep. 704.

Payment of Surplus to Owner. — Where, after the payment of specific liens, a surplus remains, this must be paid to the owner, if claimed by him, in preference to nonlien creditors. *The Lydia A. Harvey*, 84 Fed. Rep. 1000; *The Willamette Valley*, 76 Fed. Rep. 838.

When a surplus remains after the payment of vested interests and the owner does not claim the residue, the court, to avoid having the fund indefinitely impounded in the registry, may recognize purely equitable claims and ordinary debts. *The Willamette Valley*, 76 Fed. Rep. 838, *per Morrow, J.*

5. The Three Friends, 166 U. S. 1, holding that under an order of court that a libel shall be amended within a certain time or stand dismissed, the prosecution of an appeal within the time limited waives the right to amend and makes the decree final and appealable.

Decree Directing Sale. — A decree in admiralty awarding a definite sum in consequence of a maritime lien and

directing the marshal to sell the *res* and pay the proceeds into court to await further orders as to their distribution is final and appealable, as it determines the merits of the controversy, the direction to the marshal being a mere incident. *The Eugene*, (C. C. A.) 87 Fed. Rep. 1001.

The Dismissal of a Cross-libel in a collision case does not make such a final disposition of the controversy by the district court as to be reviewable on appeal. *Bowker v. U. S.*, 186 U. S. 135.

279. 1. *City of Cleveland v. Chisholm*, (C. C. A.) 90 Fed. Rep. 431, holding that an admiralty appeal to the Circuit Court of Appeals brings up the whole case for review both as to the law and the facts. See also *Gilchrist v. Chicago Ins. Co.*, (C. C. A.) 104 Fed. Rep. 566.

Where Several Distinct Claims Are Decided by one decree, an appeal from the decision as to one claim does not open the decree for review as to the others. *Mason v. Marine Ins. Co.*, (C. C. A.) 110 Fed. Rep. 452.

Second Appeal Raising New Point. — A point undecided by a mandate of the Supreme Court to a District Court may be the subject of a new appeal to the Circuit Court of Appeals. *The New York*, (C. C. A.) 104 Fed. Rep. 561, and see also *Laidlaw v. Oregon R., etc., Co.*, (C. C. A.) 81 Fed. Rep. 876, making the same ruling when the mandate was from a Circuit Court.

Proper Appellant. — Where claims presented in limitation of liability proceedings are distinct and separate, involving different subject-matters, the decree determining the rights of the claimants, though joint in form, is several in its nature and operation, and one claimant may appeal without making the others parties. *The Columbia*, (C. C. A.) 73 Fed. Rep. 226, *reversing* (C. C. A.) 67 Fed. Rep. 942.

Sureties on Release Bond. — Unless some extraneous question arises involving the obligation of the sureties on a release bond entered into under Rev. Stat. U. S., § 941, they are not necessary parties to an appeal taken

279. How Taken. — See note 2.

2. Appeal Bond — Bond to Stay Execution. — See note 5. And see APPEAL BONDS AND UNDERTAKINGS; SUPERSEDEAS AND STAY OF PROCEEDINGS.

280. 4. Assignment of Errors. — See note 2. And see ASSIGNMENT OF ERRORS.

281. 8. The Apostles. — See note 3.

Certification and Return. — See note 4.

by any of the parties to the record. *The New York*, (C. C. A.) 104 Fed. Rep. 561; *The Glide*, (C. C. A.) 72 Fed. Rep. 200.

279. 2. Braithwaite v. Jordan, 5 N. Dak. 196, holding that admiralty appeals in territorial courts are governed by the rules and usages of courts of admiralty and not by territorial statutes.

Time to Perfect Appeal. — Under Act Cong. March 3, 1891, § 11, an admiralty appeal to the Circuit Court of Appeals may be taken at any time within six months after the entry of the order or decree appealed from. *The New York*, (C. C. A.) 104 Fed. Rep. 561; *The City of Naples*, (C. C. A.) 69 Fed. Rep. 794.

5. Appeal Bond and Bond for Costs — Proceedings Against Sureties. — A libellant is entitled to proceed summarily against the sureties on an appeal bond to stay execution without any provision to that effect being inserted in the bond. *Smith v. Pendergast*, 82 Fed. Rep. 504.

280. 2. The Natchez, (C. C. A.) 78 Fed. Rep. 183; *Lafourche Packet Co. v. Henderson*, (C. C. A.) 94 Fed. Rep. 871, holding that an assignment of error should be specific and not general; *The State of Missouri*, (C. C. A.) 76 Fed. Rep. 376; *The Philadelphia*, (C. C. A.) 75 Fed. Rep. 685; *Brauer v. Campania Nav. La Flecha*, (C. C. A.) 66 Fed. Rep. 776.

Rule 11 of the Circuit Court of Appeals, Seventh Circuit, requiring an assignment of errors to be filed and returned with the record, applies to appeals in admiralty, but reserves to the court the right to notice a plain error not assigned. *Chicago Ins. Co. v. Graham, etc., Transp. Co.*, (C. C. A.) 108 Fed. Rep. 271.

Laxity in Favor of Seamen. — In the interest of seamen, who are wards of the court in admiralty, the appellate court may of its own motion take note of matters not included in the assignment of errors. *The Chattahoochee*, (C. C. A.) 74 Fed. Rep. 899, *per Putnam, J.*

Additional Assignments. — The Circuit Supp. Pl. & Pr.—6

Court of Appeals, on an appeal in admiralty, may allow additional assignments of error to be filed in that court. *Cory v. Penco*, (C. C. A.) 76 Fed. Rep. 997.

Matter Not Presented to the Lower Court by any form of pleading cannot be made the subject of an assignment of error. *The New York*, (C. C. A.) 108 Fed. Rep. 102; *The Robert Graham Dun*, (C. C. A.) 70 Fed. Rep. 270.

Matters Not Apparent of Record. — An alleged ruling of the court below which does not appear in the record and cannot be inferred therefrom cannot be assigned as error. *The Natchez*, (C. C. A.) 78 Fed. Rep. 183.

The Refusal of the Court to Grant a New Trial cannot be assigned as error. *The Natchez*, (C. C. A.) 78 Fed. Rep. 183.

Errors as to Costs may be assigned and reviewed on appeal when the force of a statute or some positive rule of law is involved. *The City of Augusta*, (C. C. A.) 80 Fed. Rep. 297.

281. 3. Making Up the Apostles. — The Circuit Court of Appeals cannot pass upon the merits of the case when the record on appeal does not contain the evidence on the trial, and there is no written agreement by the parties in regard to the evidence omitted, as required by Admiralty Rule 52. *Nelson v. White*, (C. C. A.) 83 Fed. Rep. 215; *The Glide*, (C. C. A.) 72 Fed. Rep. 200. See also *The Edward H. Blake*, (C. C. A.) 92 Fed. Rep. 202.

When the record on appeal is incomplete and the defect is due to the appellant's neglect, the case will not be remanded for a new trial or the taking of new testimony. *The McDonald*, (C. C. A.) 112 Fed. Rep. 681, *affirmed* (C. C. A.) 113 Fed. Rep. 1019.

It is desirable that the record on appeal should show which witnesses were examined in the presence of the district judge and which were not. *The Gypsum Prince*, (C. C. A.) 67 Fed. Rep. 612, *per Lacombe, J.*

4. The Margaret B. Roper, (C. C. A.) 106 Fed. Rep. 740, holding that a party

282. 9. New Testimony. — See note 1.

11. Hearing. — See note 3.

283. 14. Appeal to the Supreme Court. — See note 4.

to an appeal is entitled to a writ of certiorari to compel the clerk properly to certify and return the record.

282. 1. New Testimony — When Allowed. — The taking of new testimony is not a matter of right, and will never be allowed unless a satisfactory reason is given for the witnesses not having been produced and examined in the court below. *The Glide*, (C. C. A.) 68 Fed. Rep. 719.

In *The Carbonero*, (C. C. A.) 106 Fed. Rep. 329, where the evidence in the record was such that the appellate court could not reach a satisfactory conclusion, the case was remanded with permission to produce further proofs in the lower court and in default thereof the former decree to stand affirmed.

3. Conflicting Evidence. — The *Albert Dumois*, 177 U. S. 240; *Alaska Packers Assoc. v. Domenico*, (C. C. A.) 117 Fed. Rep. 99; *Jacobsen v. Lewis Klondike Expedition Co.*, (C. C. A.) 112 Fed. Rep. 73; *Wilder's Steamship Co. v. Low*, (C. C. A.) 112 Fed. Rep. 161; *Hartley v. American Steel-Barge Co.*; (C. C. A.) 108 Fed. Rep. 97; *Whitney v. Olsen*, (C. C. A.) 108 Fed. Rep. 292; *Elphicke v. White Line Towing Co.*, (C. C. A.) 106 Fed. Rep. 945; *The Newport News*, (C. C. A.) 105 Fed. Rep. 389; *The E. Luckenbach*, (C. C. A.) 93 Fed. Rep. 841; *City of Cleveland v. Chisholm*, (C. C. A.) 90 Fed. Rep. 431; *The Brandywine*, (C. C. A.) 87 Fed. Rep. 652; *The Columbia*, (C. C. A.) 73 Fed. Rep. 226. Compare *The Albany*, (C. C. A.) 81 Fed. Rep. 966, where the trial judge rejected the testimony of important witnesses, and *The Gypsum Prince*, (C. C. A.) 67 Fed. Rep. 612, where proper weight was not accorded to the testimony of certain witnesses and the decree was apparently influenced by the misplacing of some of the evidence.

The preponderance of evidence to authorize the reversal of a finding of fact by a lower court based upon conflicting testimony should be such as would justify the granting of a new trial in a court of common law on the ground that the verdict was against the weight of evidence. *The City of Naples*, (C. C. A.) 69 Fed. Rep. 794.

Qualifications of Rule. — Some cases qualify the rule holding that the appellate court will review the findings of fact based upon conflicting testimony, but that the opinion of the court below is entitled to "great weight" or "great respect." *The Anaces*, (C. C. A.) 106 Fed. Rep. 742; *The City of Augusta*, (C. C. A.) 80 Fed. Rep. 297. See also *The Bowden*, (C. C. A.) 78 Fed. Rep. 649; *The Lucy*, (C. C. A.) 74 Fed. Rep. 572.

Some cases make a distinction where the witnesses are not examined in the presence of the court, holding that in such cases the findings of the court are not entitled to the same weight and that the appellate court will review the evidence and reach its own conclusion. *The Joseph B. Thomas*, (C. C. A.) 86 Fed. Rep. 658; *The Glendale*, (C. C. A.) 81 Fed. Rep. 633; *The Sappho*, (C. C. A.) 94 Fed. Rep. 545, *per* Waddill, J.

The Findings of a Commissioner to whom a case has been referred by consent of the parties, and whose report has been approved by the court below, are entitled to the same weight as when found directly by the court. *The Elton*, (C. C. A.) 83 Fed. Rep. 519.

After Two Concurring Decisions below on a question of fact the finding will not be reversed by an appellate court unless it is clearly erroneous. *The Carib Prince*, 170 U. S. 655; *Compania De Nav. La Flecha v. Brauer*, 168 U. S. 104; *The Conqueror*, 166 U. S. 110; *Smith v. Burnett*, 173 U. S. 430; *The Columbian*, (C. C. A.) 100 Fed. Rep. 991; *The Providence*, (C. C. A.) 98 Fed. Rep. 133.

Rehearing of Appeal. — A rehearing of an appeal in admiralty should not be granted on the ground of newly discovered evidence when the facts sought to be introduced were known by witnesses at the former hearing and no good reason is shown why they were not proved at that time. *The Iron Chief*, (C. C. A.) 63 Fed. Rep. 289.

283. 4. The Annie Faxon, (C. C. A.) 87 Fed. Rep. 961; *The Alliance*, (C. C. A.) 70 Fed. Rep. 273, holding that under Act Cong. March 3, 1891, § 5, an appeal where the only question in issue is the jurisdiction of the court

984. XXI. EVIDENCE — 2. Depositions de Bene Esse. — See note 3.

985. 3. Dedimus Potestatem, or Commission to Take Testimony. — See note 3.

Interrogatories. — See note 4.

987. XXIII. LIMITATION OF ACTIONS. — See note 4.

Laches. — See note 5.

988. See note 1.

XXIV. INTERVENTION. — See note 2.

How Accomplished. — See note 3.

below can be brought only in the Supreme Court.

Under Act Cong. March 3, 1891, § 6, the decree of the Circuit Court of Appeals in proceedings to limit the liability of shipowners is final, and no further appeal will lie to the Supreme Court. *Oregon R., etc., Co. v. Balfour*, 179 U. S. 55.

984. 3. Depositions in Foreign Country. — *The Alexandra*, 104 Fed. Rep. 904, *per Brawley, J.*

985. 3. The Westminster, 96 Fed. Rep. 766, holding that courts of admiralty, in issuing commissions to take testimony under Rev. Stat. U. S., § 866, are not required by section 914 to conform to the usages of the state courts, but may adopt different rules.

4. The Westminster, 96 Fed. Rep. 766, holding that there is no objection to the presence of one of the parties at the hearing before the commissioner unless he interferes with the examination.

987. 4. Pacific Coast Steamship Co. v. Bancroft-Whitney Co., (C. C. A.) 94 Fed. Rep. 180; *The William M. Hoag*, 69 Fed. Rep. 742, holding that courts of admiralty are not bound by state statutes of limitation, but are governed entirely by the Acts of Congress and general principles of maritime law. See also the title LACHES, 18 Am. and Eng. Encyc. of Law (2d ed.) 127.

Adopting State Statutes. — Where a state statute creating a lien or right of action at the same time limits its duration, the limitation is a qualification of the right itself and will be strictly observed in a court of admiralty. *Stern v. La. Compagnie Generale Transatlantique*, 110 Fed. Rep. 996; *The James G. Swan*, 106 Fed. Rep. 94; *The Catherine Whiting*, (C. C. A.) 99 Fed. Rep. 445; *The H. N. Emilio*, 70 Fed. Rep. 511.

5. Pacific Coast Steamship Co. v.

Bancroft-Whitney Co., (C. C. A.) 94 Fed. Rep. 180, holding that the question of laches depends, to a great extent, upon the facts and circumstances of each particular case and must be determined by the court in the exercise of its sound discretion.

988. 1. The Conde Wifredo, (C. C. A.) 77 Fed. Rep. 324, holding that a delay through waiting for the return of a foreign vessel to bring an action *in rem* when an action might have been begun earlier *in personam* against the owner is not laches, for the action *in personam* would have waived the lien upon the ship.

2. Bond Given for Original Claim. — A bond given to satisfy the original libel cannot be proceeded against by intervening petitions filed after the release of the vessel. *The Oregon*, 158 U. S. 186, *reversing* 45 Fed. Rep. 62.

Lienor — Suit for Forfeiture. — When, after due notice, a decree is entered settling the claims presented, adjudging all others in default and the vessel forfeited, and the time for appeal has passed, the decree is conclusive against all liens thereafter sought to be enforced. *The James G. Swan*, 106 Fed. Rep. 94.

An Insurer May Intervene after the rendition of the decree awarding the damages when the issues raised relate only to the distribution of the fund. *Mason v. Marine Ins. Co.*, (C. C. A.) 110 Fed. Rep. 452.

3. The Clara A. McIntyre, 94 Fed. Rep. 552, holding that an intervenor can be heard only by permission of the court, and can acquire no standing in court through the unauthorized action of a commissioner to take testimony.

After Release of Vessel on Stipulation. — The court should not entertain jurisdiction of an intervening petition filed after the release of the vessel on stipulation unless a new order of arrest is issued. *The Oregon*, 158 U. S. 186.

289. XXV. CONSOLIDATION OF SUITS. — See notes 1, 2.

XXVI. PERSONAL INJURIES. — See note 3.

Death Claims. — See note 4.

290. See notes 1, 2.

XXVII. DEATH OF A PARTY. — See note 3.

XXVIII. COSTS. — See note 6.

289. 1. *Jacobsen v. Dailes, etc.*, Nav. Co., 93 Fed. Rep. 975, holding that all parties whose interests rest upon a common cause of action may join in the same libel, although, as between themselves, their interests are separate and distinct, and that the rule applies to both actions *in rem* and *in personam*.

Libel Against Two in Alternative. — Where a libellant has a cause of action against one of two defendants, but is uncertain against which, the court may allow him to proceed by one libel against both of them in the alternative when the joinder is conducive to the convenience of the court and no injustice will result to the parties. *Neall v. Curran*, 93 Fed. Rep. 831.

2. Various Libels for Same Cause. — *The Eliza Lines*, (C. C. A.) 114 Fed. Rep. 307, *affirming* 61 Fed. Rep. 308.

3. The Miami, 78 Fed. Rep. 818, holding that under Admiralty Rule 16 all suits for assaults and beating within the admiralty jurisdiction must be *in personam* only.

With the exception of suits for assault and battery, actions for personal injuries in admiralty may be either *in rem* or *in personam*. *The Anaces*, (C. C. A.) 93 Fed. Rep. 240.

Punitive Damages. — In a tort action *in rem* no punitive damages can be allowed. *The William H. Bailey*, 103 Fed. Rep. 799.

Locus of Tort Generally. — *The Haxby*, 95 Fed. Rep. 170; *The Strabo*, 90 Fed. Rep. 110, *affirmed* (C. C. A.) 98 Fed. Rep. 998; *Hermann v. Port Blakely Mill Co.*, 69 Fed. Rep. 646; *Price v. The Belle of the Coast*, 66 Fed. Rep. 62; *The Mary Garrett*, 63 Fed. Rep. 1009.

4. In re La Bourgogne, 117 Fed. Rep. 261; *Rundell v. La Campagnie Générale Transatlantique*, (C. C. A.) 100 Fed. Rep. 655, *affirming* 94 Fed. Rep. 366.

290. 1. *Robinson v. Detroit, etc.*, Steam Nav. Co., (C. C. A.) 73 Fed. Rep. 883. See also *The Schooner Robert Lewers Co. v. Kekaouha*, (C. C. A.) 114 Fed. Rep. 849; *The Oregon*,

73 Fed. Rep. 846, (C. C. A.) 81 Fed. Rep. 876; *Bigelow v. Nickerson*, (C. C. A.) 70 Fed. Rep. 113.

2. Actions in Rem and in Personam. — Where the statute giving a right of action to the representative expressly makes such right of action a lien upon the vessel, it may be enforced by an action *in rem*. *The Glendale*, (C. C. A.) 81 Fed. Rep. 633; *The Willamette*, (C. C. A.) 70 Fed. Rep. 874.

When the statute giving the right of action to the personal representative does not create a lien, there can be no action *in rem*. *The Mariska*, (C. C. A.) 107 Fed. Rep. 989; *The Onoko*, (C. C. A.) 107 Fed. Rep. 984.

3. The Margaret B. Roper, (C. C. A.) 106 Fed. Rep. 741.

6. The South Portland, 95 Fed. Rep. 295 [*citing* 1 ENCYC. OF PL. AND PR. 295]; *The E. A. Shores, Jr.*, 79 Fed. Rep. 987.

When Allowed. — An exaggerated claim may be followed by disallowance of costs. *The Asiatic Prince*, 103 Fed. Rep. 676.

When the libellant is entitled to nominal damages only, the case may be dismissed without costs. *Munson v. Straits of Dover Steamship Co.*, (C. C. A.) 102 Fed. Rep. 926.

Costs in a Suit Begun in Forma Pauperis cannot be avoided by a settlement made out of court in which the costs are not provided for. *Erratt v. Humphreys*, 102 Fed. Rep. 925; *The Bella*, 91 Fed. Rep. 540.

Expense of Procuring Bonds. — In *The South Portland*, 95 Fed. Rep. 295, it was held that the successful claimant should recover as part of his costs the amount paid to a surety company for furnishing the release bond. See also *Jacobsen v. Lewis Klondike Expedition Co.*, (C. C. A.) 112 Fed. Rep. 73. *Compare* *The Willowdene*, 97 Fed. Rep. 509.

On Appeals. — When an appeal and cross-appeal are heard together, only one docket fee should be taxed. *The Rabboni*, (C. C. A.) 84 Fed. Rep. 681.

Effect of Laches. — The successful party may be taxed with the costs of an appeal which he has been guilty of

291. See note 1.

294. XXIX. LIMITATION OF LIABILITY — 1. Generally. — See notes 1, 2.

297. 2. The Proceeding — c. PROCEEDINGS UNDER THE LIBEL — If Appraisal Is Asked. — See note 3.

298. Staying Proceedings. — See note 2.

delays in prosecuting. The Ethel, (C. C. A.) 66 Fed. Rep. 340, *per* Toulmin, J.

When New Evidence is Taken on an Appeal on account of which the decree is reversed, and neither party is in fault for not producing the evidence in the court below, each party should pay his own costs on appeal. The Oxford, (C. C. A.) 66 Fed. Rep. 590.

291. 1. Docket Fee. — Merritt, etc., Derrick, etc., *Co. v. Catskill, etc.*, Steamboat Co., 112 Fed. Rep. 442; The Mount Eden, 87 Fed. Rep. 483, in which cases it was held that a docket fee in admiralty is taxable only upon a final hearing.

A Decree Entered by Consent of all the parties in favor of an intervenor is a final decree, and entitles his proctor to a docket fee. The H. C. Grady, 87 Fed. Rep. 483.

A Proceeding Before a Commissioner on a reference is not a final hearing. The Mount Eden, 87 Fed. Rep. 483.

Proctor's Fees. — A proctor representing more than one libellant in claims covered by the same decree, and which are or ought properly to be united, is entitled to but one docket fee. The Mount Eden, 87 Fed. Rep. 483; The H. C. Grady, 84 Fed. Rep. 226; The State of Missouri, (C. C. A.) 76 Fed. Rep. 376.

Marshal's Fees. — Where a claimant appears voluntarily and answers a libel and the parties settle the claim without any motion being issued or the vessel being taken into custody, the marshal, having incurred no responsibility, is not entitled to any commissions. The Isabel, 79 Fed. Rep. 103.

Expense of Caring for Property. — The claim of a marshal for money expended by him in caring for a vessel in his custody is a preferred claim and may, on order of the court, be recovered from the proceeds of sale in the registry before final decree. *In re The Allegheny*, 85 Fed. Rep. 463.

Cause Dismissed for Lack of Jurisdiction. — Where a suit *in rem* is dismissed for lack of jurisdiction over the *res*, each

party will be held responsible for his own costs. The Lindrup, 70 Fed. Rep. 718, *per* Nelson, J.

Where the lack of jurisdiction does not appear upon the face of the libel, but is disclosed only by subsequent pleadings or evidence, the court may award costs. Pile Driver E. O. A., 69 Fed. Rep. 1005.

294. 1. The Albert Dumois, 177 U. S. 240, holding that the act applies to claims for personal injuries.

As to What Constitutes "Privity or Knowledge," see The Longfellow, (C. C. A.) 104 Fed. Rep. 360; The Colima, 82 Fed. Rep. 665.

2. The Annie Faxon, (C. C. A.) 75 Fed. Rep. 312, holding that Act Cong. June 26, 1884, § 18, did not repeal Rev. Stat. U. S., § 4493, denying the right of limitation of liability in case of injuries to passengers, but intended only to fix the liability of shipowners among themselves and extend the right of limitation to all cases of debt and contract obligations made on account of the ship, with the one exception of wages due to employees.

In the *S. A. McCaulley*, 99 Fed. Rep. 302, *following* *Quinlan v. Pew*, (C. C. A.) 56 Fed. Rep. 111, it was held that even where there is only one claimant a state court is not competent, within the meaning of Rev. Stat. U. S., § 4285, to administer the relief where the right of limitation of liability is demanded. But see *The Eureka* No. 32, 108 Fed. Rep. 672.

297. 3. The H. F. Dimock, (C. C. A.) 77 Fed. Rep. 226, holding that when the owner of the vessel elects to give a stipulation instead of turning over the vessel to a trustee, he must pay the costs incident to the appraisal and the giving of the stipulation.

298. 2. In re Whitelaw, 71 Fed. Rep. 733, holding that Rev. Stat. U. S., § 4285, providing that all claims and proceedings against the owner shall cease, is paramount to and not affected by section 720, restricting the power of courts of the United States to enjoin proceedings in state courts.

298. d. PROOF OF CLAIMS AND RETURN OF MONITION. — See note 3.

299. f. COSTS. — See notes 3, 4.

302. XXX. PRIZE — 7. Decree by Default. — See notes 2, 3.

303. 10. Costs and Expenses. — See note 3.

11. Damages. — See note 4.

304. 12. Appeals. — See note 1.

298. 3. The *Argus*, 100 Fed. Rep. 143, holding that the court may, in its discretion, admit claims which are presented subsequent to the return of the monition.

299. 3. The *Longfellow*, (C. C. A.) 104 Fed. Rep. 360, holding that where the owners deny all liability whatever under Admiralty Rule 56, and this issue is decided against them, the costs arising on such issue may be taxed against them instead of being paid from the fund.

All the regular expenses, fees, and other charges should be paid from the fund, but the costs arising upon independent issues created by the parties should be taxed as the costs of entirely separate litigation. The *H. F. Ditmock*, (C. C. A.) 77 Fed. Rep. 226.

4. See The *S. A. McCaulley*, 99 Fed. Rep. 302, where, in allowing limitation of liability proceedings, the court required the applicant to pay the costs and expenses incurred by the adverse party in a state court, due to delay in claiming the benefit of the limitation.

302. 2. The *Olinde-Rodrigues*, 89 Fed. Rep. 105; The *Newfoundland*, 89 Fed. Rep. 99; The *Adula*, 89 Fed. Rep. 351, holding that on the first hearing in prize cases the only evidence admissible is that taken at the examination in *preparatorio*, consisting of depositions of the officers, crew, and passen-

gers of the captured ship, given in answers to standing interrogatories, and of papers and documents found on board.

3. The *Newfoundland*, 176 U. S. 97; The *Olinde-Rodrigues*, 89 Fed. Rep. 105, *affirmed* 91 Fed. Rep. 274.

Where the evidence in *preparatorio* makes a case for condemnation, further proofs should be allowed with extreme caution. The *Adula*, 89 Fed. Rep. 351, *affirmed* 176 U. S. 361.

303. 3. Unjustifiable Capture. — The *Buena Ventura*, 175 U. S. 384; The *Olinde Rodrigues*, 174 U. S. 510, holding that where there is probable cause for the capture no costs will be decreed against the captor, although the property is restored to the owner.

4. Recovery and Award of Damages. — The *Buena Ventura*, 175 U. S. 384; The *Olinde Rodrigues*, 174 U. S. 510, holding that no damages will be awarded on restoration of the property if there was probable cause for the capture.

304. 1. The *Paquete Habana*, 175 U. S. 677, holding that under Act Cong. March 3, 1891, c. 517, an appeal lies to the Supreme Court of the United States from all final sentences and decrees in prize cases, without regard to the amount in dispute and without any certificate from the district judge as to the importance of the particular case.

ADULTERY (AS A CRIME).

305. I. THE INDICTMENT GENERALLY — The Form. — See note 2.

306. Using Word "Adultery." — See note 1.

Surplusage. — See note 3.

Party Commencing Prosecution. — See note 4.

II. ALLEGATIONS OF TIME. — See note 5.

III. NAME OF CO-CRIMINAL. — See notes 7, 8.

307. V. ALLEGATIONS OF MARRIAGE — **2. Parties Not Husband and Wife** — Manner of Making Averment. — See note 4.

4. Name of Defendant's Husband. — See note 6.

VI. JOINDER OF COUNTS. — See note 7.

305. 2. *Lyman v. People*, 98 Ill. App. 386.

306. 1. *Disharoon v. State*, 95 Ga. 351, holding that an indictment charging that a married man had intercourse with an unmarried woman, with her consent, is a good indictment against him for adultery and fornication, although called seduction in the plea.

3. *State v. Ean*, 90 Iowa 534, holding that an averment that the woman with whom the offense was committed was over eighteen years old is surplusage and need not be proven, if, without it, the allegations are sufficient to charge the offense.

4. *State v. Andrews*, 95 Iowa 451; *People v. Isham*, 109 Mich. 72.

Dismissal. — Under a statute requiring a prosecution to be commenced by the injured spouse, the complaining party may have a dismissal after the prosecution has been instituted. *Hosford v. Gratiot Circuit Judge*, (Mich. 1902) 88 N. W. Rep. 627.

5. *Lyman v. People*, 98 Ill. App. 389.

7. **Name Unknown.** — *State v. Ean*, 90 Iowa 534.

8. *Henderson v. State*, 105 Ala. 139, holding that in an indictment charging a man with adultery with Dollie Croft, evidence that he was guilty of adultery with Dollie Crawford would not support a conviction; to warrant a conviction the evidence must show that the name of the woman with whom he had committed the offense was as alleged in the indictment or that she was sometimes known or called by that name.

307. 4. *Crane v. People*, 168 Ill.

398, holding that under a statute requiring the offense to be stated in the language of the statute defining the offense, or so plainly that it may be easily understood by the jury, the indictment need not allege that each of the parties jointly charged had a spouse then living, and need not allege that the defendants were not at the time married to each other.

6. *Names v. State*, 20 Ind. App. 168, holding that an indictment against a woman sufficiently showed that she was married by charging that "the said A., being then and there a married woman and the wife of one W. J.," etc.

Pleading and Proof. — Where a woman was indicted as the wife of S. B., and her marriage certificate showed that she was married to C. W. B., such certificate was held admissible in *State v. Brink*, 68 Vt. 659, in support of the indictment, together with parol evidence showing that S. B. and C. W. B. were the same person.

Name of Defendant's Husband Need Not Be Alleged. — An information charging that a man and woman unlawfully cohabited together, said woman being lawfully married to another person then living, sufficiently alleged that the woman was married to some one other than her codefendant, and was held sufficient although the name of her husband was not alleged. *Lenert v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 563.

7. **Several Specifications.** — An indictment containing but one count, charging the defendant with many different

308. VII. JOINDER OF DEFENDANTS. — See note 1.

[**IX. VARIANCE.** — As in all other criminal prosecutions, the proof must correspond with the material allegations in the indictment or there will be a fatal variance. See note 3a.]

acts of intercourse at different times with the same person, is bad for duplicity. *Com. v. Fuller*, 163 Mass. 499.

An indictment which charges in one count that the defendants did unlawfully live together and have carnal intercourse with each other, and did then and there unlawfully have habitual intercourse with each other without living together, is not repugnant or duplicitous. *Hartsheld v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 777.

308. 1. *Kendrick v. State*, 100 Ga.

360; *Lyman v. People*, 98 Ill. App. 388.

3a. *Kendrick v. State*, 100 Ga. 360, holding that where the indictment charges a married man with adultery with a married woman, and the proof shows the woman to be unmarried, the variance is fatal; *Wood v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 235, holding that where an indictment charges adultery by habitual carnal intercourse without living together, and the evidence shows a carnal intercourse while living together, the variance is fatal.

AFFIDAVITS.

309. I. DEFINITION. — See note 1.

310. See note 1.

311. II. SUFFICIENCY — 1. **Formal Requisites** — *a.* **TITLE.** — See note 2.

312. See note 2.

When Not to Be Entitled. — See note 3.

313. b. VENUE. — See notes 2, 3, 4.

315. c. SIGNATURE. — See notes 1, 3.

309. 1. *Cox v. Stern*, 170 Ill. 442; *Grace v. Oakland Bldg. Assoc.*, 166 Ill. 637; *State v. Headrick*, 149 Mo. 396; *Lutz v. Kinney*, 23 Nev. 279; *Turner v. St. John*, 8 N. Dak. 245; *Lawrey v. Sterling*, 41 Oregon 518, each *citing* 1 ENCYC. OF PL. AND PR. 309.

What Not an Affidavit. — An entry on the record that a constable "so answers on oath" is not an affidavit. *Maines v. Black*, 21 Pa. Co. Ct. 319.

310. 1. *Bantley v. Finney*, 43 Neb. 794; *Black v. Cochran*, 21 Pa. Co. Ct. 326.

311. 2. *Parks v. State*, 110 Ga. 760, *citing* 1 ENCYC. OF PL. AND PR. 311.

312. 2. *Hill v. McBurney Oil, etc., Co.*, 112 Ga. 788 [*quoting* 1 ENCYC. OF PL. AND PR. 311]; *Harris v. Leonhardt*, 2 App. Cas. (D. C.) 318.

3. On an Application for an Injunction, it is not an abuse of discretion to refuse to admit in evidence an affidavit which is not "intituled in the cause" when there is no proof that it was made to be used as evidence in any court or in any case. *Whitley v. Berry*, 105 Ga. 251; *Warren v. Monnish*, 97 Ga. 399.

313. 2. *Teutonia Loan, etc., Co. v. Turrell*, 19 Ind. App. 469, in which case it was held that when the venue shows that the affidavit was sworn to in one county and the jurat shows that it was sworn to in another, the court will be guided by the venue as shown by the jurat.

In Missouri. — In *Barhydt v. Alexander*, 59 Mo. App. 188, the court said: "An affidavit should show upon its face that it was made before an officer competent to take affidavits, and within

some place where he was authorized by law to administer an oath. No presumption arises that an affidavit has been made at any particular place within the state nor that it was made within the limits of the state when no place is mentioned."

3. Lee v. Crawford, 10 N. Dak. 482, *citing* 1 ENCYC. OF PL. AND PR. 313. See also *American Book Co. v. Watson*, (County Ct.) 24 Misc. (N. Y.) 524.

4. See *Kesler v. Lapham*, 46 W. Va. 293, *citing* with approval 1 ENCYC. OF PL. AND PR. 313, 314.

Judicial Notice. — When an affidavit contains no venue in the jurat, the court will take judicial notice that it was taken before a notary commissioned for the county in which the court is sitting. *Hertig v. People*, 159 Ill. 237. See also *Teutonia Loan, etc., Co. v. Turrell*, 19 Ind. App. 469.

In *St. Louis, etc., R. Co. v. Deane*, 60 Ark. 524, it was decided that an affidavit in which the venue is not stated is defective but can be amended.

315. 1. *Lanier v. Taylor*, (Tex. Civ. App. 1897) 41 S. W. Rep. 516; *Anderson v. Cochran*, 93 Tex. 583, which cases were decided under Rev. Stat. Tex. (1895), art. 6. See also *McMillan v. Watauga Bank*, (Tenn. Ch. 1895) 35 S. W. Rep. 765.

3. Culver v. Guyer, 129 Ala. 602; *Wynkoop v. Grand Traverse Circuit Judge*, 113 Mich. 381 [each of which cases *cited* 1 ENCYC. OF PL. AND PR. 315]; *Savage v. Atkins*, 124 Ala. 378; *Bittick v. State*, 67 Ark. 131; *Simmons Hardware Co. v. Alturas Commercial Co.*, (Idaho 1895) 39 Pac. Rep. 550; *Armstrong v. Austin*, 45 S. Car. 69.

316. *d.* JURAT. — See notes 2, 3, 4, 5.

318. *e.* AUTHENTICATION. — See note 3.

320. *Seal.* — See note 2.

321. 2. Substance — *a.* IN GENERAL. — See note 1.

Defect Cured. — Where the court bases its order on an unsigned affidavit the defect in the affidavit is cured. *State v. Downing*, 48 La. Ann. 1420.

316. 2. Theobald *v.* Chicago, etc., R. Co., 75 Ill. App. 208.

3. *Cox v. Stern*, 170 Ill. 442 [citing 1 ENCYC. OF PL. AND PR. 316]; *Cook County Brick Co. v. Wm. Bach, etc., Co.*, 93 Ill. App. 88; *Theobald v. Chicago, etc., R. Co.*, 75 Ill. App. 208; *Bantley v. Finney*, 43 Neb. 794.

4. In *Missouri* a signed statement without a jurat is not an affidavit within the meaning of Rev. Stat. Mo. (1899), § 808. *Peters v. Edge*, 87 Mo. App. 283.

5. *Smith v. State*, 24 Ind. App. 417; *People v. Lant*, 124 Mich. 271.

Approved Form. — A jurat which recites that "on this day personally appeared G., and, having been duly sworn by me, subscribed to the foregoing affidavit" is sufficient. *Steinam v. Gahwiler*, (Tex. Civ. App. 1895) 30 S. W. Rep. 472.

Contents of Jurat. — A jurat need not contain the language of the oath or averment administered. *Colvin v. People*, 166 Ill. 82.

318. 3. *Holmes v. Crooks*, 36 Neb. 466; *Sage v. Stafford*, 42 N. Y. App. Div. 449; *Prater v. Wilson*, 55 S. Car. 468 [each of which cases cited 1 ENCYC. OF PL. AND PR. 317]; *Larson v. People*, 170 Ill. 93.

320. 2. *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496; *Alabama Nat. Bank v. Chattanooga Door, etc., Co.*, 106 Ala. 663; *Berg v. Koegel*, 16 Mont. 266; *Hill v. Alliance Bldg. Co.*, 6 S. Dak. 160; *Missouri Pac. R. Co. v. Brown*, (Tex. 1899) 53 S. W. Rep. 1019.

321. 1. *Alabama.* — *Guyton v. Terrell*, 132 Ala. 66.

Arkansas. — *Memphis Land, etc., Co. v. St. Francis Levee Dist.*, 70 Ark. 409; *Lanigan v. North*, 69 Ark. 62; *Baker v. York*, 65 Ark. 142.

California. — *People v. Findley*, 132 Cal. 301; *Coffee v. Haynes*, 124 Cal. 561; *Fisk v. French*, 114 Cal. 400.

Illinois. — *White v. Chicago*, 188 Ill. 392.

Indiana. — *State v. Bailey*, 157 Ind. 324.

Iowa. — *Stillman v. Rosenberg*, 111 Iowa 369.

Kentucky. — *Moore v. Harrod*, 101 Ky. 248.

Michigan. — *Forbes Lithograph Mfg. Co. v. Winter*, 107 Mich. 116; *Dummer v. Nungesser*, 107 Mich. 481; *Muirhead v. Sands*, 111 Mich. 487; *Hogaa v. Hadzsits*, 113 Mich. 568; *Stever v. Brown*, 119 Mich. 196.

Minnesota. — *Gilmore v. Lampman*, 86 Minn. 493; *Camp v. Murphy*, 68 Minn. 378.

Missouri. — *Thomas v. Missouri Town Mut. F. Ins. Co.*, 89 Mo. App. 12; *Frick Co. v. Marshall*, 86 Mo. App. 463.

Nebraska. — *McDonald v. Marquardt*, 52 Neb. 820.

New York. — *Salisbury v. McGibbon*, 58 N. Y. App. Div. 524; *Lumley v. Anatron Chemical Co.*, 56 N. Y. App. Div. 174; *Matter of Gagnon*, 32 N. Y. App. Div. 22; *Bruen v. Nickels*, 30 N. Y. App. Div. 396; *Blatchford v. Paine*, 24 N. Y. App. Div. 140.

North Carolina. — *State v. Bramble*, 121 N. Car. 603.

North Dakota. — *Emmons County v. Lands of Bismarck First Nat. Bank*, 9 N. Dak. 583; *Kaeppler v. Red River Valley Nat. Bank*, 8 N. Dak. 406.

Ohio. — *Sauer v. Cincinnati St. R. Co.*, 8 Ohio Dec. 473.

Pennsylvania. — *Rubinsky v. Ullman*, 4 Pa. Dist. 126.

Texas. — *Smith v. Dye*, (Tex. Civ. App. 1899) 51 S. W. Rep. 858; *Anderson v. Cochran*, 93 Tex. 583; *Cahn v. Jaffray*, 12 Tex. Civ. App. 324; *Dodson v. State*, 35 Tex. Crim. 571.

West Virginia. — *Connalley v. Wallace Co.*, 51 W. Va. 181; *Kendall v. Scott*, 48 W. Va. 251; *Phillips v. Minear*, 40 W. Va. 58.

United States. — *Nevada Co. v. Farnsworth*, 89 Fed. Rep. 164; *Fidelity Ins., etc., Co. v. Roanoke Iron Co.*, 81 Fed. Rep. 439.

See also *Northern Lake Ice Co. v. Orr*, 102 Ky. 586; *Godfrey v. Newby*, (Tex. Civ. App. 1897) 39 S. W. Rep. 594.

Rule of Court. — An affidavit made in substantial compliance with a rule of court is sufficient. *Cunningham v.*

322. *Opinions and Conclusions.*—See note 4. See also **LEGAL CONCLUSIONS.**

323. *b. PARTIES.*—See note 1.

326. **III. WHO MAY MAKE—Attorneys.**—See note 1.

327. *Agents.*—See note 1.

328. *Third Person.*—See note 1.

IV. WHO AUTHORIZED TO TAKE—1. Within the State.—

See note 2.

329. See notes 1, 2, 3.

Water-Power Sandstone Co., 74 Minn. 282.

322. 4. *Brewer, etc., Brewing Co. v. Lonergan*, 63 Ill. App. 28; *Ammon v. Kellar*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 442; *State v. Douglass*, 41 W. Va. 537.

Conclusions of Law.—To use the word "due" in an affidavit alleging a claim against an estate is not stating a conclusion of law, as generally in that connection its meaning is simply "owing." *Crocket-Woolworth Nat. Bank v. Carle*, 133 Cal. 409.

323. 1. *The Name of the Defendant* should appear in the body of an affidavit to hold to bail on a *copias*. *Hunt v. Lesh*, 6 Pa. Dist. 290.

326. 1. *Questenberry v. People's Bldg., etc., Assoc.*, 44 W. Va. 512; *Daum v. Conley*, 27 Colo. 56 [each citing 1 ENCYC. OF PL. AND PR. 326]; *Miller v. Graf*, 14 Colo. App. 167; *Harris v. Leonhardt*, 2 App. Cas. (D. C.) 318; *Chattanooga First Nat. Bank v. Willingham*, 36 Fla. 32; *Field v. New York Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 111; *Wicker v. Elmira Heights*, 42 N. Y. App. Div. 426; *State v. Superior Ct.* 17 Wash. 54; *Silver Peak Mines v. Hanchett*, 80 Fed. Rep. 990.

California Statute.—An affidavit for an order directing the publication of a summons made under Code Civ. Pro. Cal., § 412, may be made by the attorney for plaintiff. *Rue v. Quinn*, 137 Cal. 651.

327. 1. *Emerson v. Detroit Steel, etc., Co.*, 100 Mich. 127; *Kirksville Sav. Bank v. Spangler*, 59 Mo. App. 172; *Anthony v. Fox*, 53 N. Y. App. Div. 200. See also *Simon v. Greer*, (Tex. Civ. App. 1896) 34 S. W. Rep. 343. But see *Shecut v. Trubee*, 99 Ga. 637.

An agent may make an affidavit in attachment. *Hanson v. Marcus*, 8 N. Y. App. Div. 318.

In an action on a mechanic's lien an

agent may make the affidavit for his principal. *Riter v. Houston Oil Refining, etc., Co.*, 19 Tex. Civ. App. 516.

In Illinois.—Under Prac. Act Ill., § 33 (Starr & Curt. Annot. Stat. Ill. 1896, c. 110, par. 34), an agent cannot make the affidavit denying the execution of an instrument upon which an action is brought. *Warmah v. Akron First Nat. Bank*, 185 Ill. 60.

Partners.—One partner may make an affidavit for the partnership. *Standard Carbonating, etc., Co. v. Capital City Guards*, 99 Ga. 265.

Agency Must Appear.—When an affidavit is made by an agent the agency should be made apparent. *Jeary v. American Exch. Bank*, (Neb. 1902) 89 N. W. Rep. 771; *Churchill v. Demeritt*, (N. H. 1901) 51 Atl. Rep. 254.

328. 1. See *contra*, *Shecut v. Trubee*, 99 Ga. 637.

2. *Van Buren v. McKinley*, (Idaho 1901) 66 Pac. Rep. 936; *Lewiston Co-operative Soc. No. 1 v. Thorpe*, 91 Me. 64.

The Register or a Receiver of a Public Land Office is authorized and it is his duty to administer any oath required by law in connection with the entry or purchase of any tract of public land. *Peters v. U. S.*, 2 Okla. 116.

A Commissioner of Deeds for the state of Georgia residing in a foreign state is not empowered to administer an oath to an affidavit *in forma pauperis* to be used in the courts of Georgia. *Baker v. Magrath*, 106 Ga. 419.

329. 1. *Clerks.*—Under Rev. Stat. Tex., art. 1401, an affidavit to proceed *in forma pauperis* must be made before a judge, and if made before the clerk of a court in vacation time it is void. *Roberts v. Houston City St. R. Co.*, (Tex. Civ. App. 1896) 35 S. W. Rep. 66.

In *People v. Vasalo*, 120 Cal. 168, it was held under Code Civ. Pro. Cal., § 2093, that the clerk of the police court of Los Angeles is authorized to

330. Attorney. — See note 3.

333. 2. Foreign Affidavits. — See note 1.

V. USE OF AFFIDAVITS. — See note 3.

administer an oath to an information in a criminal prosecution.

2. Aldermen and Justices of the Peace have jurisdiction to administer oaths, and this jurisdiction will be presumed to exist in the absence of a statute to the contrary. *Com. v. Frank*, 7 Pa. Dist. 143.

3. *Walker v. People*, 22 Colo. 415; *Campbell v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 513.

When Notaries Incompetent. — Where the statute requires an affidavit to be taken before a justice of the peace or county clerk, it is void if made before a notary public. *Sherwood v. Ionia Circuit Judge*, 107 Mich. 136. See also *Williams v. Raitze*, 8 Ohio Dec. 695; *Adams v. Heckscher*, 80 Fed. Rep. 742.

De Facto Notary Public. — An affidavit taken before a *de facto* notary public is valid. *Schiff v. Leipziger Bank*, 65 N. Y. App. Div. 33.

When a Notary Public Is a Commissioner to Make a Public Assessment he can administer an oath to a fellow commissioner. *Peck v. People*, 153 Ill. 454.

330. 3. *Ward v. Ward*, 10 Ohio Cir. Dec. 656, decided under Rev. Stat. Ohio, §§ 5264, 5271. See also *Thomas E. Lynch Co. v. Carpenter*, (Mich. 1901) 88 N. W. Rep. 387, decided under Comp. Laws Mich., § 2640; *Horkey v. Kendall*, 53 Neb. 522, in which case the court decided that the affidavit taken before an attorney of record in a case was not necessarily a nullity, but an irregularity which might be corrected. *Contra, Evans v. Schriver Laundry Co.*, 57 Ill. App. 150; *Phillips v. Phillips*, 185 Ill. 629. See also *Dobry v. Western Mfg. Co.*, 57 Neb. 228.

Affidavit Made Before Relation Arose. — Although an affidavit in equity practice taken before an attorney of record is defective, still, if an affidavit was taken before the attorney was retained in the case, it is valid. *In re Kindt*, 3 Am. Bankr. Rep. 443, quoting 1 ENCYC. OF PL. AND PR. 331, note.

333. 1. *Lockhead v. Berkeley Springs Waterworks, etc., Co.*, 40 W. Va. 553.

In District of Columbia. — The seal of a notary public to an affidavit taken in a foreign state sufficiently authenticates the affidavit for use in the courts in the District of Columbia without the

usual formality of annexing a certificate of the clerk of the court in the state in which it is taken that the notary is authorized to take affidavits *Howard v. Citizen's Bank, etc., Co.*, 12 App. Cas. (D. C.) 222; *Hutchins v. Maneely*, 11 App. Cas. (D. C.) 88.

In Georgia it is required that an affidavit executed in a foreign state shall be authenticated, and that certification must be made of the official character of the person before whom the affidavit is executed. *Brunswick Hardware Co. v. Bingham*, 107 Ga. 271; *Castellaw v. Blanchard*, 106 Ga. 97.

Contents of Certificate. — Where an affidavit is taken in a foreign state to be used in *New York*, a certificate of authentication must properly and sufficiently describe the powers and duties of the notary public before whom the affidavit was executed. *Stanton v. U. S. Pipe Line Co.*, 90 Hun (N. Y.) 35.

An affidavit to be used in *Illinois*, if made in Canada, must contain a certificate of the authority of the notary to administer oaths in Canada. *Ferris v. Commercial Nat. Bank*, 158 Ill. 237. See also *Trevor v. Colgate*, 181 Ill. 129; *Desnoyers Shoe Co. v. First Nat. Bank*, 188 Ill. 312; *Figge v. Rowlen*, 185 Ill. 234.

A certificate of the clerk verifying a notary's signature may set out that the signature is believed to be "genuine." *Heffernan v. Harvey*, 41 W. Va. 766.

3. *In re Liter*, 19 Mont. 474, citing 1 ENCYC. OF PL. AND PR. 333.

Loss of Original. — Where it is impossible to secure the original affidavit in a suit for attachment, it will be sufficient to set forth the substance thereof in an affidavit by the plaintiff's attorney. *Levy v. Goldstein*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 639.

When Used in Appellate Court. — Affidavits to show the amount involved in the controversy will be received in the Appellate Court when there is nothing in the record to show that such amount was large enough to give the court jurisdiction to hear and determine the cause. *McLaughlin v. Darlington*, 6 Kan. App. 212.

When Attorney's Affidavit Admissible. — On the hearing of an order to show cause why an injunction should not issue it appeared that several suits be-

335. As Evidence. — See notes 1, 3.

336. As Part of Record. — See APPEALS.

Filing. — See note 2.

State Affidavits. — See note 3.

VI. AMENDMENT. — See notes 4, 5.

tween the same parties were pending. The affidavit of the defendant's attorney as to the history of the litigation, made on his knowledge, was held to be admissible as tending to make clear the identification of the parties and the subject-matter in the several suits. *Wetzstein v. Boston*, etc., Consol. Copper, etc., Min. Co., 26 Mont. 193.

335. 1. Lost Deed. — The proof of loss of an original deed is sufficiently shown by an *ex parte* affidavit of the party wishing to use the record as evidence. *Hume v. Hopkins*, 140 Mo. 65.

On Question of Jurisdiction. — In an action to enjoin the use of a trademark, affidavits are not admissible to determine the question of jurisdiction. *Robinson v. Harrison*, 9 Ohio Dec. 701.

An Affidavit for a Continuance cannot be read in evidence unless the record shows that a continuance had been denied upon the condition that the affidavit should be treated as the deposition of a witness. *Dempster Mill Mfg. Co. v. Fitzwater*, 6 Kan. App. 24.

3. Traer v. State Board of Medical Examiners, 106 Iowa 563 [*citing* 1 ENCYC. OF PL. AND PR. 334]; *St. Louis*, etc., R. Co. v. *Faisst*, 68 Ark. 587; *Carter White Lead Co. v. Pounds*, 65 N. Y. App. Div. 476. See also *Heffner v. Snohomish County*, 16 Wash. 273.

336. 2. In Casey v. Jordan, 94 Ill. App. 405, it was held that under a statute requiring the filing of an original affidavit in support of a motion to place a cause on the short-cause calendar, the filing of a copy thereof is not sufficient.

3. Hunt, etc., Co. v. Reilly, 20 Pa. Co. Ct. 88; *Maloney v. Murphy*, 173 Pa. St. 395.

Affidavits Used in Former Proceedings. — Affidavits used in contempt proceedings cannot be used thereafter on an *ex parte* application hearing on the application for a writ of certiorari. *Thompson v. Superior Ct.*, 119 Cal. 538.

4. Churchill v. Rea, 126 Mich. 175; *Union Nat. Bank v. Muskegon Circuit Judge*, 117 Mich. 678; *Corrigan v. Nichols*, 6 Tex. Civ. App. 26; *Bohn v. Zeigler*, 44 W. Va. 402.

The Omission of the Jurat to an affidavit

in distress proceedings is an amendable defect. *Beach v. Averett*, 106 Ga. 73.

5. Bittick v. State, 67 Ark. 131; *Tackaberry v. Gillmore*, 57 Neb. 450; *Fidelity Ins., etc., Co. v. Roanoke Iron Co.*, 81 Fed. Rep. 439. See also *Westbrook v. Harrison*, 99 Ga. 660; *Moore v. Moore*, 130 N. Car. 333.

A defect in an affidavit cannot be remedied by oral testimony. *Esker v. Heffernan*, 159 Ill. 38; *Bogges v. Scott*, 48 W. Va. 316.

Omissions by Accident or Mistake. — An affidavit *in forma pauperis* under 2 Code Ga., § 5124, may be amended if it appears that the words were omitted "by accident or mistake." *Josey v. Sheron*, 106 Ga. 204. See also *Atchison v. Riggie*, 6 Kan. App. 5, which was decided under a similar statute.

Filing Nunc pro Tunc. — In its discretion the court may permit the amendment of a record by the filing of an affidavit *nunc pro tunc*. *Linhart v. Cunningham*, 6 Pa. Dist. 788.

Amendment of Void Affidavit. — When the affidavit sought to be amended is not an affidavit known to the law, no amendment will be permitted. *Blyth, etc., Co. v. Swensen*, 7 Wyo. 303.

Date. — When it is clearly shown that the date is erroneous and that the affidavit has been properly sworn to and filed, it is the duty of the court to permit an amendment so that it may conform to the facts. *Arkansas Lumber Co. v. Scott*, 5 Kan. App. 636.

Affidavit of Publication may be amended. *Howard v. McChesney*, 103 Cal. 536.

An Affidavit Used on an Appeal from a Justice's Court to the Circuit Court may be amended. *Van Scoyoc v. Wolfe*, 73 Mo. App. 430.

An Affidavit for an Order of Arrest may be amended by a judge of chambers, and when so amended may be used for all the purposes of the case. *Chapman v. H. D. Lee Mercantile Co.*, 7 Kan. App. 254; *Light v. Canadian County Bank*, 2 Okla. 543.

In Replevin. — Where an affidavit in replevin is defective but the defendant waives the defect and pleads to the merits, the court, in furtherance of

337. See note 1.

justice, will thereafter allow an amendment of such an affidavit and proceed with the cause. *Gaiser v. Heim*, 4 Ohio Cir. Dec. 378. See also *Taylor v. Buck*, 100 Mich. 181; *Bayless v. McFarland*, 10 Okla. 747.

Amendment Setting Forth Subsequent Facts.—An amended affidavit must

show on its face that the facts set forth in that portion amended existed at the time that the original affidavit was executed. *Sommers v. Allen*, 44 W. Va. 120.

337. 1. *Ross v. State*, 9 Ind. App. 35; *Griffin v. Barton*, 20 N. Y. App. Div. 512.

AFFIDAVITS OF MERITS OR DEFENSE.

343. IV. WHEN REQUIRED — 1. To Prevent Inquests or Judgments by Default — *c.* IN ACTIONS ON CONTRACT, WHERE PLAINTIFF FILES AN AFFIDAVIT OF THE AMOUNT DUE. — See note 2.

345. See note 3.

346. See note 3.

347. g. IN ACTIONS OF ASSUMPSIT ACCOMPANIED BY STATEMENT OF PLAINTIFF'S DEMAND. — See note 2.

349. Plaintiff's Statement. — See note 2.

350. Judgment by Default. — See note 2.

348. 2. The Rule in Rhode Island was laid down in *West v. Darcy*, 20 R. I. 311, as follows: Where an action is brought on a note and the defendant fails to file an affidavit of defense, it "is a conclusive admission, for the purposes of the suit, of the validity of the plaintiff's claim. But the defendant is nevertheless entitled to have his claim in set-off adjudicated in that suit, and, if he prevails, to have it deducted from the plaintiff's claim, or, if it exceeds the plaintiff's claim, to a judgment for the excess."

345. 3. Original Typewriter Circular Co. v. Buehler, 67 Ill. App. 575, wherein it was declared that if the defendant fails to file his affidavit of merits with his plea in an action in assumpsit, the plea will be stricken from the file and judgment entered in favor of the plaintiff.

346. 3. Rule in Maryland. — See Acts Md. 1894, c. 631, § 181; *Griffith v. Adams*, (Md. 1902) 52 Atl. Rep. 66.

347. 2. Philadelphia, etc., R. Co. v. Snowdon, 166 Pa. St. 236.

In Illinois a rule similar to that in Pennsylvania has been established. *Original Typewriter Circular Co. v. Buehler*, 67 Ill. App. 575.

In Pennsylvania, in Actions on Judgments, an affidavit of defense is required and it must state facts sufficient to constitute a defense and not conclusions of law. *Ball v. Warrington*, 87 Fed. Rep. 695, which was an action brought in the Circuit Court for the Eastern District of Pennsylvania.

349. 2. Unless the statement or

affidavit which the rule of the court requires the plaintiff to make in order to compel the defendant to present an affidavit of defense is sufficient under the rule or statute providing for such affidavit by the plaintiff, judgment will not be allowed when the defendant files an insufficient affidavit of defense or even fails to file any affidavit. *Foertsch v. Germueller*, 2 App. Cas. (D. C.) 340.

Pennsylvania Statute. — Act Pa. 1889, art. 15, § 22, relating to municipal liens, provides that "reference being made to the number and term to which, and the docket and page in which, such claim or claims are registered in the *præcipe* instituting the suit, it shall not be necessary to file a copy of the same." In *Oil City v. Hartwell*, 164 Pa. St. 348, it was held that where such provisions are strictly complied with the plaintiff need not furnish to the defendant a copy of the claim, and if the defendant fails to file an affidavit of defense within the statutory time, judgment will be taken by default.

350. 2. Gundersheimer v. Earnshaw, 13 App. Cas. (D. C.) 178; *Chicago Stamping Co. v. Mechanical Rubber Co.*, 83 Ill. App. 230; *Wells v. Mathews*, 75 Ill. App. 395; *Tobyhanna, etc., Lumber Co. v. Home Ins. Co.*, 167 Pa. St. 231.

Where the plaintiff's statement sets out a cause of action founded upon a number of papers and upon numerous facts *in pais* extrinsic to the papers and alleges violation of contract stipula-

- 350.** Waiver of Defects. — See note 3.
352. 2. To Open Judgments or Inquests. — See OPENING, AMENDING, AND VACATING JUDGMENTS.
354. Verified Answer. — See note 2.
355. 4. To Change Venue. — See VENUE.
356. 5. On Motions Generally. — See notes 2, 5.
357. V. AT WHAT TIME MADE. — See note 2.
358. VI. BY WHOM MADE — Defendant. — See note 2.
359. Several Defendants. — See notes 2, 3.
 Agent or Attorney. — See note 4.
360. See note 1.

VII. CONTENTS OF AFFIDAVIT OF MERITS — 1. In General — *a.* THE USUAL AFFIDAVIT — Ordinary Form. — See note 3.

tions, an affidavit of defense which denies all liability under the papers and also all violation of contract stipulations, and alleges violation of contract obligations by the plaintiff, is sufficient to prevent judgment by default. *Hosletter v. United Brethren Mut. Aid Soc.*, 166 Pa. St. 636.

350. 3. Rule in Federal Courts in Pennsylvania. — If the plaintiff moves that the defendant be compelled to enter his plea and such plea is entered accordingly, the plaintiff thereby waives the right to complain of the insufficiency of the affidavit of defense. *Edison Gen. Electric Co. v. Johnstown Electric Light Co.*, 56 Fed. Rep. 456.

354. 3. Pittsburgh, etc., R. Co. v. Mahoney, 148 Ind. 196, *citing* 1 ENCYC. OF PL. AND PR. 354.

356. 2. On a Motion to Compel the Acceptance of an Answer, made on the grounds that the answer was in proper form and that the defendant is entitled to have it stand as a matter of right, an affidavit of merits is not necessary. *Paddock v. Palmer*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 426.

5. Affidavit of Merits to Secure Permission for Taking Testimony. — An affidavit in which the attorney for the plaintiff swears that certain witnesses are material to prove the allegations of the complaint; that they reside in the state of Pennsylvania, and are not within the state of New York; and that the sources of the deponent's information and the grounds of his belief are interviews and correspondence which he has had with various persons named, living in Pennsylvania, is within Code Civ. Pro. N. Y., §§ 887, 888. *Laidlaw v. Stimson*, 67 N. Y. App. Div. 545.

357. 3. In West Virginia, when the plaintiff is required to file an affidavit of defense he may do so at any time before judgment. *Quesenberry v. People's Bldg., etc., Assoc.*, 44 W. Va. 512.

358. 3. *Newman v. Goddard*, 12 App. Cas. (D. C.) 404 [*citing* 1 ENCYC. OF PL. AND PR. 358]; *Taylor v. Sellers*, 12 Pa. Super. Ct. 230.

359. 2. Where Set-off Is Claimed. — When an affidavit of defense avers a set-off, the averment must be specific and exact as to the source and character of the amount claimed as such set-off. *Anderson v. Williams*, 10 Pa. Super. Ct. 329.

3. *Meyers v. Davis*, 13 App. Cas. (D. C.) 361.

4. *Newman v. Goddard*, 12 App. Cas. (D. C.) 404 [*citing* 1 ENCYC. OF PL. AND PR. 359]; *Gordon v. Frazer*, 13 App. Cas. (D. C.) 382.

360. 1. *Gordon v. Frazer*, 13 App. Cas. (D. C.) 382; *Davis v. Solomon*, (Supm. Ct. App. T.) 28 Civ. Pro. (N. Y.) 420, 25 Misc. (N. Y.) 695; *Kirschner v. Kirschner*, 7 N. Dak. 291.

In *May v. Forbes*, 2 Penn. (Del.) 194, the affidavit of defense was made by an attorney who averred that he was "attorney in fact, with due and lawful authority." The court held that if there was a doubt as to the sufficiency of this allegation it should be resolved, according to the well-settled rule in that jurisdiction, in favor of the defendant.

3. In New York an affidavit of merits which does not state that the defendant has fully and fairly stated the case to his counsel is insufficient. *Gold v. Hutchinson*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 1; *Kirschner v. Kirsch-*

- 360.** Every Part of this Form Is Material. — See note 4.
363. See note 1.
364. Advice of Counsel. — See note 4.
365. Defendant's Belief. — See notes 3, 4.
366. *b.* WHERE FACTS ARE STATED. — See note 1.
367. *c.* THE ILLINOIS RULE. — See note 2.
368. A Partial Defense. — See note 1.
d. THE PENNSYLVANIA RULE. — See note 2.
Form — Statement of Facts. — See notes 3, 4.

ner, 7 N. Dak. 291, *citing* 1 ENCYC. OF PL. AND PR. 360.

When the Counsel Makes the Affidavit, it need not appear that the defendant has fully and fairly stated his case to the counsel. *Davis v. Solomon*, (Supm. Ct. App. T.) 28 Civ. Pro. (N. Y.) 420, 25 Misc. (N. Y.) 695.

360. 4. *Silver Peak Gold Min. Co. v. Harris*, 116 Fed. Rep. 439, *quoting* 1 ENCYC. OF PL. AND PR. 360.

363. 1. *Kirschner v. Kirschner*, 7 N. Dak. 291, *citing* 1 ENCYC. OF PL. AND PR. 363. See also *Sargent v. Kindred*, 5 N. Dak. 8.

364. 4. See *Silver Peak Gold Min. Co. v. Harris*, 116 Fed. Rep. 439.

365. 3. *Silver Peak Gold Min. Co. v. Harris*, 116 Fed. Rep. 439, *citing* 1 ENCYC. OF PL. AND PR. 365.

4. In *Woods v. Van Kirk*, 17 Pa. Co. Ct. 158, the court, *per* Mestrezat, J., said: "An affidavit of defense must aver distinctly, either upon knowledge or information and belief, every fact necessary to constitute a defense. If the affidavit is upon information and belief, the established formula is that the deponent is informed, believes, and expects to be able to prove the facts set out."

366. 1. In jurisdictions where the facts constituting a defense are required to be set out, reasonable certainty and particularity in setting forth the facts of defense are enough. Showing that an affidavit of defense might be more clear, definite, and particular does not prove its insufficiency to prevent judgment, but this is not to be construed into a judicial sanction of a relegation of the principles and established rules applicable to affidavits of defense. *Steiner v. Bartlett*, 2 Pa. Super. Ct. 4.

367. 2. "An affidavit which has only to say for the merits of a defense that defendant's counsel 'is of opinion that the defendant has a good and meritorious defense to this suit' is in-

sufficient." *Pettit v. Hall*, 80 Ill. App. 376.

368. 1. When a partial defense is relied on, the affidavit must be certain and definite in regard to the amount admitted to be due and owing. *Cosgrave v. Hammill*, 173 Pa. St. 207.

2. *Union Trust Co. v. City Trust, etc., Co.*, 4 Pa. Dist. 381.

Where Statute Does Not Require Affidavit. — Where the case is one in which an affidavit of defense is not required, but the defendant files such an affidavit, and upon demurrer the affidavit filed is held to be insufficient, the plaintiff is not entitled to judgment. *Bartoe v. Guckert*, 158 Pa. St. 124.

3. In Pennsylvania it has been held that the allegations in an affidavit of defense should be specific and certain, sufficient in detail to enable the court to say whether they amount to a defense and to what extent, and to inform the plaintiff certainly and specifically what will be introduced to defeat his claim. *Killen v. Brown*, 6 Pa. Super. Ct. 15. See also *Pennsylvania R. Co. v. Midvale Steel Co.*, 201 Pa. St. 624; *Marston v. State Hospital*, 18 Pa. Super. Ct. 547; *Czar Cycle Co. v. Holmes*, 4 Pa. Super. Ct. 548; *Williams v. Myers*, 3 Pa. Super. Ct. 481; *Woods v. Van Kirk*, 17 Pa. Co. Ct. 158; *Holt v. Holt Electric Storage Co.*, 79 Fed. Rep. 597; *Coburn v. Reynolds*, 3 Pa. Dist. 475; *Deacon v. Smaltz*, 10 Pa. Super. Ct. 151; *Ross v. Philadelphia, etc., R. Co.*, 3 Pa. Dist. 791; *Union Trust Co. v. City Trust, etc., Co.*, 4 Pa. Dist. 381; *Weixel v. Lennox*, 179 Pa. St. 457; *Clarion Second Nat. Bank v. Morgan*, 165 Pa. St. 199; *White v. Safe Harbor Match Co.*, 166 Fed. Rep. 109; *Reilly v. Daly*, 159 Pa. St. 605; *Mack Paving Co. v. Young*, 166 Pa. St. 267; *Deitrich v. Singer Mfg. Co.*, 4 Pa. Dist. 324.

4. In Delaware an affidavit of defense which simply avers that there is a defense to the cause of action, without

369. See notes 1, 2.

Information and Belief. — See note 3.

370. Partial Defense — Supplemental Affidavit. — See notes 2, 3.

371. 2. By Codefendant. — See note 1.

[Rules of Construction in Other States. — See note 3a.]

372. 3. By Agent, Attorney, or Clerk. — See note 1.

373. 4. To Obtain Change of Venue. — See VENUE.

setting forth any of the facts which constitute such defense, is insufficient. *Potts v. Wells*, (Del. 1900) 50 Atl. Rep. 62.

369. 1. *Sykes v. Anderson*, 14 Pa. Co. Ct. 329; *Northern Nat. Bank v. Hoopes*, 98 Fed. Rep. 935.

2. *Merchants Nat. Bank v. Eckel*, 191 Pa. St. 372; *Singer v. Caldwell*, 7 Pa. Dist. 583. See also *Northern Nat. Bank v. Hoopes*, 98 Fed. Rep. 935; *Spencer v. Keeler*, 11 Pa. Super. Ct. 614.

For Forms of Affidavits of defense which have been held sufficient see the following cases: *May v. Forbes*, 2 Penn. (Del.) 194; *Collins v. Hansen*, 2 Penn. (Del.) 155; *Hostetter v. United Brethren Mut. Aid Soc.*, 166 Pa. St. 636; *Smith v. Elder*, 167 Pa. St. 487; *Aetna Ins. Co. v. Confer*, 158 Pa. St. 598; *Deacon v. Smaltz*, 10 Pa. Super. Ct. 151.

Cases in Which Forms of Affidavits Have Been Held Insufficient. — See *Gordon v. Frazer*, 13 App. Cas. (D. C.) 382; *Hertz v. Sidle*, 20 Pa. Super. Ct. 88; *Reilly v. Daly*, 159 Pa. St. 605. See also *Wanner v. Emanuel's Church*, 174 Pa. St. 466; *Terriberry v. Broude*, 173 Pa. St. 48.

3. *Clarion Second Nat. Bank v. Morgan*, 165 Pa. St. 199. But see *Wolf v. Jacobs*, 187 Pa. St. 260. Compare *Robinson v. Arnold*, 23 Pa. Co. Ct. 558.

370. 2. Partial Defense. — Under Act Pa. May 31, 1893, P. L. 185, an affidavit of defense may be filed to a part of the amount sued for and judgment may be taken for that portion of the amount which is admitted to be due; it is of no consequence how the amount due is ascertained or how the balance is composed. *Roberts v. Sharp*, 161 Pa. St. 185. See also *Coburn v. Reynolds*, 3 Pa. Dist. 475; *Calkins v. Keely*, 3 Pa. Dist. 339; *Philadelphia v. Second, etc.*, St. Pass. R. Co., 13 Pa. Co. Ct. 580; *Myers v. Cochran*, 3 Pa. Dist. 135.

3. *Sykes v. Anderson*, 14 Pa. Co. Ct. 329.

When Affidavit Cannot Be Attacked. — If an affidavit of defense was sufficient when filed to carry the case to a jury and thus prevent a summary judgment, it cannot thereafter be rendered ineffectual. *Smyth v. Miller*, 174 Pa. St. 639.

371. 1. *Tyrer v. Chew*, 7 App. Cas. (D. C.) 175.

3a. The Rule in Delaware is that where an affidavit of defense is filed in an action in assumpsit a bare allegation of payment is sufficient, and it need not be specific as to when, how, or by whom the payment was made. *Ridings v. McMenamin*, 1 Penn. (Del.) 15.

Rule in District of Columbia. — The rule for construing affidavits of defense in the District of Columbia was laid down in *Pumphrey v. Bogan*, 8 App. Cas. (D. C.) 449, as follows: "Bearing in mind the rule of liberality that prevails in the construction of affidavits of defense, we are to take the statements thereof, where we can do so reasonably, 'in the sense in which they would be effectual rather than in the sense in which they would be meaningless and unavailing.'" Citing *The Richmond v. Cake*, 1 App. Cas. (D. C.) 447. But compare *Magruder v. Schley*, 17 App. Cas. (D. C.) 227; *Gordon v. Frazer*, 13 App. Cas. (D. C.) 382; *Chapman v. Natalie Anthracite Coal Co.*, 11 App. Cas. (D. C.) 386; *Foertsch v. Germailler*, 2 App. Cas. (D. C.) 340; *Lulley v. Morgan*, 21 D. C. 88.

In Rhode Island. — An affidavit of defense which is in substantial compliance with the section prescribing what such an affidavit must contain is sufficient. *New England Steam Brick Co. v. Dube*, 19 R. I. 397.

372. 1. *Kelly v. Singer Mfg. Co.*, 4 Pa. Dist. 440; *Quesenberry v. People's Bldg., etc., Assoc.*, 44 W. Va. 512.

The reason why an affidavit of defense is made by an attorney, instead of by the party whom he represents, must be stated in the affidavit. *Davis v. Solomon*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 695.

374. 5. Title, Jurat, Etc. — See notes 2, 4.

375. VIII. SERVICE AND FILING. — See note 3.

IX. CONTROVERTING THE AFFIDAVIT. — See note 6.

374. 2. *Hill v. McBurney Oil, etc.*, Hutchins *v.* Maneely, 11 App. Cas. Co., 112 Ga. 788, *citing* 1 ENCYC. OF PL. (D. C.) 88.
AND PR. 374.

An Affidavit of Defense Must Be Sworn To. — *Weyna v. Bogert*, 10 Kulp (Pa.) 205.

4. Execution Before Notary Public. — When an affidavit of defense is filed in the *District of Columbia* it is valid when subscribed before a notary public who resides in Pennsylvania.

375. 3. In the *District of Columbia* it would seem that an affidavit of defense may be filed twenty-six days after filing the plea, when the plaintiff has taken no action. *Meyers v. Davis*, 13 App. Cas. (D. C.) 361.

6. *Strauss v. Hensey*, 7 App. Cas. (D. C.) 289; *Johnston v. Callery*, 173 Pa. St. 129.

AFFIRMATION.

378. III. AMERICAN STATUTE LAW. — See note 1.

380. IV. FORM. — See note 3.

378. 1. *Riddles v. State*, (Tex. Crim. 1898) 46 S. W. Rep. 1058.

380. 3. *Colvin v. People*, 166 Ill 82, in which case it was declared that although under a statute the affirma-

tion must be in the words, "You do solemnly, sincerely, and truly declare and affirm," the jurat need not show the form of the affirmation.

AFFRAY.

382. II. THE INDICTMENT — 1. The Form. — See note 2.

383. 3. Allegation of Place. — See notes 1, 2.

III. THE TRIAL — Both Must Be Convicted. — See note 3.

382. 2. *State v. Warren*, 57 Mo. App. 502.

383. 1. *Gamble v. State*, 113 Ga. 701; *State v. Griffin*, 125 N. Car. 692.

2. *State v. Warren*, 57 Mo. App. 502, holding that a charge that the place

was "a certain public road and highway" is sufficient where the statute reads "in any public place."

3. See *contra*, *State v. Griffin*, 125 N. Car. 692, in which case the court cited *obiter* *State v. Baker*, 83 N. Car. 649.

AGREED CASE.

385. II. NATURE OF THE AGREED CASE — 1. Purpose. — See note 2.

2. **Contents.** — See note 3.

386. Not Evidence, but Facts. — See note 1.

4. **Like a Special Verdict.** — See note 4.

387. 5. Judgment. — See notes 1, 2.

6. **What Is Not an Agreed Case.** — See note 3.

388. III. NATURE OF THE CONTROVERSY — 1. Generally. — See notes 1, 2.

385. 2. Validity of By-law Assumed. — In an action brought to determine the rights of parties under certain by-laws, the validity of the by-laws will be assumed. *Brundin v. Supreme Council, etc.*, 13 N. Y. App. Div. 147.

When Regarded as Motion. — Where an agreed case praying that a receiver pay over certain money is submitted, it will be regarded as a motion, and the court having jurisdiction of such a motion acquires jurisdiction of the case. *O'Clair v. Hale*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 31.

3. Facts Showing Jurisdiction. — An agreed case must state facts showing the jurisdiction of the parties and the subject-matter of the controversy. *Forney v. Huntingdon County*, 6 Pa. Super. Ct. 397.

386. 1. Burnham v. North Chicago St. R. Co., (C. C. A.) 78 Fed. Rep. 101.

4. *Hawks v. Goshen*, 144 Ind. 343 [citing 1 ENCYC. OF PL. AND PR. 386]; *Hinkle v. Kerr*, 148 Mo. 43; *Appleman v. American Sporting Goods Co.*, 64 Mo. App. 71; *Kellerman v. Kansas City, etc., R. Co.*, 68 Mo. App. 255, in which last case it was held that when supplementary evidence is introduced by agreement, the finding of the court will not be disturbed.

Findings of Fact by Court. — When a case is submitted upon a given statement of facts the court may render judgment thereon without making findings of fact. *McMenomy v. White*, 115 Cal. 339.

387. 1. Stanberry v. Jordan, 145 Mo. 371; *Marshall v. Hayward*, 67 N. Y. App. Div. 137; *Morgan v. Mercer*

County, 8 Pa. Super. Ct. 96; *Forney v. Huntingdon County*, 6 Pa. Super. Ct. 397.

2. **A Judgment for More Land than Is Described** in the stipulation is erroneous. *De Armond v. Whitaker*, 99 Ala. 252.

In North Carolina it has been held that when the question submitted in an agreed case involves the public good the court may render an opinion, even though the facts stated are not sufficient to base a judgment upon. *Farthing v. Carrington*, 116 N. Car. 315.

3. *Reddick v. Pulaski County Com'rs*, 14 Ind. App. 598.

An Admission in a Pleading of some of the facts alleged in the other party's pleading does not constitute an agreed case. *Scott v. Davis*, 141 Mo. 213.

Clerk's Certificate Not Conclusive. — The mere fact that a document is certified by the clerk as an agreed case does not make it one. *Wright v. Shelt*, 19 Ind. App. 1.

388. 1. White v. Clarke, 111 Cal. 425; *Kelley v. Hogan*, 69 N. Y. App. Div. 251.

2. *Bailey v. Johnson*, 121 Cal. 562, holding that the parties to an agreed case must be the real parties in interest; *Jefferson County Com'rs v. Gilliam*, 17 Mont. 333; *Clapp v. Guy*, 31 N. Y. App. Div. 535, holding that it must appear that one of the parties is aggrieved.

Action Must Be Pending. — To enable parties to make an agreed case there must be an action actually pending. If a judgment could not be rendered

388. 2. Affidavit of Reality. — See note 3.

389. IV. OFFICE OF STIPULATION — 1. Extent of Control by Parties. — See note 1.

390. 2. Effect as an Estoppel. — See note 1.

393. V. FUNCTION OF THE COURT — 1. Power of Inference. — See note 2.

394. 2. Abstract Questions. — See note 2.

395. 3. Power to Amend. — See note 4.

396. 4. Power to Discharge. — See note 1.

397. 5. Miscellaneous Powers. — See note 1.

398. VI. PRACTICE — 1. Parties. — See notes 1, 2.

in favor of one party or the other in an ordinary action or suit, a stipulation will not be regarded on an agreed case. *Smith v. Eline*, 4 Pa. Dist. 490.

388. 3. *White v. Clarke*, 111 Cal. 425; *Shelbyville v. Phillips*, 149 Ind. 552; *Troy Waste Mfg. Co. v. Harrison*, 73 Hun (N. Y.) 528; *Arnold v. Porter*, 119 N. Car. 123; *Johnson v. Cameron*, 2 Okla. 266. See also *Geisen v. Reder*, 151 Ind. 529; *Grandy v. Gulley*, 120 N. Car. 176, holding that the affidavit is jurisdictional.

389. 1. *Bedford Lodge, etc., v. Lentz*, 20 Pa. Co. Ct. 269 [quoting 1 ENCYC. OF PL. AND PR. 389]; *West Hartford v. Board of Water Com'rs*, 68 Conn. 323; *Forney v. Huntingdon County*, 6 Pa. Super. Ct. 397.

The Parties Cannot Limit the Judgment after agreeing on the facts. *Southern R. Co. v. City Council*, 49 S. Car. 449.

Stipulation as to Judgment. — In *Zarkowski v. Schroeder*, 60 N. Y. App. Div. 457, the controversy being in relation to the title to real estate, the submission provided that if the title was not clear the plaintiff should have judgment for damages and other appropriate relief, while if the title was found to be clear the parties were to "be left in their present condition." It was held that the submission was defective because it did not provide for judgment in the defendant's favor in case of a decision favorable to him.

390. 1. *Hinkle v. Kerr*, 148 Mo. 43 [quoting 1 ENCYC. OF PL. AND PR. 390]; *Wilcox v. San Jose Fruit Packing Co.*, 113 Ala. 519, holding that a party cannot introduce evidence to prove his contention or rebut facts stated therein by the other side; *Chicago, etc., R. Co. v. Central Trust Co.*, 41 N. Y. App. Div. 495, in which latter case the court said: "A submission upon an agreed state of facts becomes an action, and

admissions contained in the case must necessarily have all the effect which admissions contained in pleadings and a judgment thereon could possibly have."

393. 3. *Gallagher v. Hathaway Mfg. Corp.*, 169 Mass. 578; *Tanenbaum v. Simon*, (Supm. Ct. App. Div.) 75 N. Y. Supp. 922; *American Box Mach. Co. v. Zentgraf*, 45 N. Y. App. Div. 522; *Burnham v. North Chicago St. R. Co.*, (C. C. A.) 78 Fed. Rep. 101.

Questions Not in Issue. — The court is precluded from considering questions which do not appear to be in issue in the agreed case submitted. *Arapahoe County v. Hall*, 9 Colo. App. 538; *Missouri, etc., R. Co. v. Union Trust Co.*, 156 N. Y. 592.

394. 2. *Troy Waste Mfg. Co. v. Harrison*, 73 Hun (N. Y.) 528; *James v. Fennelle*, 21 Pa. Co. Ct. 91.

395. 4. *Montana Milling Co. v. Jefferis*, 16 Mont. 559, holding that if the amount to be recovered is inadvertently omitted, the court will allow the agreed case to be amended by inserting such amount therein after the case has been submitted.

396. 1. *Merrill v. Suffolk Mut. F. Ins. Co.*, (Mass. 1897) 46 N. E. Rep. 123, holding that the court may allow the parties to amend the statement of facts in order to cover all phases of the case.

397. 1. The Judgment Must Be Based upon the Facts Stated in the agreed case; any conclusions of law therein will be disregarded by the court. *Southern R. Co. v. City Council*, 49 S. Car. 449.

398. 1. *Selectmen of a Town* may be parties to an action submitted by an agreed case if all the residents of the town are bound by the judgment. *West Hartford v. Board of Water Com'rs*, 68 Conn. 323.

399. 2. Costs. — See note 2.

400. 3. Miscellaneous. — See note 1.

402. VIII. USE IN EVIDENCE OF THE AGREED CASE UPON A SUBSEQUENT TRIAL. — See note 2.

403. IX. APPEALS — 3. Necessity for Bill of Exceptions. — See note 5.

Execution of Agreed Case by Agent. — Where an agent is employed to defend a suit he cannot execute an agreed case unless he is specially authorized by the parties thereto. *Salamanca v. Cattaraugus County*, 81 Hun (N. Y.) 282.

2. Potter v. Talkington, (Idaho 1899) 59 Pac. Rep. 362, holding that an order making one a party to an agreed case is void and the case will be dismissed if the parties are not voluntarily before the court.

399. 2. In New York costs are taxable only when provided for by the stipulation. *Herkimer County Light, etc., Co. v. Johnson*, 37 N. Y. App. Div. 259. And see generally COSTS.

400. 1. Entry of Record. — The words in the *Illinois* statute, "to be entered of record," pertaining to an agreed case, have been construed to be directory only. *Farwell v. Sturges*, 58 Ill. App. 462.

402. 2. Compare Luther v. Clay, 100 Ga. 236, holding that where the agreed case is not expressly limited to the trial in which it is made it is admissible in evidence as an admission in any other trial or litigation between the same parties where the same issues are involved, but it is not absolutely binding and conclusive upon the parties.

403. 5. Geisen v. Reder, 151 Ind. 529. And see generally BILLS OF EXCEPTIONS.

New Trial. — In *New York* a motion for a new trial is necessary before an appeal will lie from a judgment based on an agreed case. *Kenney v. Sumner*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 86.

Record on Appeal. — When an appeal is taken the whole of the agreed case must be made part of the record on appeal. *Upper Appomattox Co. v. Buffalo*, 121 N. Car. 37.

ALIMONY.

408. I. GENERAL OBSERVATIONS ON ALIMONY — 1. As an Independent Right — a. GENERALLY. — See note 2.

409. b. JURISDICTION AND PROCEDURE. — See note 2.

410. c. DECREE. — See note 2.

411. Duration of Payment. — See note 1.

412. 2. As Incident to Some Other Proceeding. — See note 2.

II. JURISDICTION — 1. Divorce Courts. — See note 3.

2. Domicil. — See note 5.

413. 3. Appearance of Defendant. — See notes 1, 2.

408. 2. Colorado. — *Hanscom v. Hanscom*, 6 Colo. App. 97.

District of Columbia. — *Shaw v. Shaw*, 2 App. Cas. (D. C.) 204. See also *Tolman v. Tolman*, 1 App. Cas. (D. C.) 299.

Kentucky. — *Tilton v. Tilton*, (Ky. 1895) 29 S. W. Rep. 290.

Nebraska. — *Cochran v. Cochran*, 42 Neb. 612.

Washington. — *Kimble v. Kimble*, 17 Wash. 75.

Compare Johnson v. Johnson, 57 Kan. 313.

409. 2. Tolman v. Tolman, 1 App. Cas. (D. C.) 299.

410. 2. In Kansas it has been held that the court may set aside any property in the state for specific alimony, whether such property lies within the county in which the action is brought or not, but the land must be specifically described in the petition. *Wesner v. O'Brien*, 56 Kan. 724.

411. 1. Craig v. Craig, 163 Ill. 176; *Johns v. Johns*, 166 N. Y. 613; *Maxwell v. Sawyer*, 90 Wis. 352. See also *Millady v. Stein*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 652. *Compare Seibly v. Person*, 105 Mich. 584.

When Both Parties Die. — Pending an appeal from an order granting alimony the representatives of both the plaintiff and the defendant can litigate the question on appeal, in order that the alimony which accrued before the death of the wife may be collected. *Coffman v. Finney*, 65 Ohio St. 61.

A Homestead Cannot Be Set Apart for the use of the wife, by an order granting alimony under Civ. Code Cal.,

§ 146, for a longer period than the life of the innocent party. *Huellmantel v. Huellmantel*, 117 Cal. 407.

412. 2. Eickhoff v. Eickhoff, 14 Colo. App. 127; *Woolfolk v. Woolfolk*, 96 Ky. 659.

Permanent Alimony. — Permanent alimony should not be granted where a suit for divorce between the parties is pending. *Matter of Johnston*, 54 Kan. 726.

3. Gaston v. Gaston, 114 Cal. 542.

When Courts Have Concurrent Jurisdiction. — Where a husband and wife each sue for a divorce in different courts, both of which have jurisdiction to grant such divorce, the court which first acquired jurisdiction is the only court that can award alimony. *Mahn v. Mahn*, 63 Mo. App. 375.

5. De La Montanya v. De La Montanya, 112 Cal. 101.

413. 1. Coger v. Coger, 48 W. Va. 135 [quoting 1 ENCYC. OF PL AND PR. 413]; *Lynde v. Lynde*, 162 N. Y. 405; *Massey v. Stimmel*, 6 Ohio Dec 549, 5 Ohio N. P. 29; *Hekking v. Pfaff*, (C. C. A.) 91 Fed. Rep. 60. See also *Dillon v. Starin*, 44 Neb. 881.

When a Wife Is Unable to Obtain Service upon her husband in a proceeding for divorce on account of his absence from the state, she can proceed in the action to a decree, and thereafter, when she can get service, bring a separate action for alimony. *Adams v. Abbott*, 21 Wash. 29.

2. Alimony Before Return Day. — It was held in *Corbin v. Corbin*, 16 Pa. Co. Ct. 448, that alimony *pendente lite* could be granted under the service of

- 414.** 5. Application After Dissolution of Marriage. — See notes 5, 8, 9.
- 415.** 6. Where Cause Is Still Open. — See note 2.
7. Divorce *Ex Parte*. — See note 3.
- 416.** 8. Enforcing Decree in Another State. — See note 1.
- 417.** III. PROCEDURE — 2. Pleadings — *a*. PRAYER FOR ALIMONY. — See notes 4, 6. See also PRAYERS FOR RELIEF.
- 418.** *b*. WHEN TEMPORARY ALIMONY ASKED AND GRANTED. — See notes 4, 5, 6.

a subpoena on a defendant and before the return day of the subpoena or the appearance of the defendant.

Waiver of Service. — Where the defendant files an affidavit denying the allegations of the plaintiff, he waives service of summons. *Moody v. Moody*, 118 N. Car. 926.

414. 6. Kansas Statute. — Under Civ. Code Kan., § 643 (Gen. Stat. Kan., c. 96, § 64), the court has authority to divide property acquired by the joint labors of the husband and wife, although it is held in the name of the wife, and although, both parties being in fault, a decree of divorce is refused. *Raper v. Raper*, 58 Kan. 590.

8. *Ex p. O'Brien*, (Cal. 1897) 48 Pac. Rep. 71.

9. New York Statute. — Under Code Civ. Pro. N. Y., § 1759, subdiv. 2, providing that the court may enter a decree for alimony where a final judgment is rendered, it has been held that where the court dissolves a marriage and reserves the question of alimony for further consideration, it still retains jurisdiction to award such alimony as it deems proper. *Hauscheld v. Hauscheld*, 33 N. Y. App. Div. 296.

415. 2. In the District of Columbia alimony may be allowed on a divorce both *mensa et thora* and a *vinculo*. *Alexander v. Alexander*, 13 App. Cas. (D. C.) 334.

Laches. — Where a final decree for divorce *a vinculo* has been entered without an award of alimony, a supplemental decree granting alimony cannot be entered under Civ. Code Cal., § 138, and this is especially true if the time for appeal has expired. *Howell v. Howell*, 104 Cal. 45.

3. *Adams v. Abbott*, 21 Wash. 29, quoting 1 ENCYC. OF PL. AND PR. 415.

416. 1. *Waterhouse v. Waterhouse*, 8 Ohio Dec. 73, citing with approval 1 ENCYC. OF PL. AND PR. 416. See also *Miller v. Miller*, 21 Pa. Co. Ct. 252.

Sequestration. — In *Wood v. Wood*,

(C. Pl. Spec. T.) 31 Abb. N. Cas. (N. Y.) 235, 7 Misc. (N. Y.) 579, it was held that while the state court had jurisdiction and power to compel the payment of alimony decreed by a French court, it had no equity jurisdiction to sequester the defendant's property or to enter an order directing him to give ample security for the future payment of alimony.

417. 4. *Hecht v. Hecht*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 597. See also *Seibly v. Person*, 105 Mich. 584.

When a Prayer for Alimony Is Stricken Out of the complaint and the suit proceeds to a decree for divorce, an order for the payment of alimony is not justified. *Boyd v. Boyd*, 22 Tex. Civ. App. 200.

Alimony Claimed in Subpoena. — In *Seibly v. Person*, 105 Mich. 584, a subpoena which contained an underwriting stating that "a personal decree is sought against the defendant for divorce, and the bill is filed to reach interests in property, and not to obtain any further relief against the remainder of the defendants," was held to be sufficient indication of a claim for alimony.

6. *Arnold v. Arnold*, 140 Ind. 199.

418. 4. *De La Montanya v. De La Montanya*, 112 Cal. 101; *Fleming v. West*, 98 Ga. 778; *Hamill v. Talbott*, 81 Mo. App. 210; *Dillon v. Starin*, 44 Neb. 881; *Massey v. Stimmel*, 8 Ohio Cir. Dec. 237, 15 Ohio Cir. Ct. 439; *Scott v. Scott*, 9 S. Dak. 125; *Coger v. Coger*, 48 W. Va. 135; *Hekking v. Pfaff*, (C. C. A.) 91 Fed. Rep. 60.

Constructive Notice. — If, upon constructive notice, a wife fails to appear when she is made defendant in a suit for divorce, after a final decree in favor of the husband she will be estopped from demanding alimony. *Sprague v. Sprague*, 73 Minn. 474.

5. *Lynde v. Lynde*, 162 N. Y. 405.

6. *Thrall v. Thrall*, 83 Hun (N. Y.) 188. Compare *Noble v. Noble*, 20 N. Y. App. Div. 395.

419. See notes 2, 3.

420. See note 2.

c. PERMANENT ALIMONY. — See notes 4, 6.

d. DIVORCE AND ALIMONY SEPARATELY CONSIDERED.

— See note 7.

421. *c.* WHAT TO BE SHOWN TO WARRANT ALIMONY PENDENTE LITE. — See notes 3, 4, 6.

419. 3. Premature Application. — In *Halsted v. Halsted*, 21 N. Y. App. Div. 589, a decree for an absolute divorce in favor of the husband had been entered; on the wife's appeal the judgment of the lower court was reversed, but the wife applied for alimony *pendente lite* and counsel fees before the order of reversal was entered. It was held that this application was not premature.

3. Under Georgia Statute. — 2 Code Ga., § 2461, provides that "the judge presiding may, either in term or vacation, grant alimony." In *Ray v. Ray*, 109 Ga. 465, it was decided under this section that a petition for the payment of alimony *pendente lite* for the support of a wife and a child need not be filed during a session of court.

420. 3. Harding v. Harding, 79 Ill. App. 621.

4. Lonsdale v. Lonsdale, 41 N. Y. App. Div. 224.

6. Roe v. Roe, 52 Kan. 724.

Silence of Decree as to Alimony. — When a court enters a decree of divorce *a vinculo* and the decree is silent as to alimony, it will not thereafter entertain a motion for the payment of alimony. *Bassett v. Bassett*, 99 Wis. 344.

In *Kentucky* the statute allows a divorce *a vinculo* where it satisfactorily appears that a man and wife have been separated for five years, and the court will not inquire which of the parties was to blame for the separation. Where a husband obtains a divorce upon this ground the wife may, after judgment, come in and obtain alimony. *Lacey v. Lacey*, 95 Ky. 110; *Newsome v. Newsome*, 95 Ky. 383.

7. Alimony Without Divorce. — Where a woman marries a man knowing him to be addicted to the use of intoxicants she is not entitled to a divorce, but may under some circumstances be entitled to alimony and separate maintenance. *Tilton v. Tilton*, (Ky. 1895) 29 S. W. Rep. 290.

421. 3. Banks v. Banks, 42 Fla. 362; *McKenna v. McKenna*, 70 Ill. App. 340; *Shaw v. Shaw*, 92 Iowa 722.

When Marriage Is Denied by the Husband the court, in considering whether it will grant temporary alimony to the wife, will not at that time inquire into the validity of the marriage. *Bardin v. Bardin*, 4 S. Dak. 305. See also *Shaw v. Shaw*, 92 Iowa 722; *Finkelstein v. Finkelstein*, 14 Mont. 1.

But in *Kiefer v. Kiefer*, 4 Colo. App. 506, it was held that when a husband denies the existence of a marriage and pleads a prior divorce in another jurisdiction, temporary alimony will be refused.

Allegations of Marriage. — Allegations that the plaintiff has performed faithfully the duties of a wife to the defendant and all obligations as a mother to his children are not sufficient allegations of marriage to entitle the plaintiff to alimony or separate maintenance. *Miller v. Miller*, 43 S. Car. 306.

Evidence of Common-law Marriage has been held to be sufficient in *California* to support an order for the payment of temporary alimony and counsel fees. *Hite v. Hite*, (Cal. 1898) 55 Pac. Rep. 900.

Bigamy. — If it appears on the face of the pleadings or in the affidavits in a suit for separation that the marriage was bigamous, the wife will not be entitled to alimony *pendente lite*. *Blinks v. Blinks*, (N. Y. Super. Ct. Spec. T.) 5 Misc. (N. Y.) 193.

4. In Louisiana, before a wife can obtain alimony *pendente lite*, it must appear that she has resided continuously in the home assigned to her by the judge immediately after suit had been commenced for the separation. *Suberville v. Adams*, 46 La. Ann. 119.

6. Tolman v. Tolman, 1 App. Cas. (D. C.) 299; *Haddon v. Haddon*, 36 Fla. 413; *Carlin v. Carlin*, 65 Ill. App. 160; *Simpson v. Simpson*, 91 Iowa 235; *Shoemaker v. Shoemaker*, 5 Pa. Dist. 449.

Wife Need Not Exhaust Separate Estate. — The fact that a wife who is a complainant in a suit for separate maintenance has property of her own does

422. See notes 1, 3, 4, 5, 6, 7, 8, 9.

not prevent her from receiving temporary alimony. The law does not require her to exhaust her own resources before she shall be granted relief of that character. *White v. White*, 50 Ill. App. 149.

Amount.—When demanding alimony the plaintiff should state what amount will be sufficient to support herself and her children. *Arnold v. Arnold*, 140 Ind. 199.

423. 1. *Haddon v. Haddon*, 36 Fla. 413; *Carlin v. Carlin*, 65 Ill. App. 160; *Burghoffer v. Burghoffer*, 46 Ill. App. 396; *Simpson v. Simpson*, 91 Iowa 235; *Shoemaker v. Shoemaker*, 5 Pa. Dist. 449; *Baer v. Baer*, 3 Pa. Dist. 379; *Grant v. Grant*, 5 S. Dak. 17.

3. **In a Petition for Alimony Pendente Lite** the detailed history of petty quarrels and disagreements will be stricken from the complaint. *Smith v. Smith*, 50 S. Car. 54.

4. *Kendrick v. Kendrick*, 105 Ga. 38; *Glaser v. Glaser*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 231; *Levy v. Levy*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 374.

Developments in Trial.—After a court has allowed seventy-five dollars a month as temporary alimony, and it develops at the trial of another suit that the wife is an adulteress, the order for the payment of alimony may be suspended or modified in the discretion of the court. *Ronan v. Ronan*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 467.

5. **Demurrable Bill.**—Even if the wife's bill is demurrable, she will be entitled to alimony *pendente lite* if her husband files a cross-bill charging her with adultery and asking for divorce. *Funk v. Funk*, 81 Ill. App. 540.

6. *Brindley v. Brindley*, 115 Ala. 474; *Hite v. Hite*, (Cal. 1898) 55 Pac. Rep. 900; *Tolman v. Tolman*, 1 App. Cas. (D. C.) 299; *Gamble v. Gamble*, 57 Ill. App. 183.

Prima Facie Case.—A case based on information and belief is not a sufficient ground for allowing alimony *pendente lite* and counsel fees. *Downing v. Downing*, 23 N. Y. App. Div. 559.

When Ground to Cross-claim.—When the husband files a bill for divorce and the wife counterclaims charging him with adultery, she is entitled to alimony *pendente lite*. *Masey v. Masey*, 58 N. Y. App. Div. 619, 68 N. Y. Supp. 994.

7. *Gamble v. Gamble*, 57 Ill. App. 183.

Conditional Offer of Support.—When a wife prays for alimony *pendente lite* in an action for divorce, the fact that the husband offers to support her if she will return home should be disregarded by the court. *McCue v. McCue*, 149 Ind. 466.

The court in its discretion may refuse to grant alimony *pendente lite*, although the case made by the wife may be perfect. *Gray v. Gray*, 74 Ill. App. 509.

Contra.—A wife living separately from her husband brought a suit for permanent alimony and prayed temporary alimony until the final determination of her application. The husband thereupon brought a suit for absolute divorce, the wife filing a cross-bill and praying for temporary alimony, based upon the action for divorce. The court held that the result was to vacate the first order, which allowed temporary alimony, and to leave her second petition for temporary alimony to be decided upon its merits. *Berry v. Berry*, 98 Ga. 393.

8. *Cooper v. Cooper*, 85 Ill. App. 575.

Fault of Wife.—In granting alimony *pendente lite*, or suit money, the court will not consider whether the wife is at fault, although her conduct might have some influence on the amount of permanent alimony to be granted. *Cooper v. Cooper*, 85 Ill. App. 575.

When Adultery Is Charged and denied under oath by the wife, she should be allowed alimony *pendente lite*. *Israel v. Israel*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 57; *Miller v. Miller*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 758; *Rublinsky v. Rublinsky*, (N. Y. Super. Ct. Spec. T.) 24 N. Y. Supp. 920.

Support of Children.—Where a wife who is charged with adultery sets up the validity of a foreign marriage upon which her husband founds the charge of adultery, she is entitled to alimony *pendente lite* for the support of her children. *Bailie v. Bailie*, 5 N. Y. Annot. Cas. 193.

Denial of Wife.—Where the husband charges the wife with adultery and she makes no denial, alimony *pendente lite* will not be allowed. *Williams v. Williams*, 114 Ga. 772. But see the case of *Stearns v. Stearns*, (Supm. Ct. App. Div.) 53 N. Y. Supp. 348, in which

423. *f.* HEARING OF HUSBAND. — See notes 1, 3.

g. PARTIES. — See note 4.

h. HOW WIFE SUES. — See note 7.

424. 3. Evidence — Wife's Affidavit. — See note 2.

Affidavits and Depositions. — See note 5.

425. See note 1.

The Burden of Proving. — See notes 2, 3, 4.

it was held that a mere formal and general denial of adultery would not be sufficient to warrant a court in ordering the husband to pay alimony when the fact of the commission of the act was established by the testimony of several witnesses whose evidence was undenied and unexplained.

Adultery condoned by the husband will not bar a wife from alimony *pendente lite*. Kendrick v. Kendrick, 105 Ga. 38.

Plea to Merits. — It has been held that even where there is some competent evidence that a wife has committed adultery, the court will be justified in allowing alimony *pendente lite*. Heaton v. Heaton, 102 Ga. 578; Carroll v. Carroll, 68 Mo. App. 190; Gray v. Gray, 78 Hun (N. Y.) 610, (Supm. Ct. Gen. T.) 28 N. Y. Supp. 856; Rublinsky v. Rublinsky, (N. Y. Super. Ct. Spec. T.) 24 N. Y. Supp. 920; Cohen v. Cohen, (C. Pl. Spec. T.) 11 Misc. (N. Y.) 704.

9. Jurisdiction of Court. — In Gray v. Gray, 143 N. Y. 354, the plaintiff asked for divorce and alimony *pendente lite*. The acts of adultery upon which the divorce was founded were alleged to have been committed in Pennsylvania. The defendant, answering, averred that at the time the acts were alleged to have been committed both the plaintiff and the defendant were residents of the state of Pennsylvania. He denied the acts upon which the suit was founded and contended that the court had no jurisdiction, under the facts stated in the pleadings, to make an order for alimony *pendente lite*. The court held that the trial court had jurisdiction to grant an order for alimony *pendente lite*, and that it was not necessary for the court to determine questions of fact as to where the parties really resided before making such order. See also Miller v. Miller, 33 Fla 453.

Practice in Indiana. — Where the husband excepts to the jurisdiction of the court in an action for divorce, he cannot be compelled to show cause why he will not pay alimony until his excep-

tion to the jurisdiction of the court has been heard and determined. State v. St. Paul, 104 La. 6.

423. 1. Coger v. Coger, 48 W. Va. 135. *quoting* 1 ENCYC. OF PL. AND PR. 422.

A husband's answer to a prayer for alimony *pendente lite* must be confined to the statement of his ability to pay or that the wife has a separate estate, and any allegations tending to degrade the character of the complainant before marriage will be stricken out as irrelevant and scandalous. Tolman v. Tolman, 1 App. Cas. (D. C.) 299.

Hearing of Husband. — If the court hears the testimony of the wife on a motion to grant temporary alimony, it is reversible error to refuse to hear the husband. Rogers v. Rogers, 103 Ga. 763.

The court will not stop to try a question of insanity raised by the husband's answer when alimony *pendente lite* is prayed for by the wife. Storke v. Storke, 99 Cal. 621.

3. Corder v. Speake, (Oregon 1898) 51 Pac. Rep. 647.

4. Maharry v. Maharry, 5 Okla. 371.

7. People v. District Ct., 21 Colo. 251; Anderson v. Steger, 173 Ill. 112; Callies v. Callies, 91 Ill. App. 305; Garrison v. Garrison, 150 Ind. 417.

Parties Rendering Necessities to the Wife cannot be heard, in an action for divorce, to ask reimbursement. All orders for the payment of counsel fees, suit money, and maintenance must be in the name of the wife. Holmes v. Hamburger, 67 Ill. App. 121.

424. 2. Evidence as to the Amount of the Husband's Estate is not improperly considered on an application for temporary alimony. Driver v. Driver, (Ind. 1898) 52 N. E. Rep. 401.

5. Rogers v. Rogers, 103 Ga. 763.

425. 1. Rogers v. Rogers, 103 Ga. 763.

Oral Testimony. — Stewart v. Stewart, 28 Ind. App. 378.

2. Fowler v. Fowler, 31 Oregon 65.

3. Baer v. Baer, 3 Pa. Dist. 379.

4. Whelen v. Whelen, 8 Colo. App. 196.

426. See note 1.

Decision on Affidavits. — See note 4.

428. 4. Decree — *a.* FORM — Sum in Gross — Specific Property. — See notes 1, 4.

The Order for Temporary Alimony. — See note 5.

429. Award During Joint Lives. — See note 3.

430. *b.* MODIFICATION. — See note 1.

Temporary Alimony. — See note 2.

Findings of Fact by Court. — Under Code N. Car., § 1291, a judgment for alimony which is not based on a finding of fact by the court is void. *Moody v. Moody*, 118 N. Car. 926. See also *Zimmerman v. Zimmerman*, 113 N. Car. 432, in which it was held that a finding by the court that no answer had been filed was sufficient upon which to base an order for alimony *pendente lite*.

426. 1. *When Burden of Proof Shifts.* — When the husband fails to comply with the order directing the payment of temporary alimony, the burden of proof is upon him to satisfy the court that his failure was due solely to his financial inability to make the payment. *Hurd v. Hurd*, 63 Minn. 443.

4. *Cohen v. Cohen*, (C. Pl. Spec. T.) 11 Misc. (N. Y.) 704; *Rublinsky v. Rublinsky*, (N. Y. Super. Ct. Spec. T.) 24 N. Y. Supp. 920.

428. 1. *Seibly v. Person*, 105 Mich. 584; *Williams v. Williams*, 6 S. Dak. 284; *Hooper v. Hooper*, 102 Wis. 598. See also *King v. Miller*, 10 Wash. 274.

It Is Discretionary with the Chancellor whether alimony shall be paid in instalments or in a gross sum. *Irwin v. Irwin*, (Ky. 1899) 52 S. W. Rep. 927.

4. *Williams v. Williams*, 6 S. Dak. 284.

5. See *Heilbron v. Heilbron*, 158 Pa. St. 297, wherein it was held when alimony *pendente lite* only is asked, it is error to grant permanent alimony.

429. 3. *Maxwell v. Sawyer*, 90 Wis. 352.

430. 1. *Smith v. Smith*, 51 S. Car. 379 [quoting 1 ENCYC. OF PL. AND PR. 430]; *Brindley v. Brindley*, 115 Ala. 474; *Sharrit v. Sharrit*, 112 Ala. 617; *Owens v. Owens*, 56 Ill. App. 312; *Ferguson v. Ferguson*, 111 Iowa 158; *Bristow v. Bristow*, (Ky. 1899) 51 S. W. Rep. 819; *Smith v. Smith*, 77 Minn. 67; *Scales v. Scales*, 65 Mo. App. 292; *Rigney v. Rigney*, 62 N. J. Eq. 8; *Tonjes v. Tonjes*, 14 N. Y. App. Div. 542; *Greenleaf v. Greenleaf*, 6 S. Dak. 348. Compare *Livingston v. Livingston*, 46 N. Y. App. Div. 18.

Estoppel from Proceeding in Contempt. — A petition to modify an order for the payment of alimony will not estop the wife from proceeding in contempt for past noncompliance with the order. *Fricke v. Fricke*, 10 Ohio Cir. Dec. 203, 18 Ohio Cir. Ct. 433.

Reservation and Decree. — There need be no reservation in the decree that the court will, upon a change of circumstances, modify the decree for alimony in order to give to the court jurisdiction to make such an order of modification as it may deem equitable. *Alexander v. Alexander*, 13 App. Cas. (D. C.) 334.

Accrued Alimony. — Where a man has resisted the payment of alimony up to the time of his death, the court will not hear a personal representative on a motion for the modification of the amount already accrued. *Rigney v. Rigney*, 62 N. J. Eq. 8.

At What Term. — In *Ohio* the court will not hear a motion for the modification of alimony at the same term in which the order for the payment thereof was made and the judgment for divorce entered. *Law v. Law*, 64 Ohio St. 369.

Alimony for Gross Amount. — A judgment for a gross amount of alimony cannot be modified. *Barkman v. Barkman*, 94 Ill. App. 440.

New Order Not Necessary. — The court may modify an order for alimony by striking out words in the order already made. *Storke v. Storke*, 99 Cal. 621.

Husband's Ability to Pay. — Where the affidavits for and against an increase of temporary alimony leave the mind of the court in serious doubt as to the husband's ability to pay, an increase will be refused. *Grant v. Grant*, 5 S. Dak. 17.

Illegal Allowance. — Where a court has declared an allowance of alimony illegal, it will not thereafter entertain a motion to modify the amount of allowance. *Howell v. Howell*, 104 Cal. 45.

2. *Smith v. Smith*, 51 S. Car. 379, quoting 1 ENCYC. OF PL. AND PR. 430.

430. Permanent Alimony. — See notes 5, 6.

431. When Power Exercised. — See notes 1, 2.

432. Application for Modification. — See notes 1, 2, 3, 4.

433. c. ENFORCING DECREE — By What Tribunal. — See note 1.
In Other States. — See note 2.

430. 5. In North Carolina the court will not grant alimony after a divorce *a vinculo*. *Duffy v. Duffy*, 120 N. Car. 346.

6. *Moross v. Moross*, (Mich. 1901) 87 N. W. Rep. 1035.

The court has the right to reserve the power to control future payments of alimony and to modify them as it may deem proper. *Jones v. Jones*, 131 Ala. 443.

431. 1. *Jones v. Jones*, 131 Ala. 443. See also *Daugherty v. Daugherty*, 71 Ill. App. 301; *Rigney v. Rigney*, 62 N. J. Eq. 8; *Sibley v. Sibley*, 66 N. Y. App. Div. 552; *Wetmore v. Wetmore*, 70 N. Y. Supp. 604, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 640; *Williams v. Williams*, 6 S. Dak. 284. Compare *Gordon v. Gordon*, 111 Ga. 844.

Adjudication in Bankruptcy is not a sufficient change of circumstances of the defendant to warrant the court in modifying a decree for alimony when he is in receipt of the income from a trust fund unaffected by the bankruptcy proceedings. *Wetmore v. Wetmore*, 44 N. Y. App. Div. 220.

2. On a motion to modify an order for the payment of alimony, an allegation that the woman in whose favor such order was made committed adultery before the decree was entered, which fails to allege fraud in concealing the adultery is insufficient. *Daugherty v. Daugherty*, 71 Ill. App. 301.

432. 1. In Nebraska the district courts are vested with jurisdiction to hear and determine applications for the modification of decrees for permanent alimony. *State v. Cook*, 51 Neb. 822.

2. *State v. Dltmar*, 19 Wash. 324.

3. The justice who made an order for the payment of alimony *pendente lite* ought to hear the application for modification. *Newell v. Newell*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 117.

4. In Illinois it is not necessary to file a separate petition to modify an order for prospective alimony, although the filing of such petition is the usual practice. *Craig v. Craig*, 163 Ill. 176.

Construction of Order. — Where for a

long time parties have agreed upon the construction of an order for the payment of alimony, the court will adopt their construction and will refuse to compel the defendant to pay more alimony by virtue of the original order. *Mooney v. Mooney*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 386.

Modification When in Contempt. — Usually courts will not modify an order to pay alimony when the petitioner is in contempt, although they have the power to do so. *Craig v. Craig*, 163 Ill. 176.

433. 1. Separate Action. — Alimony is unliquidated pending the litigation, and cannot be recovered in a separate action until after the determination of the suit for divorce. *Cutler v. Cutler*, 88 Ill. App. 464.

In *Vine v. Vine*, 21 R. I. 190, it was held that a decree for alimony *pendente lite* is interlocutory and cannot be made the foundation of a separate action.

In New York a decree for temporary alimony must not only be enforced in the court which granted it, but it must be enforced while the action for divorce is pending. After the discontinuance of an action for divorce a wife cannot enforce a claim for alimony *pendente lite* against her husband's assignee for the benefit of creditors. *Matter of Thrall*, 12 N. Y. App. Div. 235.

A Woman Waives Her Right to have a decree for alimony enforced by waiting seventeen years after its rendition and seven years after her remarriage before petitioning the court to compel payment. *Franck v. Franck*, (Ky. 1899) 54 S. W. Rep. 195.

2. *Waterhouse v. Waterhouse*, 8 Ohio Dec. 73 [citing with approval 1 ENCYC. OF PL. AND PR. 433]; *Brisbane v. Dobson*, 50 Mo. App. 170; *Wood v. Wood*, (C. Pl. Spec. T.) 31 Abb. N. Cas. (N. Y.) 235, 7 Misc. (N. Y.) 579.

Another State. — Where a husband obtains a valid decree of divorce from his wife in another state, and no order is made with reference to alimony, the wife cannot thereafter, in an action brought in Kansas to obtain a divorce and alimony, obtain a decree for ali-

434. See note 1.

The Methods Employed. — See notes 6, 9.

435. See notes 2, 3.

436. See notes 5, 6, 7.

437. Attachment for Contempt. — See notes 2, 4. See also CONTEMPT.

mony alone in the absence of any showing that the law of the state where the divorce was granted is different from the law of Kansas. *Roe v. Roe*, 52 Kan. 724.

434. 1. *Brisbane v. Dobson*, 50 Mo. App. 170.

In *Lynde v. Lynde*, 41 N. Y. App. Div. 280, it was held that the court will not enforce the payment of alimony on a decree granting alimony rendered in another state in any manner provided for the collection of alimony except as a simple money judgment. Resort cannot be had to the usual methods of requiring the defendant to give bonds, enjoining him from alienating his property, and sequestration.

6. *Fleming v. Peterson*, 167 Ill. 465.

9. *Brisbane v. Dobson*, 50 Mo. App. 170.

435. 2. *Halsted v. Halsted*, 21 N. Y. App. Div. 466.

3. *Matter of Cave*, 26 Wash. 213, citing 1 ENCYC. OF PL. AND PR. 434.

436. 5. *Maharry v. Maharry*, 5 Okla. 371.

Service of Order. — A bill will not be dismissed on account of the failure of the plaintiff to pay temporary alimony unless the order for the payment of such alimony has been personally served upon him. *Scott v. Scott*, 9 S. Dak. 125.

6. *Smith v. Smith*, 18 Wash. 158, citing 1 ENCYC. OF PL. AND PR. 436.

Refusal to Entertain Appeal. — The payment of temporary alimony may be enforced by the refusal of an appellate court to determine an appeal from an order refusing to modify a judgment for permanent alimony. *Williams v. Williams*, 6 S. Dak. 284.

7. *Compare Foley v. Foley*, 120 Cal. 33.

Failure to Comply with Order for Alimony Pendente Lite. — It has been held that the answer should not be stricken because of the defendant's failure to comply with an order for payment of alimony *pendente lite*. *McMakin v. McMakin*, 68 Mo. App. 57; *Scott v. Scott*, 9 S. Dak. 125.

Loss of Jurisdiction. — The court does

not lose jurisdiction to determine the action by striking the defendant's answer from the files in order to compel him to pay alimony *pendente lite*. *Hughes v. Kepley*, 60 Kan. 859, 58 Pac. Rep. 556.

When Defendant Appears and Answers. — Although the court may strike the defendant's answer from the files on account of his failure to pay temporary alimony, it is without power to strike his appearance from the record. *Knott v. Knott*, 6 N. Y. App. Div. 589. See also *Larson v. Larson*, 9 S. Dak. 1.

437. 2. *Stonehill v. Stonehill*, 146 Ind. 445 [citing 1 ENCYC. OF PL. AND PR. 437, 438]; *Matter of Cave*, 26 Wash. 213 [citing 1 ENCYC. OF PL. AND PR. 437]; *People v. District Ct.*, 21 Colo. 251; *Barclay v. Barclay*, 184 Ill. 471; *McSherry v. McSherry*, 49 Ill. App. 90; *Mercer v. Mercer*, 73 Hun (N. Y.) 192; *Reese v. Reese*, 46 N. Y. App. Div. 156; *Ronan v. Ronan*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 467; *Hecht v. Hecht*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 597; *Myers v. Myers*, 4 Ohio Dec. 217; *Lubbering v. State*, 10 Ohio Cir. Dec. 508, 19 Ohio Cir. Ct. 658; *State v. Smith*, 17 Wash. 430. But see *Hart v. Hart*, 1 Ohio Dec. 94, 1 Ohio N. P. 56, in which it was held that the proper mode of enforcing an order to pay alimony in gross is by execution and not by proceedings in contempt.

When Punishment for Contempt Inflicted by Appellate Court. — Where an appellate court orders the payment of alimony pending the appeal, it has jurisdiction to punish the defendant for refusing to pay the alimony. *Tolman v. Leonard*, 6 App. Cas. (D. C.) 224.

Counsel Fees. — The payment of costs and counsel fees may be enforced by attachment for contempt. *Hilt v. Hilt*, 23 Pa. Co. Ct. 422.

Judgments Rendered in Foreign State. — The court has no jurisdiction to punish a defendant for refusing to pay a judgment for alimony rendered in another state. *Lynde v. Lynde*, 162 N. Y. 405.

4. *Ervay v. Ervay*, 120 Mich. 525; *Delanoy v. Delanoy*, 19 N. Y. App.

438. See notes 1, 3, 4, 5, 7, 8.

439. When Remedy by Attachment. — See notes 1, 4, 5.

Imprisonment for Debt. — See note 6.

442. 5. Securing Alimony and Defeating Frauds Thereon —
a. SECURING ALIMONY — (2) *Writ of Injunction*. — See notes
1, 2, 5.

443. Receiver. — See note 6. See also RECEIVERS.

Div. 295; *Luther v. Luther*, 25 Pa. Co. Ct. 16; *Larson v. Larson*, 9 S. Dak. 1.

438. 1. *Barclay v. Barclay*, 184 Ill. 471; *Ervay v. Ervay*, 120 Mich. 525; *Delaney v. Delaney*, 19 N. Y. App. Div. 295; *Kaderabek v. Kaderabek*, 2 Ohio Cir. Dec. 236.

When Demand Not Necessary. — Where it is in evidence that the husband has before demand declared that he would never pay alimony, it is not necessary to allege or prove a demand before proceeding to punish him for contempt. *State v. Dittmar*, 19 Wash. 324.

3. *State v. King*, 49 La. Ann. 1503; *Kaderabek v. Kaderabek*, 2 Ohio Cir. Dec. 236.

4. Where a Husband Stipulates to Pay Alimony he assumes a contractual obligation and cannot be imprisoned for contempt on his failure to comply with the terms of the contract. *Glynn v. Glynn*, 8 N. Dak. 233.

5. *Wester v. Martin*, 115 Ga. 776 [citing 1 ENCYC. OF PL. AND PR. 437, 438]; *Ex p. Silvia*, 123 Cal. 293; *Kadlowsky v. Kadlowsky*, 63 Ill. App. 292; *Schuele v. Schuele*, 57 Ill. App. 189; *McSherry v. McSherry*, 49 Ill. App. 90; *Pancost v. State*, 8 Ohio Cir. Dec. 546, 15 Ohio Cir. Ct. 246.

7. *Hurd v. Hurd*, 63 Minn. 443. See also *Tolman v. Leonard*, 6 App. Cas. (D. C.) 224.

8. *McSherry v. McSherry*, 49 Ill. App. 90; *Hurd v. Hurd*, 63 Minn. 443; *State v. Smith*, 17 Wash. 430.

Unemployed Defendant. — The court has no jurisdiction to compel a man to seek work in order to obtain money to pay alimony when his answer shows that he has been unemployed for a long time. *Ex p. Todd*, 119 Cal. 57.

439. 1. *Flower v. Flower*, (N. J. 1901) 49 Atl. Rep. 158. See also *Beeder v. State*, 55 Neb. 133, holding that refusal to comply with an order for the payment of permanent alimony cannot be treated as contempt unless fraud is positively shown.

4. *Matter of Cave*, 26 Wash. 213.

5. See *Davidson v. Davidson*, 29 N. Y. App. Div. 629.

6. *Smith v. Smith*, 51 S. Car. 379 [quoting 1 ENCYC. OF PL. AND PR. 439]; *Matter of Cave*, 26 Wash. 213 [citing 1 ENCYC. OF PL. AND PR. 439]; *Tolman v. Leonard*, 6 App. Cas. (D. C.) 224; *State v. King*, 49 La. Ann. 1503; *Hurd v. Hurd*, 63 Minn. 443; *Effinger v. State*, 5 Ohio Cir. Dec. 408.

Remedy by Scire Facias. — The fact that a defaulting defendant may be forced by scire facias to pay alimony will not prevent the court from punishing him for a wilful refusal to comply with its order. *State v. King*, 49 La. Ann. 1503.

Habeas Corpus. — Where one has been imprisoned for contemptuous refusal to pay alimony, the court will not review on habeas corpus the validity of the order entered for its payment. *Matter of Cave*, 26 Wash. 213.

442. 1. *Van Orden v. Van Orden*, 58 N. J. Eq. 545.

2. *Smith v. Smith*, 51 S. Car. 379, quoted 1 ENCYC. OF PL. AND PR. 442.

5. See *Fletcher v. Fletcher*, 7 Ohio Cir. Dec. 605, holding that where the persons who have an interest in the property have been made parties it will be unnecessary to issue an injunction against them in order to prevent a transfer of the property to the injury of the wife.

443. 6. *Huellmantel v. Huellmantel*, 124 Cal. 583; *Seibly v. Person*, 105 Mich. 584.

When a Husband Is a Nonresident a receiver may be appointed where it is alleged without denial that he is about to transfer his property in order to defeat the claim for alimony. *Anderson v. Anderson*, 124 Cal. 48.

Receiver and Execution. — When a receiver of the husband's property has been appointed in order to enforce the payment of alimony, an execution against the same property for the collection of alimony cannot thereafter be issued. *Anderson v. Anderson*, 123 Cal. 445.

Action to Reach Assets. — When a receiver has been appointed the wife may bring an independent action to

444. (3) *Decree as Lien on Land.* — See note 3.

445. (4) *Requiring Security.* — See notes 1, 6.

446. *h.* FRAUDULENT ASSIGNMENTS. — See note 1. And see CREDITORS' BILLS AND FRAUDULENT CONVEYANCES.

6. Appeals. — See notes 5, 6. See also APPEALS.

Discretion as to Amount. — See note 7.

restrain certain administrators and executors from paying a legacy to the husband, and to compel them to pay such legacy into the hands of the receiver. *Garden v. Garden*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 97.

444. 3. *McSherry v. McSherry*, 49 Ill. App. 90; *Trumble v. Trumble*, 26 Wash. 133.

Colorado Statute. — *Mills's Annot. Stat. Colo.* (1891), § 1567, which authorizes the court to enforce the payment of alimony and maintenance in any manner consistent with the rules and practice of the court, will not justify the court in making such order for alimony a lien on the real estate of the husband. *Johnson v. Johnson*, 22 Colo. 20.

445. 1. *Petaluma Sav. Bank v. Superior Ct.*, 111 Cal. 488, decided under Civ. Code Cal., § 140.

6. *Burnside v. Wand*, 77 Mo. App. 382.

446. 1. **Necessity to Allege Husband's Insolvency.** — A suit instituted by a wife to set aside a conveyance of property made to defraud her of alimony must sufficiently allege the insolvency of the grantor at the time the transfer was made. *De Ruiter v. De Ruiter*, 28 Ind. App. 9.

5. *Fletcher v. Fletcher*, (Ky. 1900) 54 S. W. Rep. 953; *Chappell v. Chappell*, 86 Md. 532.

Support of Children. — Money ordered to be paid for the support of children is not alimony, and no appeal can be taken from an order directing the payment of money for such purpose. *Rogers v. Rogers*, 51 Ohio St. 1.

What May Be Reviewed on Appeal. — On an appeal from an order refusing or granting alimony the whole record may be reviewed by the court, and all the evidence upon which the judgment for divorce was founded will be considered. *Beeler v. Beeler*, (Ky. 1898) 44 S. W. Rep. 136. See also *Masterson v. Masterson*, (Ky. 1898) 46 S. W. Rep. 20, holding that the court may reverse a judgment for divorce improperly granted and may sustain an order

made in the same case for the payment of alimony.

6. *Wolff v. Wolff*, (Cal. 1894) 37 Pac. Rep. 858; *People v. District Ct.*, 21 Colo. 251; *McKennon v. McKennon*, 10 Okla. 400.

Appeal from Order Modifying Decree. — An appeal will lie from an order for the modification of a decree for alimony. *State v. Cook* 51 Neb. 822.

An Order Compelling a Nonresident to Pay Alimony is appealable. *De La Montanya v. De La Montanya*, 112 Cal. 101.

Motion for New Trial. — In *Maine*, in order to have the appellate court entertain an appeal from an order for the payment of alimony and the custody of children, it is necessary to file a motion for a new trial in the court below. *Deidesheimer v. Deidesheimer*, 74 Mo. App. 234.

Exceptions Must Be Saved. — No appeal will be considered from an order granting alimony *pendente lite* unless the exception was saved at the proper time in the court below. *Hinrichs v. Hinrichs*, 84 Mo. App. 27. See also EXCEPTIONS AND OBJECTIONS.

7. *Alabama.* — *Rast v. Rast*, 113 Ala. 319.

California. — *Rose v. Rose*, 109 Cal. 544.

District of Columbia. — *Tolman v. Tolman*, 1 App. Cas. (D. C.) 299.

Florida. — *Haddon v. Haddon*, 36 Fla. 413.

Georgia. — *Collins v. Collins*, 94 Ga. 490.

Illinois. — *Cooper v. Cooper*, 85 Ill. App. 575; *Gamble v. Gamble*, 57 Ill. App. 183; *Gray v. Gray*, 74 Ill. App. 509.

Indiana. — *Gussman v. Gussman*, 140 Ind. 433.

Kansas. — *Neddo v. Neddo*, 56 Kan. 507.

Kentucky. — *Masterson v. Masterson*, (Ky. 1898) 46 S. W. Rep. 20.

Louisiana. — *Carroll v. Carroll*, 48 La. Ann. 835.

Nebraska. — *Heist v. Heist*, 48 Neb. 794; *Wilde v. Wilde*, 37 Neb. 891.

447. See note 1.

Abuse of Discretion. — See note 3.

Alimony Pendente Lite. — See note 4.

448. See notes 2, 4, 5, 6, 7.

New York. — *McCarthy v. McCarthy*, 143 N. Y. 235; *Patterson v. Patterson*, 4 N. Y. App. Div. 146; *Aldrich v. Aldrich*, 74 Hun (N. Y.) 638, 26 N. Y. Supp. 344.

West Virginia. — *Wass v. Wass*, 42 W. Va. 460.

Amount of Suit Money Named in Petition. — The court, in allowing suit money, is not bound by the amount prayed for in the petition, and may order the payment of a larger sum. *Rose v. Rose*, 109 Cal. 544.

Limitation as to Amount of Alimony. — Where a statute limits the amount of money for which a court can render a judgment, it would seem that an order to pay as alimony more money than the amount named in the statute is void. *Hall v. Harrington*, 7 Colo. App. 474. See also *Wilson v. Wilson*, 67 Minn. 444.

447. 1. *Rose v. Rose*, 109 Cal. 544; *Haddon v. Haddon*, 36 Fla. 413; *Yost v. Yost*, 141 Ind. 584. See also *Aurand v. Aurand*, 55 Ill. App. 426; *Cochran v. Cochran*, 42 Neb. 612.

8. Alabama. — *Brindley v. Brindley*, 115 Ala. 474; *Rast v. Rast*, 113 Ala. 319; *Sharrit v. Sharrit*, 112 Ala. 617.

California. — *Wolff v. Wolff*, (Cal. 1894) 37 Pac. Rep. 858; *Anderson v. Anderson*, 124 Cal. 48.

Colorado. — *Taylor v. Taylor*, 7 Colo. App. 549.

District of Columbia. — *Shaw v. Shaw*, 2 App. Cas. (D. C.) 204.

Georgia. — *Bender v. Bender*, 98 Ga. 717; *Culpepper v. Culpepper*, 98 Ga. 304; *Vinson v. Vinson*, 94 Ga. 493; *Collins v. Collins*, 94 Ga. 490.

Illinois. — *Cooper v. Cooper*, 85 Ill. App. 575; *Aurand v. Aurand*, 55 Ill. App. 426; *White v. White*, 50 Ill. App. 151.

Indiana. — *McCue v. McCue*, 149 Ind. 466; *Yost v. Yost*, 141 Ind. 584; *Sellers v. Sellers*, 141 Ind. 305; *Gussman v. Gussman*, 140 Ind. 433; *Breedlove v. Breedlove*, 27 Ind. App. 560.

Kansas. — *Neddo v. Neddo*, 56 Kan. 507.

Kentucky. — *Brown v. Brown*, (Ky. 1896) 33 S. W. Rep. 830; *Russell v. Russell*, (Ky. 1895) 32 S. W. Rep. 619; *Thiesing v. Thiesing*, (Ky. 1894) 26 S. W. Rep. 718.

Louisiana. — *Carroll v. Carroll*, 48 La. Ann. 835.

Michigan. — *Kirkland v. Kirkland*, 111 Mich. 166; *Horning v. Horning* 107 Mich. 587.

Minnesota. — *Becker v. Bohmert*, 63 Minn. 403.

Montana. — *Finkelstein v. Finkelstein*, 14 Mont. 1.

Nebraska. — *Brasch v. Brasch*, 50 Neb. 73; *McGeachie v. McGeachie*, 43 Neb. 523; *Wilde v. Wilde*, 37 Neb. 891.

New York. — *Thrall v. Thrall*, 83 Hun (N. Y.) 188; *Aldrich v. Aldrich*, 74 Hun (N. Y.) 638, 26 N. Y. Supp. 344; *Patterson v. Patterson*, 4 N. Y. App. Div. 146.

Pennsylvania. — *Com. v. Herr*, 16 Pa. Co. Ct. 598.

South Dakota. — *Williams v. Williams*, 6 S. Dak. 284.

Virginia. — *Heninger v. Heninger*, 90 Va. 271.

Wisconsin. — *McChesney v. McChesney*, 91 Wis. 268.

Allowance of One-third of Income. — It is not necessarily an abuse of discretion to allow to the wife one-third of the husband's income. *Razor v. Razor*, 149 Ill. 621.

One-half of Income of Community Property. — It is abuse of discretion, unless a strong *prima facie* case is made, to allow one-half of the income of the community property as alimony *pendente lite*. *Bohan v. Bohan*, (Tex. Civ. App. 1900) 56 S. W. Rep. 959.

4. Stewart v. Stewart, 28 Ind. App. 378; *Chappell v. Chappell*, 82 Md. 647.

448. 2. Sellers v. Sellers, 141 Ind. 305.

In Georgia an order refusing temporary alimony is appealable upon a "fast" writ of error by virtue of Code Ga. (1882), § 1748 (2 Code Ga. 1895, § 2468), but such appeal must be taken and prosecuted with due diligence. *Bender v. Bender*, 98 Ga. 717.

Appeal from Final Order—Review of Order Pendente Lite. — When a final judgment of divorce and final order for the payment of alimony are before the appellate court for review, it will not consider an order for alimony which was made by the trial court *pendente lite*. *Williams v. Williams*, 6 S. Dak. 284.

449. See note 1.

Grant by Appellate Court. — See note 7.

450. Collateral Attack. — See note 4.

IV. SUIT MONEY, COUNSEL FEES, AND COSTS — 1. Definitions. — See notes 5, 6.

452. **2. Suit Money — Of What It Consists.** — See note 1.

When Made. — See note 9.

On Final Hearing. — See notes 12, 13, 14.

453. Discretion of Court. — See note 1.

448. **4. People v. Cook County Circuit Ct., 169 Ill. 201; Elzas v. Elzas, 183 Ill. 160; Harding v. Harding, 79 Ill. App. 691; Earle v. Earle, 75 Ill. App. 351; Hall v. Hall, 77 Miss. 741; Rosenfeld v. Rosenfeld, 63 Mo. App. 411; Disbrough v. Disbrough, 51 N. J. Eq. 306; Pollock v. Pollock, 7 S. Dak. 331.**

5. Rosenfeld v. Rosenfeld, 63 Mo. App. 411.

6. Rosenfeld v. Rosenfeld, 63 Mo. App. 411; Disbrough v. Disbrough, 51 N. J. Eq. 306.

7. Disbrough v. Disbrough, 51 N. J. Eq. 306; Pollock v. Pollock, 7 S. Dak. 331.

449. **1. Rosenfeld v. Rosenfeld, 63 Mo. App. 411; Pollock v. Pollock, 7 S. Dak. 331.**

7. Tolman v. Leonard, 6 App. Cas. (D. C.) 224; Hall v. Hall, 77 Miss. 741; Disbrough v. Disbrough, 51 N. J. Eq. 306; Winkemeier v. Winkemeier, 11 N. Y. App. Div. 301, holding that a meritorious showing must be made. See also Taylor v. Taylor, 7 Colo. App. 549, holding that when a woman sues for a divorce and the court finds that there has been no valid marriage she is not entitled to alimony pending an appeal from such a decision.

450. **4. Brandt v. Brandt, 40 Or. 477.**

5. Rast v. Rast, 113 Ala. 319; Elzas v. Elzas, 183 Ill. 160; Shepherd v. Shepherd, 18 Pa. Co. Ct. 614; Bloom v. Bloom, 17 Pa. Co. Ct. 478; McClelland v. McClelland, (Tex. Civ. App. 1896) 37 S. W. Rep. 350.

When the Wife Is the Defendant and alleges a strong prima facie case in her cross-complaint, counsel fees will be allowed to her. Masey v. Masey, 58 N. Y. App. Div. 619, 68 N. Y. Supp. 994.

6. Gamble v. Gamble, 57 Ill. App. 183; Yost v. Yost, 141 Ind. 584; Paule v. Paule, 17 Pa. Co. Ct. 147; Wass v. Wass, 42 W. Va. 460.

Adultery Denied under Oath. — Expenses of litigation will be allowed to a wife charged with adultery if she denies the charge under oath. *Rubinsky v. Rubinsky*, (N. Y. Super. Ct. Spec. T.) 24 N. Y. Supp. 920.

452. **1. Past Expenses.** — In the discretion of the court an allowance may be made for past expenses of litigation. *Winkemeier v. Winkemeier*, 11 N. Y. App. Div. 199. See also *Schuster v. Schuster*, 84 Minn. 403, in which case the court held that the husband could be compelled to pay an attorney's fee incurred in a former trial of the same action. Past expenses will not be allowed except where such payment is necessary to be made in order to enable the wife to prosecute or defend her case. *Loveren v. Loveren*, 100 Cal. 493.

Traveling Expenses. — The court may allow traveling expenses of the libelee incurred in coming from another state to defend an action for divorce. *Fernald v. Fernald*, 5 Pa. Super. Ct. 629.

8. Counsel Fees Allowed When Alimony Refused. — When the charges in a husband's complaint for divorce institute a long and expensive litigation, an extra allowance for counsel fees will be made to the wife, notwithstanding the fact that she has a separate estate and is not entitled to alimony. *Shaw v. Shaw*, (Buffalo Super. Ct. Spec. T.) 5 Misc. (N. Y.) 497.

12. Brasch v. Brasch, 50 Neb. 73. See also *Rose v. Rose*, 109 Cal. 544, holding that suit money may be allowed from time to time as expenses increase or difficulties multiply.

13. Contra, Johnson v. Johnson, 57 Kan. 343.

14. Johnson v. Johnson, 57 Kan. 343.

453. **1. Plant v. Plant, 63 Ark. 128; Tolman v. Tolman, 1 App. Cas. (D. C.) 299; Earle v. Earle, 60 Ill. App. 360; Hilker v. Hilker, 153 Ind. 425; Brasch v. Brasch, 50 Neb. 73.**

453. 3. Counsel Fees. — See notes 3, 4.

454. The Amount. — See notes 1, 3, 4.

The Number of Attorneys. — See note 5.

No Proof Is Necessary. — See note 8.

When Allowance Refused. — See notes 10, 11.

455. On Appeal. — See notes 2, 3.

456. 4. Costs — Costs Against Wife. — See note 2.

453. 3. *Baillie v. Baillie*, 5 N. Y. Annot. Cas. 193; *Kunze v. Kunze*, 5 N. Y. Annot. Cas. 8.

4. Sufficiency of Petition. — A petition for counsel fees which alleges that the libellant "is the owner of a good farm and other valuable property sufficient to pay said sum" is too vague and general a statement to enable the court to know what counsel fee, if any, should be paid. *Baer v. Baer*, 3 Pa. Dist. 379.

Where a petition for counsel fees in an action by the wife for a separation alleges that the petitioner owes an attorney certain moneys for certain services performed, without stating what the services were, it is insufficient and no allowance will be made. *Emerson v. Emerson*, (Supm. Ct. Spec. T.) 26 N. Y. Supp. 291.

The mere fact that a petition for counsel fees alleges that if counsel are not paid for their past services they will abandon the petitioner's cause does not make it a *prima facie* case entitling the petitioner to the allowance. *Emerson v. Emerson*, (Supm. Ct. Spec. T.) 26 N. Y. Supp. 292.

454. 1. *Parker v. Parker*, 71 Miss. 164.

3. *Parker v. Parker*, 71 Miss. 164, holding that the amount allowed should be large enough to secure to the wife the service of competent counsel.

4. In Delaware it is against the policy of the court to grant a large amount for suit money and counsel fees on the first application. If the amount so granted is not sufficient it is the practice for the wife to apply for more. *Addicks v. Addicks*, 1 Mar. (Del.) 338.

5. *Rogers v. Rogers*, 103 Ga. 763, holding that where a number of attorneys are employed it is necessary to

show that the employment of so many was necessary to protect the wife's interest before the court will allow counsel fees to each one.

8. *McCloskey v. McCloskey*, 68 Mo. App. 199.

10. When Bill Dismissed on Motion of Wife. — Allowance of counsel fees and costs will be refused where the action for divorce has been dismissed by the wife. *Carden v. Carden*, (Tenn. Ch. 1896) 37 S. W. Rep. 1022.

11. *Van Vleck v. Van Vleck*, 21 N. Y. App. Div. 272.

455. 2. *Schuster v. Schuster*, 84 Minn. 403; *Cohen v. Cohen*, (C. Pl. Spec. T.) 11 Misc. (N. Y.) 704, 1 N. Y. Annot. Cas. 226; *Halsted v. Halsted*, (C. Pl. Spec. T.) 11 Misc. (N. Y.) 592.

3. *Elzas v. Elzas*, 83 Ill. App. 523.

In order to entitle a woman to collect counsel fees on appeal, it must appear that the defendant is financially able to comply with an order compelling him to make a payment for such purpose. *Engleman v. Engleman*, 97 Va. 487.

More Question of Fact Involved. — If the wife's case on appeal alleges no specific error of law, the case made showing only a dispute as to questions of fact, and it appears exceedingly doubtful whether her action will be sustained, counsel fees on appeal will be denied with leave for her to amend her papers and renew the request. *Gansz v. Gansz*, (Supm. Ct. Spec. T.) 59 N. Y. Supp. 955.

456. 2. *Carden v. Carden*, (Tenn. Ch. 1896) 37 S. W. Rep. 1022.

Dismissal of Suit. — When the court dismisses both the wife's complaint and the husband's cross-bill, costs may be taxed against the wife. *Payne v. Payne*, 96 Tenn. 59. See also *Brasfield v. Brasfield*, 96 Tenn. 580.

AMENDMENTS.

463. II. OF PLEADINGS AND PROCEEDINGS IN EQUITY — 1. The Cardinal Rule — *a.* AMENDMENTS DISCRETIONARY. — See note 1.

464. In Furtherance of Justice. — See note 1.

b. REVIEW OF EXERCISE OF DISCRETION. — See note 5.

466. See note 1.

2. Of Bills — *a.* IN RESPECT OF PARTIES — Change of Parties. — See note 2.

467. See note 1.

At What Stage. — See note 6.

469. *b.* IN RESPECT OF MATTER — (1) *In General.* — See note 1.

470. See note 1.

463. 1. *Wolverton v. Taylor*, 157 Ill. 485 [citing 1 ENCYC. OF PL. AND PR. 463]; *Shaw v. Monson* Maine State Co., 96 Me. 41; *Insurance Co. of North America v. Svendsen*, 74 Fed. Rep. 346; *Gubbins v. Laughtenschlager*, 75 Fed. Rep. 615; *Sheffield, etc., Coal, etc., Co. v. Newman*, 41 U. S. App. 766.

In *Alabama* the correction by amendment, at any time before final decree, of insufficiency or of error in the allegations or prayer of a bill, is matter of right secured by statute. *Stein v. McGrath*, 116 Ala. 593; *Truss v. Miller*, 116 Ala. 494. See *Henderson v. Hall*, (Ala. 1900) 32 So. Rep. 840, reversing an order striking a material amendment.

But amendments not coming within such statute are not allowable as matters of right. *McCaw v. Barker*, 115 Ala. 543.

Harmless Error. — Where no relief could have been obtained under the amendment if it had been allowed, there is no available error in the refusal of its allowance. *Tutwiler v. Atkins*, 106 Ala. 104.

464. 1. *Wolverton v. Taylor*, 157 Ill. 485; *Field v. Middlesex Banking Co.*, 77 Miss. 180, reversing and remanding the cause to the docket in order that the real issues might be presented and the merits of the controversy fairly acted upon; *Insurance Co. of North*

America v. Svendsen, 74 Fed. Rep. 346.

5. *Illinois.* — *Shavers v. Warrick*, 152 Ill. 355.

Tennessee. — *Johnston v. Grosvenor*, 105 Tenn. 353.

United States. — *Berliner Gramophone Co. v. Seaman*, (C. C. A.) 113 Fed. Rep. 750, *Anthony v. Campbell*, 50 C. C. A. 195, 112 Fed. Rep. 212.

Immaterial Amendment. — It is not error to refuse to allow the filing of an amended bill which presents no new or material issue and will only encumber the record. *Woman's College v. Horne*, (Tenn. Ch. 1900) 60 S. W. Rep. 609.

466. 1. *Anthony v. Campbell*, 50 C. C. A. 195, 112 Fed. Rep. 212.

2. *Martin v. Martin*, 95 Va. 26.

467. 1. *Insurance Co. of North America v. Svendsen*, 74 Fed. Rep. 346, holding that a plaintiff may be struck out and made a defendant.

6. *Wilmington v. Addicks*, 7 Del. Ch. 56, amendment allowed on payment of the costs of the pleas and subsequent proceedings.

469. 1. **Additional Ground for Relief** may be inserted. *Kunze v. Solomon*, 126 Mich. 290, citing 1 ENCYC. OF PL. AND PR. 468, 485.

470. 1. *McGhee v. Alexander*, 104 Ala. 116; *Hank v. Van Ingen*, 196 Ill. 20; *Clark v. Pittsburg Natural Gas*

471. (2) *Matter Occurring Pending Suit.* — See note 1. See also SUPPLEMENTAL PLEADINGS.

472. (4) *Making a New Case* — (a) *The Rule Stated.* — See note 4.

473. See note 5.

474. (b) *Tests.* — See note 1.

475. See notes 1, 2.

476. (c) *Objection, How Taken* — See note 3.

(5) *Inconsistent or Repugnant Amendments.* — See note 5.

477. *Limitation of the Rule.* — See note 1.

Co., 184 Pa. St. 188; *Tidball v. Shenandoah Nat. Bank*, 100 Va. 741; *Baker v. Briggs*, 99 Va. 360; *Glenn v. Brown*, 99 Va. 322; *Bird v. Stout*, 40 W. Va. 43; *Eakin v. Hawkins*, 48 W. Va. 364.

Waiving Discovery. — But on the trial the court may be justified in permitting an amendment by withdrawing the waiver of discovery and inserting a prayer for discovery. *Jefferson v. Markert*, 112 Ga. 498.

Waiving Oath to Amendment. — *Springfield Co. v. Ely*, (Fla. 1902) 32 So. Rep. 892.

Erroneous Rulings. — For rulings disallowing amendments held to be erroneous, see *Crane v. Davis*, (Miss. 1896) 21 So. Rep. 17; *Carey v. Fulmer*, 74 Miss. 729.

Whatever Might Have Been Inserted in the Original Bill may be allowed by way of amendment. *Henderson v. Harness*, 184 Ill. 520.

471. 1. Inchoate Right. — *Totten v. Nighbert*, 41 W. Va. 800.

Waiver of Objection. — Where matter properly the subject of a supplemental bill is introduced into the suit by amendment, objection must be made by demurrer, plea, or answer, or it will be waived. *Seattle, etc., R. Co. v. Union Trust Co.*, 48 U. S. App. 255, 79 Fed. Rep. 179.

472. 4. Alabama. — *Gardner v. Knight*, 124 Ala. 273.

Rhode Island. — *Storer v. Harrison*, (R. I. 1896) 35 Atl. Rep. 676.

Virginia. — *Pettyjohn v. Burson*, (Va. 1895) 22 S. E. Rep. 508.

West Virginia. — *Edgell v. Smith*, 50 W. Va. 349; *Christian v. Vance*, 41 W. Va. 754.

United States. — *Savage v. Worsham*, 104 Fed. Rep. 18.

Alternative Relief. — *Prehm v. Porter*, 165 Mo. 115; *Walker v. Warner*, 179 Ill. 16, in respect to the statute of limitations. See also *Henderson v. Harness*, 184 Ill. 520.

No Cause of Action at Time of Filing Original Bill. — If the complainant had no cause of action at the time of the filing of the original bill, he cannot by amendment introduce a cause of action which accrued thereafter. *Mellor v. Smither*, 114 Fed. Rep. 116. See also SUPPLEMENTAL PLEADINGS.

473. 5. Schenck v. Olyphant, 181 Pa. St. 191.

474. 1. Angelo v. Aldridge, 164 Ill. 388.

475. 1. Smith v. Hiles-Carver Co., 107 Ala. 272; *Scheerer v. Agee*, 106 Ala. 139.

Changing a Prayer for Specific Relief, the state of facts as alleged in the original bills remaining substantially unchanged, may be allowed. *Pendery v. Carleton*, (C. C. A.) 87 Fed. Rep. 41.

2. Wimberly v. Montgomery Fertilizer Co., 132 Ala. 107; *Easter v. Riley*, 79 Miss. 625; *Tennant v. Dunlop*, 97 Va. 235; *Anthony v. Campbell*, 50 C. C. A. 195, 112 Fed. Rep. 212. See also *Hogueland v. Arts*, 113 Iowa 634.

476. 3. Waiver of Objection. — By answering, taking evidence, and submitting the case for final decree, the defendant waives such objection. *Pendery v. Carleton*, (C. C. A.) 87 Fed. Rep. 41.

5. Cockey v. Plempel, 86 Md. 181; *Carter v. Carter*, 63 N. J. Eq. 716.

Striking Out Contradicted Matter. — *Hill v. Harriman*, 95 Tenn. 300, holding that an amended bill was properly stricken from the files because not accompanied by any excuse for or explanation of the conflict and contradiction between it and the original bill.

477. 1. Brainard v. Buck, 184 U. S. 99, affirming 16 App. Cas. (D. C.) 595; *Anthony v. Campbell*, 50 C. C. A. 195, 112 Fed. Rep. 212.

As holding the proposed amendments not a departure, see *Metcalf v.*

- 478.** (6) *Of Sworn Bills.* — See note 3.
c. AT WHAT STAGE OF PROCEEDINGS — (1) Before Issue. — See note 5.
479. See note 1.
480. (2) *After Demurrer — The Old Rule Relaxed.* — See note 1.
Leave Given on Argument. — See note 2.
Application for Leave. — See note 3.
481. *Remand with Leave to Amend.* — See note 3.
482. (4) *After Replication — Excuse Must Be Shown.* — See note 7.
(5) *After Witnesses Examined.* — See note 8.
483. (6) *After Reference or Master's Report.* — See note 5.
484. (7) *At the Hearing — Amending Prayer.* — See note 3.

Arnold, 132 Ala. 74; McDonnell v. Finch, 131 Ala. 83; Freeman v. Pullen, 130 Ala. 653.

478. 3. *Bauer Grocer Co. v. Zelle*, 172 Ill. 407.

6. *Greater Indulgence* is extended at this stage than at a later stage of the cause. *Shaw v. Monson Maine Slate Co.*, 96 Me. 47.

479. 1. *Federal Equity Rules.* — See *Insurance Co. of North America v. Svendsen*, 74 Fed. Rep. 346, decided under U. S. Equity Rule 28.

480. 1. *Federal Equity Rule.* — See *Edward P. Allis Co. v. Withlacoochee Lumber Co.*, 44 C. C. A. 673, 105 Fed. Rep. 680.

After Several Amendments. — After the court has allowed many amendments to the bill and passed on demurrers thereto, has set aside an order dismissing the bill, and allowed a supplemental bill to be filed, and has then sustained demurrers to the bill as amended and the supplemental bill, it is not error to refuse leave to embody the original bill with the various amendments and the supplemental bill, in a new bill as a substitute, this being an effort to put the pleadings in a shape to have the court again consider them on demurrer. *Fitch v. Gray*, 162 Ill. 337.

2. *A Motion to Strike a Cross-bill* should not be granted without giving to the cross-complainant an opportunity to amend unless it appears that no amendment could be made which would entitle him to relief. *Jones v. Hillis*, 91 Ill. App. 403.

3. *After Demurrer for Laches.* — *Lant v. Morgan*, 43 U. S. App. 623, 75 Fed. Rep. 627.

Laches of Applicant. — The motion should be made with reasonable promptness. *Edward P. Allis Co. v.*

Withlacoochee Lumber Co., 44 C. C. A. 673, 105 Fed. Rep. 680.

481. 3. See *Morgan v. Morgan*, 42 W. Va. 542.

482. 7. *Federal Equity Rules.* — Under U. S. Equity Rule 29, "the purpose of the amendment must be not to strengthen or enlarge the complainant's case, not to change the character or quantity of the relief for which he has asked, but to enable the court to administer substantial justice." *Bass v. Feigenspan*, 82 Fed. Rep. 260.

A motion unsupported by an affidavit embodying the essential requisites of U. S. Equity Rule 29 will be denied. *Beavers v. Richardson*, 118 Fed. Rep. 320.

3. *Hoofstutler v. Hostetter*, 173 Pa. St. 575.

483. 5. *American Freehold Land Mortg. Co. v. Pollard*, 132 Ala. 155. But see *Milhaus v. Sally*, 43 S. Car. 318.

Discretion of Court. — An application to amend at this stage of the cause is addressed entirely to the discretion of the court. *Hudson v. Randolph*, 23 U. S. App. 681.

Cross-bill. — *Olson v. Sheffield*, 90 Ill. App. 198, holding that an amendment of a cross-bill, in no way changing the real issue, should have been allowed, though application therefor was made after the master had reported and the case had been submitted to the chancellor.

It is no abuse of discretion to refuse a motion for leave to amend a cross-bill after the report of a master and exceptions thereto. *Chandler v. Ward*, 83 Ill. App. 315, affirmed 188 Ill. 322. See also *Foster v. Van Ostern*, 72 Ill. App. 307.

484. 3. *Loggie v. Chandler*, 95 Me. 220.

- 484.** Perfecting Allegations. — See note 4.
485. To Conform to Proof. — See note 1.
487. See note 1.
 Making a New Case. — See note 3.
 (8) After Decree. — See note 4.
488. **(9) In Appellate Court.** — See notes 1, 2.

484. 4. See *Tishomingo Sav. Inst. v. Allen*, 76 Miss. 114, where the amendment was held to be proper under the peculiar circumstances of the case.

485. 1. *Tennessee*. — *Patton v. Dixon*, 105 Tenn. 97.

To Meet Allegations in Answer. — When the defendant files a supplemental answer introducing new matter, the complainant has a right to amend his bill to meet such new matter if he asks leave before submission of the case; but after the complainant has consented to the submission of the case on a general replication to such answer, it would seem that an application to amend is too late. *Ward v. Ward*, 50 W. Va. 517.

Statement of Additional Ground for Relief. — *Kunze v. Solomon*, 126 Mich. 290, citing 1 ENCYC. OF PL. AND PR. 468, 485.

Duty of Plaintiff to Amend. — In *Murray v. Hilton*, 8 App. Cas. (D. C.) 281, the court warned the bar that good practice requires an amendment if a decree for the complainant is to be sustained.

487. 1. *Allen v. Stephens*, 107 Ga. 733, quoting 1 ENCYC. OF PL. AND PR. 485, 486.

3. But in *O'Connor v. O'Connor*, 20 R. I. 256, the court permitted an amendment by striking out of the bill the allegations of fraud, which were not sustained, upon payment of all costs to the time of the hearing, such terms being equivalent to requiring the filing of a new bill.

4. New Issues Requiring a New Trial will not be allowed to be introduced by amendment at such stage. *Farwell v. Meyer*, 67 Mo. App. 566; *Smith Granite Co. v. Newall*, 22 R. I. 295.

Diligence Required. — It is not an abuse of discretion to refuse leave to file an amended bill at this stage where there is no showing that the facts upon which the amendment is based came to the complainant's knowledge after the original bill was filed, or why the amendment was not offered before the case was decided. *Vashon v. Barrett*,

99 Va. 344; *Alsop v. Catlett*, 97 Va. 364.

Decree Entered in Vacation. — Under a statute providing that a decree entered in vacation may be set aside, modified, or excepted to at the next term, the court may, at the term following the entry of a decree in vacation, grant leave to amend a bill to make its allegations conform to the findings, in order to support the decree. *Cooper v. Gum*, 152 Ill. 471.

In Alabama the amendment is allowable, by statute, at any time before final decree — not after final decree. *Hunt v. Stockton Lumber Co.*, 113 Ala. 387.

488. 1. *In United States Supreme Court.* — As to the same rule applied in the Circuit Court of Appeals, see *Post v. Beacon Vacuum Pump, etc., Co.*, 50 U. S. App. 407, 89 Fed. Rep. 1. But see *Jones v. Meehan*, 175 U. S. 1.

Striking Out Party Defendant. — Where a party defendant has been improperly joined, the record may be considered as amended *nunc pro tunc* by striking his name therefrom. *Natalie Anthracite Coal Co. v. Ryan*, 188 Pa. St. 138.

2. Affirming Decree on Demurrer. — Where there are no apparent equities sufficiently strong to justify it the appellate court will not permit a continuance of the litigation after affirming a decree sustaining a demurrer to the bill, by granting a motion for leave to reserve the right to move the court below to allow amendments, but it may affirm the decree with the modification that the dismissal of the bill shall be without prejudice, and remand the cause to the court below for further proceedings accordingly. *Post v. Beacon Vacuum Pump, etc., Co.*, 50 U. S. App. 407.

Bill Retained for Amendment upon Contingency. — In *York v. Murphy*, 91 Me. 320, a bill was dismissed on demurrer because the matter set up furnished a complete defense for the complainant in an action at law then pending, and upon overruling exceptions to such decree the Supreme Judicial Court re-

488. (10) *Remand with Leave to Amend.* — See note 4.

489. See notes 1, 2.

(11) *After Remand from Appellate Court.* — See notes 3, 4.

490. *d. EFFECT OF AMENDMENT* — (1) *Right of Defendant to Plead Anew.* — See notes 2, 3, 4.

ained the bill for amendment to cover appropriate alternative relief in the event that the complainant's defense in the action at law should fail by reason of facts not disclosed by the bill.

In Maine, upon a Case Reported to a Law Court, that court will not generally allow an amendment, but will dismiss the bill without prejudice where the suit cannot be maintained on the bill as framed. *Shaw v. Monson Maine Slate Co.*, 96 Me. 41.

488. 4. *Tidball v. Shenandoah Nat. Bank*, 98 Va. 768; *Fidelity L. & T. Co. v. Engleby*, 99 Va. 168; *Union Cent. L. Ins. Co. v. Phillips*, 41 C. C. A. 263, 102 Fed. Rep. 19; *Great Southern F. Proof Hotel Co. v. Jones*, 177 U. S. 449.

489. 1. *Fidelity L. & T. Co. v. Engleby*, 99 Va. 168.

2. *Norton v. Parsons*, 67 Vt. 526.

As to a remand by the Court of Appeals of the District of Columbia, see *Warner v. Godfrey*, 186 U. S. 365, holding the rule to be especially applicable when the facts upon which the amendment rests were known at the incipency of the litigation and the character of the relief was such as called for promptness in asserting a right thereto.

3. See *Henderson v. Harness*, 184 Ill. 520, as to such power when the cause is remanded without specific directions and for such other and further proceedings as should appertain to equity; *Paige v. Hieronymus*, 192 Ill. 546. See also *Jones v. Stoddart*, (Idaho 1902) 67 Pac. Rep. 650, citing 1 ENCYC. OF PL. AND PR. 489.

Massachusetts — On Rescript of Full Court. — Where, on appeal to the full court from an order entered by a single justice on his docket as "bill dismissed," the full court sends down a rescript ordering the clerk to enter in the said docket "bill dismissed with costs," the single justice may, before final judgment or decree, grant a motion to change the proceedings into an action at law. *Merrill v. Beckwith*, 168 Mass. 72.

4. *Paige v. Hieronymus*, 192 Ill. 546;

Butler v. Thompson, (W. Va. 1902) 43 S. E. Rep. 174.

Lower Court Concluded by Mandate of Appellate Court. — Where, on appeal, full consideration is given to the facts and judgment on which the decree is based, the merits are fully discussed and settled, and the cause is remanded, with directions as to the judgment or decree to be entered, there is no power in the inferior court to which the mandate is sent to retry the cause or to allow amendments, etc., not in conformity with the mandate. *Roby v. Calumet, etc., Canal, etc., Co.*, 165 Ill. 277; *Chicago v. Gregsten*, 157 Ill. 160.

And an amendment pursuant to the opinion of the appellate court on a former appeal is no longer open to question. *Tidball v. Shenandoah Nat. Bank*, 100 Va. 741.

490. 2. *Warner v. Godfrey*, 186 U. S. 365, holding that the Court of Appeals of the District of Columbia has no authority to remand a case and reopen it to allow an amendment asserting a new and distinct ground of relief and at the same time to provide that the case shall not be reopened, or in other words deprive the defendant of all opportunity of interposing any defense.

Contra. — In *Casserly v. Wayne Circuit Judge*, 124 Mich. 157, it was denied that the rule stated in the text (taken from 1 Daniell's Ch. Pl. and Pr., 6th Am. ed., 409), even if correct in some cases, is universally true, and it was held that the rule as stated can have no application authorizing a new answer setting up new matter, by a defendant who has answered, after an amendment merely bringing in a new defendant, which amendment in no way changed or affected the rights of the original defendant.

3. **Amendment to Obviate Necessity of Revivor.** — In *Dyer v. Cranston Print Works Co.*, 20 R. I. 143, it was held that an amendment rendered necessary by the death of one of the complainants, and made by virtue of an equity rule to obviate the necessity of

491. See notes i, 3, 4, 5.

(2) *Retroactive Effect* — Original and Amendment One Record.

— See note 6.

492. See note 1.

Statute of Limitations Suspended. — See note 2.

494. (6) *New Process upon Amendment.* — See note 2:

a bill in the nature of a bill of revivor, does not give to the defendant the right to set up defenses not contained in its original answer, except such as relate to matters set forth in the amendment.

490. 4. *Bauer Grocer Co. v. Zelle*, 172 Ill. 407.

New Matter Not Requiring Answer. — The defendant is not prejudiced by the allowance of an amendment of a bill and ordering his answer to the original bill to stand as an answer to the bill as amended, where the fact set up in the amendment is proved at the hearing and is relied upon in the argument by the defendant. *Whiting Paper Co. v. Busse*, 95 Ill. App. 283.

Adoption by Cross-bill of Allegation in Amended Bill. — In *Gillespie v. Crawford*, (Tex. Civ. App. 1897) 42 S. W. Rep. 621, it was held that where the allegations of an original bill had been adopted by a cross-bill, the latter would be taken as adopting also the allegations of the original bill as afterwards amended, although it might have been more regular to have filed an amended cross-bill re-adopting the plaintiff's bill as amended.

491. 1. **New Demurrer.** — But not to refile a demurrer when the only amendment consisted of the striking out of a party to whom the demurrer in no wise related. *Elyton Land Co. v. Denny*, 108 Ala. 553.

3. Rule to Answer. — *Adams v. Gill*, 158 Ill. 190.

4. Bond v. Pennsylvania Co., 171 Ill. 508, citing 1 ENCYC. OF PL. AND PR. 491, 6 ENCYC. OF PL. AND PR. 414.

5. State v. Mitchell, 104 Tenn. 336, holding further, however, that the effect of sustaining a demurrer to the amended bill is to leave the original bill standing.

6. Security Trust Co. v. Tarpey, 66 Ill. App. 589; *State v. Mitchell*, 104 Tenn. 336.

Amendment of Footnote. — An amendment of such a character as may be properly made by interlining does not require an additional footnote to the

bill as amended. *Frey v. Fenn*, 126 Ala. 291.

Dismissal of Original Bill. — But where by leave of court the amended bill is filed after the order appealed from and before appeal perfected, and the amended bill is not in the record on the appeal and is not called to the attention of the appellate court, the dismissal of the original bill will not operate as a dismissal of the amended bill. *Berliner Gramophone Co. v. Seaman*, (C. C. A.) 113 Fed. Rep. 750.

Striking Original. — If the complainant intends the amended pleading to displace the original he should strike out the latter, else the two together must be taken as constituting the bill of complaint. *American Freehold Land Mortg. Co. v. Pollard*, 127 Ala. 227; *Brackin v. Newton*, 121 Ala. 311.

Prayer for Alternative Relief. — Where the prayer of the original bill is sufficient to justify particular relief it is not defeated by a prayer for alternative relief asked by way of amendment. *Rigney v. DeGraw*, 100 Fed. Rep. 213.

492. 1. **Lis Pendens.** — In some cases *lis pendens* will begin with the filing of the amendment and will not relate back to the commencement of the action so as to affect intervening rights. This, however, is true only where the amendment sets up a new equity, or brings forward a new claim on a different and distinct ground of relief not before asserted. *Norris v. He*, 152 Ill. 190.

2. State v. Woodruff, (Miss. 1902) 33 So. Rep. 78; *Easter v. Riley*, 79 Miss. 625; *Pendery v. Carleton*, (C. C. A.) 87 Fed. Rep. 41.

Contra, where a new cause is introduced. *Walker v. Warner*, 179 Ill. 16; *Hawley v. Simons*, 157 Ill. 218.

494. 2. **Notice of Amendment** by service of the bill or by subpoena is required in *Maryland* where new facts are introduced and the case is varied in material respects. *Cockey v. Plempe*, 86 Md. 181.

Voluntary Submission to the Jurisdiction of the court, by a stipulation to file an

496. 6. Of Answers — *a.* IN GENERAL. — See note 4.

497. See notes 3, 4.

498. See notes 1, 2.

499. *c.* MAKING A NEW DEFENSE. — See note 3.

500. *e.* AT AND AFTER HEARING. — See note 4.

answer to an amended bill in consideration of an extension of time for that purpose, and the subsequent filing of such answer, is a waiver of process. *Seattle, etc., R. Co. v. Union Trust Co.*, 48 U. S. App. 255, 79 Fed. Rep. 179.

Process Returnable to Rules. — Where an order sustaining a demurrer to a bill grants leave to file an amended bill at rules and mature such bill for hearing and says nothing as to process, it is competent to order out the process returnable to rules and the proceedings thereon should be the same as in case of an original suit. *Wilson v. Maddox*, 46 W. Va. 641.

496. 4. *Southern R. Co. v. North Carolina Corp. Commission*, 105 Fed. Rep. 270.

Upon Motion and Cause Shown the court has power, under an equity rule in *Florida*, to permit amendments although they may qualify and alter the original statements. *Saunders v. Richards*, 35 Fla. 28.

497. 3. *Ferguson Contracting Co. v. Manhattan Trust Co.*, (C. C. A.) 118 Fed. Rep. 791.

4. *Ritchie v. McMullen*, 47 U. S. App. 470, 79 Fed. Rep. 522, holding that an application for leave to file an amended answer and cross-bill, made a year and a half after the case was at issue on the original pleadings and only a few days before the time fixed for closing the evidence, is addressed to the legal discretion of the court, and that it is proper, upon such application, to examine into the legal sufficiency of the facts averred as equitable defenses to the case made by the bill and the answers of the applicant's co-defendants, and also into the evidence already taken in the cause, to see whether the probability that the applicant could support his new averments by proof is sufficiently great to justify a delay of the cause for this purpose.

498. 1. *Chattanooga Grocery Co. v. Livingston*, (Tenn. Ch. 1900) 59 S. W. Rep. 470; *Goldsmith v. Goldsmith*, 46 W. Va. 426; *Schultz v. Phenix Ins. Co.*, 77 Fed. Rep. 375.

2. *Chattanooga Grocery Co. v. Liv-*

ington, (Tenn. Ch. 1900) 59 S. W. Rep. 470; *McCarthy v. Catholic Knights, etc., of America*, 102 Tenn. 345; as to amendment at the hearing; *Goldsmith v. Goldsmith*, 46 W. Va. 426.

After Expiration of the Complainant's Time to Take Testimony the court will not allow amendment of an answer where the amendment raises an issue not logically or properly raised in the answer, for the complainant would have the right to ask leave to introduce evidence looking to this new complexion of the issue and the cause might be prolonged indefinitely. *Southern R. Co. v. North Carolina Corp. Commission*, 105 Fed. Rep. 270.

499. 3. On Motion to Conform the Answer to the Proof the defendant will not be permitted to substitute an entirely new defense. *Crompton, etc., Loom Works v. Brown*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 319, affirmed (Supm. Ct. App. T.) 28 Misc. (N. Y.) 513.

500. 4. *Kellogg v. American Ins. Co.*, 62 N. J. Eq. 811, affirmed 58 N. J. Eq. 344, where permission was given to apply to amend by setting up a defense shown for the first time by the complainant's proof, the court saying further that as to infant defendants the usual course is to direct amendments.

In *Mississippi* it was held that an amendment is properly refused at this stage, under the statute in that state. *Duggan v. Champlin*, 75 Miss. 441.

After Submission it is error to permit an amendment without setting aside the submission and giving notice to the complainant. *McMinn v. Karter*, 116 Ala. 390; *Wilkinson v. Buster*, 115 Ala. 578, filing plea of infancy after submission.

Cross-bill — Sufficient Diligence. — See *Willard v. Willard*, 98 Va. 465, holding that, under the circumstances, there was no lack of diligence in bringing forward additional acts of adultery, for the purpose of amendment when the cause came on for hearing.

Amendment of Cross-bill After Dismissal of Bill. — After an order dismissing an original bill, which order operates also

501. See note 2.

[After the perfection of an appeal from the decree an answer cannot be amended in the lower court so as to set up a new defense, and such an amendment, if made, will be disregarded in the appellate court. See note 4a.]

502. 9. **Leave to Amend** — *a.* **WHEN NECESSARY.** — See note 5.

503. *b.* **APPLICATION.** — See note 2.

504. 10. **How Amendments Are Made** — *a.* **OF BILLS** — **Should Be Designated.** — See note 1.

505. **Form of Amended Bill.** — See note 1.

Verification. — See note 2.

506. 11. **Terms.** — See notes 3, 4.

508. **III. OF PLEADINGS AND PROCEEDINGS AT COMMON LAW AND UNDER CODES AND STATUTES** — 1. **Power to Amend** — *a.* **INHERENT.** — See notes 3, 4.

to dispose of the cross-bill, a subsequent order allowing an amendment to the cross-bill is without effect. *Etowah Min. Co. v. Wills Valley Min., etc., Co.*, 121 Ala. 672.

Refusal Not Abuse of Discretion. — Where the application comes at a late stage without showing excuse for delay, and the amendment is merely technical, a refusal of leave to amend is not an abuse of discretion. *Cole v. Rankin*, (Tenn. Ch. 1896) 42 S. W. Rep. 72.

New Defense. — The defendant will not be allowed to amend on the day of the hearing where the pleadings are sworn to and the amendment sets up an entirely new defense of which the defendant was cognizant from the beginning, and no reason is shown for the delay or why the defense was not incorporated in the original answer. *Cooney v. A. Booth Packing Co.*, 169 Ill. 370.

To Obviate Variance. — See *Richards v. Weingarten*, 58 N. J. Eq. 206.

501. 2. See also *Gubbins v. Laughtenschlager*, 75 Fed. Rep. 615, refusing to permit the amendment.

4a. *Reedy v. Millizen*, 155 Ill. 636.

502. 5. *Gubbins v. Laughtenschlager*, 75 Fed. Rep. 615, in which case, decided under U. S. Equity Rule 60, the court refused to allow the filing of an amended answer.

503. 2. *Bauer Grocer Co. v. Zelle*, 172 Ill. 407; *Schenck v. Olyphant*, 181 Pa. St. 191, under the equity rule of that court.

504. 1. **Affidavit Used on Hearing.** — An affidavit filed by the complainant

for the purpose of showing the necessity for the immediate appointment of a receiver, no leave having been asked for or granted by the court to amend the original bill, is in no sense in the nature of an amendment of the bill. *Sidway v. Missouri Land, etc., Co.*, 116 Fed. Rep. 381.

505. 1. **Styled "Supplemental Bill."** — Where the allegations of an additional pleading relate to matters which occurred prior to the institution of the suit it is an amended bill, though denominated by the party a "supplemental bill." *Bauer Grocer Co. v. Zelle*, 172 Ill. 407.

2. **When Verification Unnecessary.** — Where no relief by way of injunction is asked by the amendment, and the original injunction does not need for its support the amended matter, it is not essential to the amended bill that it be verified by affidavit. *Bauer Grocer Co. v. Zelle*, 172 Ill. 407.

506. 3. *Stevens v. Bosch*, 54 N. J. Eq. 50, wherein an amendment was allowed without imposing costs.

4. See *Jones v. Galbraith*, (Tenn. Ch. 1900) 59 S. W. Rep. 350.

In *Miller v. Billington*, 184 Pa. St. 583, an order allowing an amendment without terms was modified by imposing as a condition the payment of one-half of the costs accrued on account of delay in making the application, and with this modification the decree appealed from was affirmed.

508. 3. *Smith v. Smith*, 123 N. Car. 229; *Cantwell v. Herring*, 127 N. Car. 81.

509. See notes 1, 3.

510. *b.* SOMETHING TO AMEND OR AMEND BY. — See notes 1, 2, 3.

c. RELATION BETWEEN FEDERAL AND STATE PRACTICE. — See note 4.

511. See notes 1, 4, 6.

Substitution for Lost Pleading. — Where the records are destroyed, an amended petition seeking a recovery on one of the contracts sued on in the original may be filed and the action may be tried thereon. *District of Columbia v. Falty*, 182 U. S. 510.

After Transfer. — In *Baker v. Southern California R. Co.*, 114 Cal. 501, it was held that when a case is transferred from a justice's court to the Superior Court because it involves the question of title to or possession of real property, the latter court may allow amendments, not affecting the jurisdiction, to the same extent as if the action had been commenced there.

508. 4. *Harby v. Wells*, 52 S. Car. 156.

509. 1. **Liberal Construction of Statute.** — Rev. Stat. U. S., § 954, which declares that the courts of the United States "may at any time permit either of the parties to amend any defect in the process or pleadings" is remedial and must be liberally construed. *Tyler v. Mutual Dist. Messenger Co.*, 13 App. Cas. (D. C.) 267.

3. *Western Union Tel. Co. v. Smith*, 93 Ga. 635.

510. 1. *Adams v. Hopkins*, (Cal. 1902) 69 Pac. Rep. 228.

Essential Allegations May Be Supplied by amendment. — *Louisville, etc., R. Co. v. Woods*, 105 Ala. 561; *Esrey v. Southern Pac. R. Co.*, 103 Cal. 541; *Poundstone v. Baldwin*, 145 Ind. 139; *Louisville, etc., R. Co. v. Pointer*, 69 S. W. Rep. 1108, 24 Ky. L. Rep. 772, holding that it is sufficient if there is the least substance in the original pleading to amend by; *Lynch v. Lynch*, 87 Mo. App. 32; *Merrill v. Wright*, 54 Neb. 517, holding that an amendment of a petition does not set up a new cause of action with respect to the statute of limitations, though it supplies the allegations of facts without which the plaintiff could not recover; *Johnston v. Farmers' F. Ins. Co.*, 106 Mich. 96.

2. *Mutual L. Ins. Co. v. Inman Park Presb. Church*, 111 Ga. 677; *McCosker*

v. Hilton, etc., *Lumber Co.*, 110 Ga. 328; *Bryson v. Thurmond*, 103 Ga. 463; *Pattillo v. Jones*, 104 Ga. 301; *Davis v. Muscogee Mfg. Co.*, 106 Ga. 126; *Illinois Cent. R. Co. v. Campbell*, 170 Ill. 163; *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185, with respect to the statute of limitations; *Field v. French*, 80 Ill. App. 78; *Missouri, etc., R. Co. v. Bagley*, 65 Kan. 188, holding that the statute of limitations runs up to the time of the amendment; *Stewart v. Walterboro, etc.*, R. Co., 64 S. Car. 92; *Lasater v. Fant*, (Tex. Civ. App. 1897) 43 S. W. Rep. 321, as to the practice in the county court.

Where the Original Plea Sets up No Defense the same rule is applied. *Smith v. Marietta First Nat. Bank*, 115 Ga. 608.

3. *Jones v. Hurst*, 95 Ga. 286; *Chicago City R. Co. v. Hackendahl*, 188 Ill. 300; *Ruberg v. Brown*, 50 S. Car. 397.

4. See *Hodges v. Kimball*, (C. C. A.) 91 Fed. Rep. 845; *Leeds v. Evans*, 99 Fed. Rep. 28.

511. 1. See *Edwards v. Bates County*, 79 Fed. Rep. 56, allowing an amendment under the state statute, and *Booth v. Denike*, 65 Fed. Rep. 43, wherein the court, exercising its power of amendment under the federal statute, allowed an amendment which would have been improper under the state practice.

Limitation of Rule. — In *Van Doren v. Pennsylvania R. Co.*, 35 C. C. A. 282, it was held that United States circuit courts are not bound to conform to the state practice or pleadings in subordinate details where such conformity would result in gross or substantial injustice to litigants.

Rev. Stat. U. S., § 914, undertakes to conform the federal practice to the state model, "'as near as may be,' not as near as may be possible nor as near as may be practicable." *Salisbury v. Bennett*, 72 Fed. Rep. 743.

4. See *Seymore v. Franklin*, 92 Fed. Rep. 122.

6. **Other Instances.** — *Mack v. Porter*, 25 U. S. App. 595, 72 Fed. Rep. 236.

511. *d.* AMENDMENT OF JURISDICTIONAL AVERMENTS. — See notes 7, 8.

512. Defective Averments. — See notes 1, 2.

In the Federal Courts. — See note 4.

513. 2. Amendments by Referee — *a.* POWER WHOLLY STATUTORY. — See note 4.

b. CODE PROVISIONS. — See note 5.

514. *c.* THE POWER CONCURRENT. — See note 1.

d. NEW CAUSE OF ACTION. — See note 2.

e. NEW DEFENSE. — See note 3.

515. *h.* REVIEW OF REFEREE'S RULING. — See note 3.

511. 7. *Johnson v. Fischer*, 56 Mo. App. 552.

To Confer Jurisdiction. — An amendment cannot be allowed for the purpose of conferring jurisdiction. *Gillam v. Life Ins. Co.*, 121 N. Car. 369.

8. *Mier v. St. Louis, etc., R. Co.*, 56 Mo. App. 655; *Hogan v. Glueck*, 2 N. Y. App. Div. 82, to conform to proof; *McBride v. Welborn*, 119 N. Car. 508; *Whalen v. Gordon*, (C. C. A.) 95 Fed. Rep. 305.

In Justice's Court. — *Blair v. Porter*, 12 Ind. App. 296, holding that the allowance of such an amendment will not be disturbed where it does not appear that the defendant was harmed.

512. 1. *Harvey v. Richmond, etc., R. Co.*, 64 Fed. Rep. 19. See also *Shaw v. American Tobacco Co.*, 48 C. C. A. 68, 108 Fed. Rep. 842.

2. An Allegation of Residence in an amended complaint which is served as matter of right will be presumed to refer to residence at the time of beginning the action. *John W. Simmons Co. v. Costello*, 63 N. Y. App. Div. 428.

4. *Great Southern F. Proof Hotel Co. v. Jones*, 177 U. S. 449; *Nevada Co. v. Farnsworth*, 89 Fed. Rep. 164.

513. 4. **Reference by Consent.** — Where by consent a case is referred to a referee with power to pass upon all questions of law and fact, he may permit an amendment of a pleading. *Tackaberry v. Gilmore*, 57 Neb. 450.

5. *Blanton v. Bostic*, 126 N. Car. 418, under § 422 of the code of that state.

Extent of Power. — The referee may permit the amendment of an answer on the trial when it does not substantially change the defense. *Drew v. Longwell*, 81 Hun (N. Y.) 144.

514. 1. **May Require Application to Court.** — See *Hayes v. Kerr*, 39 N. Y. App. Div. 529.

Where an application to amend a pleading is made before the referee, who declines to entertain the application but refers the party to the court, and grants an adjournment for the purpose of permitting him to make an application to the court, the fact that the party has first made the application to the referee will not estop him from applying to the court, as there was no exercise of discretion by the referee upon the application made before him; nor is the party estopped from making the application to the court by reason of his having claimed before the referee that the pleading is sufficient. *Woolsey v. Shaw*, 34 N. Y. App. Div. 405.

Power of Court Pending Trial by Referee. — Where, after the amendment of a petition in replevin by the referee to whom the cause had been referred by consent, there was a second reference to try the issues presented by the amended pleadings, it was held that the court might, pending the reference, permit the affidavit in replevin to be amended to conform to the allegations in the amended petition. The case was before the court for all purposes not included in the order of references. *Tackaberry v. Gilmore*, 57 Neb. 450.

2. *Spies v. Lockwood*, 40 N. Y. App. Div. 296.

3. *Demings v. Supreme Lodge, etc.*, 20 N. Y. App. Div. 622; *Drake v. Slebold*, 81 Hun (N. Y.) 178; *McGill v. Holmes*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 514.

515. 3. **Harmless Error.** — It is immaterial whether or not an auditor erred in allowing an amendment when it had no bearing upon the result of his investigation. *Marsh v. Hix*, 110 Ga. 888.

515. 3. In Furtherance of Justice — *a*. PRINCIPLE PERVADES ALL AMENDMENTS. — See note 4.

517. b. AMENDMENTS FAVORED. — See note 1.

518. c. THE DEFENDANT FAVORED. — See note 1.

Municipal Corporations. — See note 3.

519. d. AMENDMENTS BARRED BY LIMITATION. — See notes 1, 2.

e. FURTHER AMENDMENTS. — See note 4.

f. AMENDMENT OF PLEA IN ABATEMENT. — See note 5.

515. 4. Bigelow v. Draper, 6 N. Dak. 152 [citing 1 ENCYC. OF PL. AND PR. 515, 516]; *Hughie v. Hammett*, 105 Ga. 368; *Wymore First Nat. Bank v. Myers*, 44 Neb. 306, holding that upon an application to amend, the rights of the applicant are not alone to be considered; *Peterson v. Felt*, 61 N. Y. App. Div. 176, holding that under the particular circumstances the imputation of laches was overcome and the amendment should have been allowed in furtherance of justice, and reversing an order refusing leave; *Grothler v. New York, etc., Bridge*, 19 N. Y. App. Div. 586.

The Only Restriction upon the Exercise of the Power to allow amendments within the general scope of the subject of the action is, broadly considered, that it must be used in furtherance of justice. *Post v. Campbell*, 110 Wis. 378.

Mistake of Law. — *Foerst v. Empire L. Ins. Co.*, 44 N. Y. App. Div. 87; *Wisconsin Marine, etc., Ins. Co. Bank v. Mann*, 100 Wis. 596.

In *O'Neil v. Hester*, 82 Hun (N. Y.) 432, it was said that while newly discovered facts may sometimes justify the amendment of a pleading, it is doubtful whether the promulgation of a decision settling a question of law before unsettled furnishes sufficient reason for the allowance of an amendment to meet such new conditions. But see *Goddard v. Cassell*, 84 Hun (N. Y.) 43, where the exercise of discretion in allowing such an amendment was not disturbed.

517. 1. North Dakota. — *Martin v. Luger Furniture Co.*, 8 N. Dak. 220.

South Dakota. — *Haggarty v. Strong*, 10 S. Dak. 585, citing 1 ENCYC. OF PL. AND PR. 517.

Virginia. — *Langhorne v. Richmond City R. Co.*, 91 Va. 364, citing 1 ENCYC. OF PL. AND PR. 516, 517.

518. 1. Thrall v. Gosnell, 28 Ind. App. 174.

3. Stemmler v. New York, 45 N. Y. App. Div. 573.

519. 1. O'Connor v. Chicago, etc., R. Co., 92 Wis. 612, where the allowance of such an amendment was held to be an abuse of discretion.

Where the Original Cause Is Barred it is proper to refuse to allow the filing of an amended complaint to which the plea of the statute would still be good. *Patterson v. Doe*, 130 Cal. 333.

2. Taylor v. Taylor, 110 Iowa 207; *State v. Thompson*, 81 Mo. App. 549; *Hodges v. Kimball*, (C. C. A.) 91 Fed. Rep. 845.

Due to Applicant's Laches. — Where a demurrer to a complaint in an action in equity against the directors of a corporation has been sustained on the ground that the action was not maintainable in equity, and during a period of several years this order has been affirmed as well as successive orders sustaining demurrers to successive amended complaints in which the plaintiff has adhered to his original position in defiance of the successive rulings of the appellate court, the plaintiff is not in a position to ask leave to amend by converting his suit into a number of actions at law, and an order permitting such amendment will be reversed. If the actions at law are otherwise barred by limitations it is due to the course pursued by the plaintiff, and will not entitle him to indulgence. *Higgins v. Gedney*, 30 N. Y. App. Div. 481.

4. See also Tulare Bldg., etc., Assoc. v. Coleman, (Cal. 1896) 44 Pac. Rep. 793; *Bartlett v. Scott*, 55 Neb. 477, as to second amendment, offered after commencement of trial; *Alexander v. Brown*, (Tex. Civ. App. 1895) 29 S. W. Rep. 561, refusing to disturb the discretion of the lower court in disallowing the amendment. See also *supra*, III. 3. *d. Amendments Barred by Limitation*, note 2.

5. Mitchell v. Smith, 74 Conn. 125;

520. *g.* UNCONSCIONABLE DEFENSES — USURY AND LIMITATION. — See note 3.

521. See note 1.

522. *Infancy.* — See note 1.

h. LACHES OF APPLICANT. — See notes 2, 3.

Laufer v. Bridgeport Traction Co., 68 Conn. 475; *Brockett v. Fair Haven*, etc., R. Co., 73 Conn. 428; *Bacon v. Schepflin*, 185 Ill. 122.

Amendable Like Any Other Plea. — In *Caldwell v. Lamkin*, 12 Tex. Civ. App. 29, it was held that such a plea in abatement, like any other defective plea, may be corrected by amendment by leave of court.

Where Not Plea in Abatement. — *Weekes v. Sunset Brick, etc., Co.*, 22 Tex. Civ. App. 556, citing 1 ENCYC. OF PL. AND PR. 519.

520. 3. Discretion of Court. — While the old rule is no longer as strictly enforced as formerly, nevertheless, when application is made to the favor of a court for leave to interpose any defense, and the application is one resting in discretion, the court will take care not to sanction any such abuse of procedure as would shock the conscience. *Salisbury v. Bennett*, 72 Fed. Rep. 743.

521. 1. Alabama. — It is discretionary with the court to refuse to allow a plea of usury to be filed on the trial. *Lytle v. Dothan Bank*, 121 Ala. 215.

Arkansas. — *Kempner v. Dooley*, 60 Ark. 526, holding that it is a matter of discretion with the trial court to permit or to refuse to permit the filing, on the trial, of an amended answer setting up usury.

California. — The refusal to allow an amendment after trial, setting up limitations, is not an abuse of discretion. *San Joaquin Valley Bank v. Dodge*, 125 Cal. 77.

Kentucky. — In *Metropolitan L. Ins. Co. v. Blesch*, 58 S. W. Rep. 436, 22 Ky. L. Rep. 530, it was held to be a proper exercise of discretion to refuse to allow limitations to be set up for the first time by an amended answer.

Montana. — *Baxter v. Hamilton*, 20 Mont. 327, refusing to disturb the discretion of the lower court in not allowing the filing of a plea of limitations at the close of the testimony.

North Carolina. — It is within the discretion of the court to allow the defendant to set up the statute of limitations at the term to which the referee made

his report. *Smith v. Smith*, 123 N. Car. 229.

South Dakota. — As every defense for which the legislature has provided is meritorious, there is no abuse of discretion in allowing the statute of limitations to be pleaded by way of amendment. *Houts v. Bartle*, 14 S. Dak. 322.

Tennessee. — *Nunnally v. Southern Iron Co.*, 94 Tenn. 397, refusing to disturb the discretion of the lower court in disallowing the amendment on the trial.

Washington. — The statute of limitations is not an unconscionable defense. *Morgan v. Morgan*, 10 Wash. 99.

Wisconsin. — *Sullivan v. Collins*, 107 Wis. 291, holding that while the court has the same power to allow amendments setting up such defenses, the question whether an amendment setting up what is considered a hard and unconscionable defense is in furtherance of justice is necessarily a different question from that which arises when application is made to insert some minor allegation in a pleading or to set up a defense which goes to the merits of the case; that it is an abuse of discretion to permit an amendment of the first kind upon the trial without any showing to excuse the delay and without imposing some terms or condition. See also *Whereatt v. Worth*, 108 Wis. 291.

522. 1. *Gillam v. Life Ins. Co.*, 121 N. Car. 369.

2. California. — *Blood v. La Serena Land, etc., Co.*, 113 Cal. 221.

Illinois. — *Berkowsky v. Specter*, 79 Ill. App. 215.

Kansas. — *Atchison Sav. Bank v. Means*, 61 Kan. 857, 58 Pac. Rep. 989.

Kentucky. — *Atkeson v. Salyer*, 64 S. W. Rep. 443, 23 Ky. L. Rep. 836; *Cassidy v. Martin Bank*, 62 S. W. Rep. 528, 23 Ky. L. Rep. 203; *Blalock v. Copeland*, 65 S. W. Rep. 349, 23 Ky. L. Rep. 1455; *Duis v. Fisher*, 65 S. W. Rep. 337, 23 Ky. L. Rep. 1425; *Board of Internal Imp. v. Moore*, 66 S. W. Rep. 417, 23 Ky. L. Rep. 1885; *Continental Ins. Co. v. Moore*, 62 S. W. Rep. 517, 23 Ky. L. Rep. 72.

523. Where the Facts Were Known. — See note 1.

Minnesota. — Minneapolis, etc., R. Co. v. Firemen's Ins. Co., 62 Minn. 315.

Mississippi. — National Mut. Bldg., etc., Assoc. v. Brahan, 80 Miss. 407.

Nebraska. — Murray v. Loushman, 47 Neb. 256.

New York. — Hentz v. Havemeyer, 15 N. Y. App. Div. 357; Farmer's Nat. Bank v. Underwood, 15 N. Y. App. Div. 626; Gerdau v. Faber, 26 N. Y. App. Div. 606, reversing an order refusing permission to amend, because it appeared to the appellate court that the party was not guilty of laches; Babbitt v. Gibbs, 54 N. Y. App. Div. 634; Israel v. Israel, 54 N. Y. App. Div. 408, as to knowledge of other acts upon which right to relief is sought to be based; O'Neil v. Hester, 82 Hun (N. Y.) 432; Rowland v. Kellogg, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 498.

South Dakota. — Brown v. Edmonds, 9 S. Dak. 273.

Tennessee. — Nunnally v. Southern Iron Co., 94 Tenn. 397.

Washington. — Bishop v. Averill, 19 Wash. 490.

Wisconsin. — Rice v. Ashland County, 114 Wis. 130.

See also People v. Page, 39 N. Y. App. Div. 110; Chapman v. Yellow Poplar Lumber Co., 61 U. S. App. 499.

Adverse Party Responsible for Delay. — Delay not wholly to the plaintiff's charge, but resting also in part upon the defendant, cannot be set up to disturb the action of the court in permitting the plaintiff to amend. Bomar v. Means, 47 S. Car. 190.

522. 3. Mooney v. Tyler, 68 Ark. 314; Cornett v. Combs, (Ky. 1899) 53 S. W. Rep. 32; Dennison v. Musgraves, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 627; Maney v. Hart, 11 Wash. 67; St. Clara Female Academy v. Northwestern Nat. Ins. Co., 101 Wis. 464. See also Elizabethtown, etc., R. Co. v. Catlettsburg Water Co., 61 S. W. Rep. 47, 22 Ky. L. Rep. 1632; Dulle v. Lally, 167 Ill. 485; Dubuque Lumber Co. v. Kimball, 111 Iowa 48; Jacobus v. U. S., 86 Fed. Rep. 84.

Municipal Corporations. — The rule which ordinarily prevails, that an amendment of a pleading will not be allowed where there has been laches or delay, should not be as strictly applied in the case of a municipal cor-

poration as in the case of an individual. Stemmler v. New York, 45 N. Y. App. Div. 573.

523. 1. Bransford v. Norwich Union F. Ins. Soc., 21 Colo. 34; Greenlee v. Home Ins. Co., 103 Iowa 484, as to amendment of answer; Brady v. Peck, 99 Ky. 42, as to answers; Jackson First Baptist Church v. Citizens Mut. F. Ins. Co., 119 Mich. 203; Jefferson v. Burhans, 29 C. C. A. 487, 85 Fed. Rep. 924, where the defendant sought to amend and plead an entirely new defense.

In *New York* it is held that the trial term is not the place for an amendment of pleadings unless in respect to some feature of the case which has unexpectedly developed itself; that when the facts are known before trial the application must be made at special term and as soon as the facts are ascertained. Rhodes v. Lewin, 33 N. Y. App. Div. 369; Ackman v. Third Ave. R. Co., 54 N. Y. App. Div. 632.

Laches of Attorney. — Dudley v. Broadway Ins. Co., 42 N. Y. App. Div. 555.

Changing Admission to Denial. — In National Pipe Bending Co. v. Fisher, 87 Hun (N. Y.) 175, the original answer seemingly admitted the contract, but was interposed by the defendant's attorney, upon insufficient information, and was verified by such attorney in the defendant's absence. The amendment sought was not upon a mere technical defect in the execution of the contract, but went to the denial of the contract itself. It was held that the amendment was one that should have been allowed upon just terms, Smith v. Athens, 74 Hun (N. Y.) 26, being distinguishable in that there, after admission of the contract, it was sought to amend by setting up defects in the execution of the contract, and the amendment was refused because it was not considered in furtherance of justice, the defendant having made his election. See also *infra*, III. 11. A.

(1) **Where Remand Is General—Discretionary.**

In Hill v. Ragland, (Ky. 1902) 70 S. W. Rep. 634, the court refused to say, after there had been one trial, that there had been an abuse of discretion in not allowing a tender of an issue of fact which up to that time had stood confessed.

523. *i.* IMMATERIAL, UNNECESSARY, OR UNAVAILING AMENDMENTS — See notes 2, 3, 5.

524. See notes 1, 2.

Issues Treated on Appeal as Raised. — Notwithstanding there was a proper exercise of discretion in refusing to permit an amended answer to be filed unseasonably, if the issues presented thereby were fully litigated by the parties the appellate court will treat the case as if such issues were properly made by the pleadings. *Louisville Trust Co. v. Louisville Fireproof Constr. Co.*, (Ky. 1900) 57 S. W. Rep. 506.

523. 2. *Van Duzor v. Towne*, 12 Colo. App. 4; *Haney School Furniture Co. v. Hightower Baptist Institute*, 113 Ga. 289; *Colvard v. Black*, 110 Ga. 612; *Equitable Bldg., etc., Assoc. v. Holloway*, 114 Ga. 780; *Blalock v. Copeland*, 65 S. W. Rep. 349, 23 Ky. L. Rep. 1455; *Baxter v. Hamilton*, 20 Mont. 327; *Alden v. Clark*, 86 Hun (N. Y.) 357; *Union Bank v. Richmond*, 94 Va. 316; *Price Baking Powder Co. v. Rinear*, 17 Wash. 95; *Municipal Invest. Co. v. Industrial, etc., Trust Co.*, 89 Fed. Rep. 254.

Amendment Struck Out on Condition. — The fact that the court, as a condition of striking out an amended answer, required of the plaintiffs a stipulation that the facts set out in it might be proved as though pleaded establishes the materiality of the amendment. *Taylor v. Carson*, 53 N. Y. App. Div. 627.

Additional Pleadings to counts no longer in the case may be refused. *Hygeia Distilled-Water Co. v. Hygeia Ice Co.*, 72 Conn. 646.

3. *Mono County v. Flanigan*, 130 Cal. 105; *O'Banion v. Goodrich*, 62 S. W. Rep. 1015, 23 Ky. L. Rep. 313, where the matters might have been shown under the general issue. See also *Christopher, etc., R. Co. v. Twenty-Third St. R. Co.*, 149 N. Y. 51.

Harmless Allowance. — The allowance of an amendment which is unnecessary or immaterial, but which does not change the issues, furnishes no ground of complaint. *Roush v. Charleston First Nat. Bank*, 102 Ga. 109; *Craig v. Chipman*, (Ky. 1900) 57 S. W. Rep. 244; *South Thomaston v. Friendship*, 95 Me. 201; *Alton v. Meeuwenburg*, 108 Mich. 629; *Fillman v. Ryon*, 168 Pa. St. 484; *Duckworth v. McKinney*, 58 S. Car. 418.

5. California. — *Fisk v. Casey*, 119 Cal. 643; *Buffalo Cycle Co. v. Todd*, 133 Cal. 292.

Colorado. — *Bush v. McMann*, 12 Colo. App. 504.

Georgia. — *Kahn v. Thomson*, 113 Ga. 957; *La Pierre v. Webb*, 113 Ga. 820; *McDaniel v. Nelms*, 96 Ga. 366; *National Computing Scale Co. v. Eaves*, (Ga. 1902) 42 S. E. Rep. 783.

Kentucky. — *Davidson v. Dishman*, 59 S. W. Rep. 326, 22 Ky. L. Rep. 940; *Louisville, etc., R. Co. v. Jordan*, 66 S. W. Rep. 27, 23 Ky. L. Rep. 1730, where the allowance of such an amendment was held to have been erroneous.

Nebraska. — *Dufrene v. Anderson*, (Neb. 1902) 90 N. W. Rep. 221; *Harrington v. Connor*, 51 Neb. 214.

New Jersey. — *Lower v. Segal*, 60 N. J. L. 99.

New York. — *Gallagher v. Kingston Water Co.*, 25 N. Y. App. Div. 82, affirmed 164 N. Y. 602; *Johnson v. Brooklyn-Heights R. Co.*, 63 N. Y. App. Div. 374.

Rhode Island. — *Dyer v. Cranston Print Works*, 21 R. I. 63.

South Carolina. — *Milhouse v. Sally*, 43 S. Car. 318.

South Dakota. — *Harrington v. Willson*, 10 S. Dak. 606.

Washington. — *Price v. Scott*, 13 Wash. 574.

Wisconsin. — *St. Clara Female Academy v. Northwestern Nat. Ins. Co.*, 101 Wis. 464.

Amendment Contradicting Facts. — *Louisville Ins. Co. v. Monarch*, (Ky. 1896) 36 S. W. Rep. 563, refusal to allow amendment not conforming to the proof.

After verdict an amendment which is not sustained in its allegations by the evidence should not be allowed. *Gilland v. Union Pac. R. Co.*, 6 Wyo. 185.

Harmless Error. — Where such an amendment is allowed, but operates merely as matter of description and does not create a departure, a motion to strike out the whole complaint is properly overruled. *Lister v. Vowell*, 122 Ala. 264.

524. 1. *Tulare Bldg., etc., Assoc. v. Coleman*, (Cal. 1896) 44 Pac. Rep. 793; *Klippel v. Oppenstein*, 8 Colo. App. 187; *Rast v. Germania Loan*,

524. 4. Amendments Discretionary — a. REVIEW OF DISCRETION — (1) On What Grounds — In Many of the States. — See note 4.

etc., Co., 115 Ga. 935; *May v. Ball*, (Ky. 1902) 70 S. W. Rep. 196; *Haupt v. Independent Tel. Messenger Co.*, 25 Mont. 122; *Bartlett v. Scott*, 55 Neb. 477; *Johnson v. Brooklyn Heights R. Co.*, 63 N. Y. App. Div. 374; *Flack v. O'Brien*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 399; *Hume v. Kelly*, 28 Oregon 398. See also *infra*, III. 13. c. *Application for Leave — Prima Facie Case Sufficient*.

Insufficient Amendment. — *Martin v. Shannon*, 101 Iowa 620, holding that it is within the power of the court to permit an amendment to remain on file though it contains substantially the same matter as an amendment which has been stricken out.

524. 2. Wright v. Roberts, (Ga. 1902) 42 S. E. Rep. 369; *Princeton First Nat. Bank v. Cash*, (Ky. 1898) 44 S. W. Rep. 381.

4. District of Columbia. — *Tyler v. Mutual Dist. Messenger Co.*, 13 App. Cas. (D. C.) 267; *Morris v. Wheat*, 11 App. Cas. (D. C.) 201.

Maine. — *Wade v. Curtis*, 96 Me. 309.

Maryland. — *Hearn v. Quillen*, 94 Md. 39; *Thillman v. Neal*, 88 Md. 525.

Massachusetts. — *Benjamin v. Casey*, 181 Mass. 542.

New Hampshire. — *Jenness v. Jones*, 68 N. H. 475; *Jaquith v. Benoit*, 70 N. H. 1; *Brown v. Fitzgerald*, 70 N. H. 211; *Lawson v. Kimball*, 68 N. H. 549; *State v. Collins*, 68 N. H. 46.

New York. — *Martin v. Home Bank*, 160 N. Y. 190, holding that an exception to the exercise of discretion presents no question of law for the Court of Appeals; *Reiner v. Jones*, 38 N. Y. App. Div. 441; *Rice v. Coutant*, 38 N. Y. App. Div. 543; *Sturges v. Newcombe*, (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 371.

In the inferior or intermediate courts of New York possessing appellate jurisdiction, the action of the lower court is subject to review, though it will not be disturbed in the absence of an abuse of discretion. See *Pennie v. Newburgh Electric R. Co.*, 47 N. Y. App. Div. 635; *Jackson v. Foley*, 53 N. Y. App. Div. 97; *Zimmer v. Third Ave. R. Co.*, 36 N. Y. App. Div. 265; *Louis v. Connecticut Mut. L. Ins. Co.*, 58 N. Y. App. Div. 137; *Hoffman v. Susemihl*, 15 N. Y. App. Div. 405;

Hoffman v. Third Ave. R. Co., 45 N. Y. App. Div. 586; *Rowell v. Moeller*, 91 Hun (N. Y.) 421; *Sun Printing, etc., Assoc. v. Abbey Effervescent Salt Co.*, 62 N. Y. App. Div. 54; *O'Neil v. Hester*, 82 Hun (N. Y.) 432; *Goddard v. Cassell*, 84 Hun (N. Y.) 43; *Coler v. Lamb*, 24 N. Y. App. Div. 623, where an order sustaining a demurrer to a counterclaim was affirmed with the modification that the defendant was allowed to amend; *Zinsser v. Columbia Cab Co.*, 66 N. Y. App. Div. 514; *Edge v. Third Ave. R. Co.*, 57 N. Y. App. Div. 29; *People v. Clausen*, 61 N. Y. App. Div. 184; *Peterson v. Felt*, 61 N. Y. App. Div. 176; *Woolsey v. Shaw*, 34 N. Y. App. Div. 405; *Gallagher v. Kingston Water Co.*, 25 N. Y. App. Div. 82, *affirmed* 164 N. Y. 602; *Gerdau v. Faber*, 26 N. Y. App. Div. 606; *National Pipe Bending Co. v. Fisher*, 87 Hun (N. Y.) 175.

It Is Mandatory upon the Municipal Court of the City of New York to allow a pleading to be amended at any time before the trial or during the trial if substantial justice will be promoted thereby, and refusal to permit such an amendment is error of so substantial a nature as to require a reversal of the judgment. *King v. Dorman*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 133; *Bergman v. Neidhardt*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 804; *Thedford v. Reade*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 563; *Milch v. Westchester F. Ins. Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 231.

When the Amendment Asked for Is Just and Reasonable, and the adverse party has no moral right to complain of it, an order refusing to allow it will be reversed on appeal. *Cox v. Bates*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 816.

North Carolina. — *Parker v. Harden*, 122 N. Car. 111; *Goodwin v. Caraleigh Phosphate, etc., Works*, 121 N. Car. 91.

South Carolina. — *Lawson v. Gee*, 57 S. Car. 502; *Jarrell v. Charleston, etc., R. Co.*, 58 S. Car. 491. See also *Burns v. Southern R. Co.*, 61 S. Car. 404, where the refusal to allow an amendment was held to be error.

Vermont. — *Lamoille County Nat. Bank v. Hunt*, 72 Vt. 357; *Swerdferger v. Hopkins*, 67 Vt. 136.

United States. — *Buchanan v. Cleve-*

527. In Other States. — See note 1.

land Linseed-Oil Co., (C. C. A.) 91 Fed. Rep. 88; Cincinnati, etc., R. Co. v. Gray, 41 C. C. A. 535, 101 Fed. Rep. 623. See also Union Cent. L. Ins. Co. v. Phillips, 41 C. C. A. 263, 102 Fed. Rep. 19; Philip Schneider Brewing Co. v. American Ice-Mach. Co., 40 U. S. App. 382.

527. 1. *California*. — Brittan v. Oakland Sav. Bank, 124 Cal. 282; Matter of Redfield, 116 Cal. 637; Ford v. Kenton, (Cal. 1895) 40 Pac. Rep. 1031; Siskiyou County v. Gamlich, 110 Cal. 94.

Colorado. — Cascade Ice Co. v. Austin Bluff Land, etc., Co., 23 Colo. 292; Browns v. Lutin, 16 Colo. App. 263; Anthony v. Slayden, 27 Colo. 144; Belmont Min., etc., Co. v. Costigan, 21 Colo. 471 (abuse of discretion); Tom Boy Gold Mines Co. v. Green, 11 Colo. App. 447.

Delaware. — Higgins v. Wilmington, (Del. 1902) 51 Atl. Rep. 1. But see Valley Paper Co. v. Smalley, 2 Marv. (Del.) 289.

Illinois. — Chicago, etc., R. Co. v. Logue, 158 Ill. 621; Sturtevant v. Sullivan, 69 Ill. App. 47, as to additional or amended pleas.

Indiana. — La Plante v. State, 152 Ind. 80; Case v. Moorman, 25 Ind. App. 293; Trueblood v. Shellhouse, 19 Ind. App. 91.

Indian Territory. — Martin v. Stratton-White Co., 1 Indian Ter. 394.

Iowa. — Clough v. Bennett, 99 Iowa 69; Heusinkveld v. St. Paul F. & M. Ins. Co., 96 Iowa 224; Ankrum v. Marshalltown, 105 Iowa 493; National Horse-Importing Co. v. Novak, 105 Iowa 157; Klos v. Zahorik, 113 Iowa 161, where the appellate court refused to interfere with the action of the lower court in overruling a motion to strike out an amended pleading as having been filed too late.

Kansas. — Beebe v. Carter, 54 Kan. 261; Lavid v. Farwell, 60 Kan. 512, allowance of amendment; Mitchell v. Ripley, 5 Kan. App. 818.

Kentucky. — Mattingly v. Bank of Commerce, (Ky. 1899) 53 S. W. Rep. 1043; Carnahan v. Thompson, (Ky. 1899) 52 S. W. Rep. 931.

As to reversal for refusal to permit amendment, see Mocerf v. Stirman, (Ky. 1895) 29 S. W. Rep. 324; Lebus v. Poindexter, (Ky. 1896) 38 S. W. Rep. 9.

Michigan. — Baker v. Michigan Mut.

Protective Assoc., 118 Mich. 431. See also Shank v. Woodworth, 111 Mich. 642. But compare Pratt v. Davis, 105 Mich. 499.

Minnesota. — Rice v. Longfellow Bros. Co., 78 Minn. 394; Boen v. Evans, 72 Minn. 169; Pfefferkorn v. Haywood, 65 Minn. 429.

Missouri. — State v. Thompson, 81 Mo. App. 549.

Nebraska. — Murray v. Loushman, 47 Neb. 256; Kleckner v. Turk, 45 Neb. 176; Central City Bank v. Rice, 44 Neb. 594; Imhoff v. Richards, 48 Neb. 590; Harrington v. Connor, 51 Neb. 214; Scherar v. Prudential Ins. Co., 63 Neb. 530; Chicago, etc., R. Co. v. Martelle, (Neb. 1902) 91 N. W. Rep. 364.

As to reversal for abuse of discretion, see Perkins County v. Miller, 55 Neb. 141; Gage v. West, 62 Neb. 612.

North Dakota. — Martin v. Luger Furniture Co., 8 N. Dak. 220, holding that the discretion is legal and not arbitrary, and that to refuse arbitrarily to allow an amendment which should be allowed is an abuse of discretion; Loverin-Browne Co. v. Buffalo Bank, 7 N. Dak. 569, citing 1 ENCYC. OF PL. AND PR. 524 et seq.

Oklahoma. — Swope v. Burnham, 6 Okla. 736; Consolidated Steel, etc., Co. v. Burnham, 8 Okla. 514, holding that where an amendment is calculated to promote the ends of justice it is error to refuse it.

Oregon. — Nosler v. Coos Bay, etc., R., etc., Co., 39 Oregon 331; Davis v. Hannon, 30 Oregon 192; Jester v. Lipman, 40 Oregon 408; Nunn v. Bird, 36 Oregon 515; Clemens v. Hanley, 27 Oregon 326.

South Carolina. — Pelzer v. Morris, 56 S. Car. 88.

South Dakota. — Baskerville v. Gaar, 15 S. Dak. 211.

Texas. — But see Dublin v. Taylor, etc., R. Co., 92 Tex. 535, wherein it was said that the Supreme Court has no power to reverse the discretionary action of the trial judge, but the court affirmed the decision of the Court of Civil Appeals, and in the opinion of the latter court, (Tex. Civ. App. 1898) 49 S. W. Rep. 667, the rule of the text was asserted.

Washington. — Newman v. Buzard, 24 Wash. 225; Ross v. Howard, 25 Wash. 1; State v. Lorenz, 22 Wash. 289; Van Lehn v. Morse, 16 Wash. 672,

530. Absolute Right. — See note 2.

531. (2) For Want of Power. — See notes 1, 2, 3.

holding the refusal to permit an amendment to be reversible error, where substantial injustice resulted from such refusal; *Seattle v. Baxter*, 20 Wash. 714; *Price v. Scott*, 13 Wash. 574.

Wisconsin. — *Roberts v. Weadock*, 111 Wis. 488; *Withee v. Simon*, 104 Wis. 116; *St. Clara Female Academy v. Northwestern Nat. Ins. Co.*, 101 Wis. 464; *Segelke, etc., Mfg. Co. v. Hulberg*, 94 Wis. 106; *Rice v. Ashland County*, 114 Wis. 130.

See also *Southern Express Co. v. Platten*, 36 C. C. A. 46; *Chapman v. Yellow Poplar Lumber Co.*, 61 U. S. App. 499; *Merchants' L. Assoc. v. Yolkum*, 39 C. C. A. 56.

530. 2. Alabama. — Within the following limitations the right to amend cannot be denied. There must not be an entire change of plaintiff or defendant; nor an entire change of cause of action; nor the introduction of a cause of action accruing after the commencement of the suit; nor the addition of a cause barred by limitations; nor a misjoinder of causes of action. *Springfield F., etc., Ins. Co. v. De Jarnett*, 111 Ala. 248. See also *Rand v. Gibson*, 109 Ala. 266.

Georgia. — Under Act Ga. 1897, if the defendant makes the affidavit prescribed the court has no discretion, but must permit the amendment. *Wynn v. Wynn*, 109 Ga. 255; *Alabama Midland R. Co. v. Guilford*, 114 Ga. 627; *Georgia R., etc., Co. v. Gardner*, 113 Ga. 897.

In *Hogans v. Dixon*, 105 Ga. 171, the trial court having refused to allow an amendment and dismissed the action, though there was enough to amend by, the judgment was reversed.

Stipulation Restricting Issues. — Where the parties, by agreement in open court, have limited the judicial inquiry to a particular question, they cannot afterwards, as a matter of right, enlarge the scope of that inquiry. *Pettitt v. Macon*, 95 Ga. 645.

Limitation as to Time of Pleading. — The right to amend is a right whose limits are to be determined in connection with the power of the court to control the time and order of pleading, so far as may be necessary to compel the parties to reach a final issue within a reasonable time, and with the discre-

tion of the court to receive pleas out of time. *Wagar Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558; *Walker v. English*, 106 Ala. 369; *Foster v. Bush*, 104 Ala. 662; *Trustees of Donations, etc. v. Parish of Christ Church*, 68 Conn. 369. See also *Links v. Connecticut River Banking Co.*, 66 Conn. 277.

In *Burch v. Swift*, (Ga. 1902) 43 S. E. Rep. 64, it was held to be error to allow a defendant who had filed a plea in his own name to amend by joining with him in his plea codefendants who were in default.

531. 1. Martin v. Massie, 127 Ala. 504, holding that where under the undisputed evidence the plaintiff's only remedy was on a contract, and he could not have recovered on the common counts if he had sued on them in the beginning, it was error to allow an amendment introducing them.

2. Moran v. Bentley, 71 Conn. 623; *Boxley Banking Co. v. Carter*, 112 Ga. 529; *Madden v. Watts*, 59 S. Car. 81; *Haddock v. Salt Lake City*, 23 Utah 521.

3. Dunnett v. Thornton, 73 Conn. 1; *Hoyt v. Wayne Circuit Judge*, 117 Mich. 172, wherein the erroneous ground of refusal was that the proposed amendment introduced a new cause of action, the court not exercising its discretion; *Munzinger v. Courier Co.*, 82 Hun (N. Y.) 575; *Martin v. Fayetteville Bank*, 131 N. Car. 121; *Booth v. Langley Mfg. Co.*, 51 S. Car. 412.

Ground of Decision, How Ascertained. — The court's memorandum is no part of the order, and where it does not appear to the contrary in the order it must be assumed, without regard of such memorandum, that the order denying leave to amend was made as a matter of discretion. *Boen v. Evans*, 72 Minn. 169.

Where the court denied an application for leave to amend an answer by setting up an equitable defense, an exception reciting that the refusal was on the ground that the application was too late was interpreted to mean, not that the court was of opinion that it had no power to allow the amendment, but that it ought not to be allowed because the defendant had neglected to make the application at an earlier stage. *Chelsea First Nat. Bank v. Hall*, 170 Mass. 526.

532. (3) *Presumptions in Favor of Trial Court.* — See note 1.

533. (4) *Harmless Error.* — See notes 1, 2, 3.

532. 1. *Indiana.* — *Citizens St. R. Co. v. Heath*, (Ind. App. 1901) 62 N. E. Rep. 107; *Hedrick v. Whitehorn*, 145 Ind. 642; *Consumer's Gas Trust Co. v. Corbaley*, 14 Ind. App. 549.

Kansas. — *Atchison Sav. Bank v. Means*, 61 Kan. 857, 58 Pac. Rep. 989. *Missouri.* — *Harlan v. Moore*, 132 Mo. 483.

Montana. — *York v. Steward*, 21 Mont. 515.

Nebraska. — *Central City Bank v. Rice*, 44 Neb. 594; *Donovan v. Hibbler*, (Neb. 1902) 92 N. W. Rep. 637.

Oregon. — *Foster v. Henderson*, 29 Oregon 210.

Washington. — *Ogle v. Jones*, 16 Wash. 319.

Wisconsin. — *Roberts v. Weadock*, 111 Wis. 488.

Showing Required in Trial Court. — *Schaller v. Chicago, etc., R. Co.*, 97 Wis. 31; *Withee v. Simon*, 104 Wis. 116.

Sufficiency of Record. — *Boyd v. Ames*, 110 Iowa 749; *Imhoff v. Richards*, 48 Neb. 590.

533. 1. *Wellman v. Jones*, 124 Ala. 580; *Freeman v. Brown*, 115 Ga. 23; *Wilson v. Carey*, 97 Ga. 397; *Newbury v. Getchel, etc., Lumber, etc., Co.*, 100 Iowa 441; *Whitmire v. Boyd*, 53 S. Car. 315; *King County Land etc., Co. v. Thomson*, 21 Tex. Civ. App. 473; *German Ins. Co. v. Norris*, 11 Tex. Civ. App. 250. See also *Christopher, etc., R. Co. v. Twenty-Third St. R. Co.*, 149 N. Y. 51.

Rendered Harmless by Findings. — Where an amendment was allowed setting up limitations, a finding that the statute of limitations had no application to the case rendered the allowance of the amendment harmless. *Allen v. Petty*, 58 S. Car. 240.

Error Cured by Verdict. — In an action against a city error, if any, in allowing amendment of the *ad damnum* to an amount greater than the claim or bill presented by the plaintiff to the council is not prejudicial where the verdict and judgment are for less than the amount of such claim or bill. *Quint v. Merrill*, 105 Wis. 406.

2. *California.* — *McDougald v. Hulet*, 132 Cal. 154, holding that error in refusing to allow an amendment was cured by receiving evidence and finding upon the matter to which the

proposed amendment was directed; *Pacific Rolling Mill Co. v. Bear Valley Irrigation Co.*, 120 Cal. 94, where all the evidence which could have been admitted had the amendment been allowed was admitted and considered after disallowing the amendment; *Butler v. Gosling*, 130 Cal. 422; *Green v. Burr*, 131 Cal. 236; *Fowler v. Carne*, 132 Cal. xviii, 64 Pac. Rep. 581; *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407.

Colorado. — *Denver Consol. Tramway Co. v. Riley*, 14 Colo. App. 132; *Manners v. Fraser*, 6 Colo. App. 21.

Indiana. — *Dietz v. Spahr*, 16 Ind. App. 591.

Indian Territory. — *Missouri, etc., R. Co. v. White*, 2 Indian Ter. 23, citing 1 ENCYC. OF PL. AND PR. 533.

Iowa. — *Thompson v. Brown*, 106 Iowa 367, holding that the allowance of an amendment will not be disturbed on the ground of surprise where the same evidence might have been given under the original pleading; *Longueville v. May*, 115 Iowa 709, holding that the refusal to allow an amendment is not prejudicial where the court proceeds upon the theory that the issue has been already presented by the original pleading; *Rosenberger v. Marsh*, 108 Iowa 47; *Martin v. Shannon*, 101 Iowa 620; *Union Mill Co. v. Prenzler*, 100 Iowa 540.

Kentucky. — *Owensboro Harrison Telephone Co. v. Wisdom*, 62 S. W. Rep. 529, 23 Ky. L. Rep. 97; *Carnahan v. Thompson*, (Ky. 1899) 52 S. W. Rep. 931, where the refusal did not withdraw anything from the consideration of the jury.

Montana. — *Hunter v. Montana Cent. R. Co.*, 22 Mont. 525.

Nebraska. — *Scherar v. Prudential Ins. Co.*, 63 Neb. 530.

South Carolina. — *McDaniel v. Monroe*, 63 S. Car. 307.

Washington. — *Biddle Purchasing Co. v. Port Townsend Steel Wire, etc., Co.*, 16 Wash. 681.

Wisconsin. — *Lessel v. Zillmer*, 105 Wis. 334, where the judgment recovered was on the cause as originally stated. See also *Carroll v. Fethers*, 102 Wis. 436.

Where No Amendment Is Made in accordance with the leave obtained, the opposite party cannot complain of the

533. *Circumstances Rebutting Prejudice.* — See note 4.

(5) *Objection and Exception.* — See note 5. See also EXCEPTIONS AND OBJECTIONS.

534. See note 2.

(6) *Method of Review.* — See note 3.

granting of leave to amend. *Richards v. Bradley* 129 Cal. 670.

532. 3. *Hume v. Kelly*, 28 Oregon 398.

533. 4. *Benepe v. Meier*, 75 Ill. App. 561; *Weis v. Morris*, 102 Iowa 327; *Leek v. Chesley*, 98 Iowa 593; *Minkley v. Springwells Tp.*, 113 Mich. 347; *Foster v. Henderson*, 29 Oregon 210; *Jester v. Lipman*, 40 Oregon 408.

5. *Kennenberg v. Neff*, 74 Conn. 62; *Stone v. Nix*, 101 Ga. 290, holding that an amendment to a petition allowed without objection must be considered as a part of the petition; *Kahn v. Thomson*, 113 Ga. 957; *North British, etc., Ins. Co. v. Rudy*, 26 Ind. App. 472; *Sanford v. Newell*, 18 Mont. 126.

Specific Objection Required. — *Farley v. Bay Shell Road Co.*, 125 Ala. 184.

Method of Objection. — To question the propriety of allowing an amendment, the party should object to its allowance or move to strike. A demurrer does not raise the question. *Nashville, etc., R. Co. v. Parker*, 123 Ala. 683; *Springfield F., etc., Ins. Co. v. De Jarnett*, 111 Ala. 248.

Objections in Advance of Filing. — It is not contrary to good practice to entertain objections in advance of the filing of an amended pleading, and it is not necessary that the court should allow the pleading to be filed and thus require the opposite party to move to strike or demur, but either method is proper. *Anthony v. Slayden*, 27 Colo. 144. See also *Peiser v. Griffin*, 125 Cal. 9.

Waiver of Objection. — See also *Logeling v. New York El. R. Co.*, 5 N. Y. App. Div. 198.

Though the statute authorizing a justice of the peace to allow amendments of pleadings provides that no amendment shall be allowed after a witness has been sworn on the trial when an adjournment thereby will be made necessary, if a justice allows an amendment of the complaint after a witness is sworn, on condition that one day's attendance of the defendant's witnesses be paid by the plaintiff, and the amount is paid by the plaintiff and the defendant consents to an adjourn-

ment, the justice does not lose jurisdiction. *State v. Daubner*, 111 Wis. 671.

Answering and Going to Trial waives any objection which might have been made to an amendment. *Baldwin Coal Co. v. Davis*, 15 Colo. App. 371; *Hunt v. Hicks*, 3 Indian Ter. 275; *Miller v. Cavanaugh*, 99 Ky. 377; *Martini v. Christensen*, 65 Minn. 489.

For the First Time on Appeal it is too late to raise objection to the propriety of filing an amended pleading. *Dunham v. Brown*, 9 Kan. App. 889, 58 Pac. Rep. 232; *Chance v. Jennings*, 59 Mo. 544; *Miller v. Fiss*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 66.

Amendment by Agreement. — Where a defendant obtains important concessions for an agreement that an amendment shall be made, he cannot afterwards repudiate the agreement. *Jobe v. Hunter*, 165 Pa. St. 5.

534. 2. *Troup v. Horbach*, 57 Neb. 644 [citing 1 ENCYC. OF PL. AND PR. 534]; *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73; *Jaroszewski v. Allen*, (Iowa 1902) 91 N. W. Rep. 941. See also *Hartzell v. McClurg*, 54 Neb. 313, as to action of justice of the peace.

Assignment of Error on the ruling of the court on a motion to strike an amendment is necessary to present the ruling to the appellate court for review, although the case is one tried in equity and on appeal is tried *de novo*. But an assignment challenging such a ruling, found in connection with the argument of counsel, is sufficient to bring the ruling before the appellate court for review. *Hogueland v. Arts*, 113 Iowa 634. See also ASSIGNMENT OF ERRORS.

Bill of Exceptions. — Applications to amend on the trial are not part of the record unless made so by a bill of exceptions. *Van Duzer v. Towne*, 12 Colo. App. 4; *Chance v. Jennings*, 59 Mo. 544; *Imhoff v. Richards*, 48 Neb. 590. See also BILLS OF EXCEPTIONS.

3. **In Nebraska** an order denying an application for leave to amend is not appealable. *Troup v. Horbach*, 57 Neb. 644.

In North Carolina an order made on an application to amend is not appeal-

535. See note 1.

536. 5. In Respect of Parties — *a.* MISNOMER — Modern Statutes. — See note 1.

537. *b.* MISDESCRIPTION OF PLAINTIFF — CHANGING NOMINAL PLAINTIFF. — See note 1.

able. *Tillery v. Candler*, 118 N. Car. 888, *Goodwin v. Caraleigh Phosphate, etc., Works*, 123 N. Car. 162; *Parker v. Harden*, 122 N. Car. 111.

Decision Involving Final Determination.

— Where the question of making an amendment involves the final determination of the case an appeal lies. *Hodges v. Kimball*, (C. C. A.) 91 Fed. Rep. 845.

Mandate to Compel Allowance. — When the appellate court, upon reversing a judgment and remanding the cause, has granted leave to a party to amend, and the trial court makes an order practically denying the right thus given, as by attaching a condition to the right to amend, the appellate court will issue a writ of mandate to compel the allowance of the amendment. *Dixon v. Risley*, 114 Cal. 204.

From Order Refusing to Open Default.

— Where at the trial a motion for leave to amend is denied, the defendant's counsel may pursue either of two remedies. He may except to the decision, proceed with the trial, and avail himself of his exception on appeal; or he may abandon the case and suffer judgment by default to be taken. But when he adopts the latter course he cannot be permitted to reconsider his action after the plaintiff has made his proof and dismissed his witnesses, and the appellate court will not disturb an order refusing to open the default. *Dudley v. Broadway Ins. Co.*, 42 N. Y. App. Div. 555.

536. 1. New York — Sufficiency of Amended Pleading. — The question whether an amended complaint or answer sets forth a good cause of action or defense will not be determined on an appeal from an order allowing, *Thilemann v. New York*, 71 N. Y. App. Div. 595, or refusing, *Gerdau v. Faber*, 26 N. Y. App. Div. 606, the application to amend.

An Order Denying a Motion for Re-argument of a motion for leave to serve an amended pleading is not appealable. *Peterson v. Felt*, 61 N. Y. App. Div. 176.

In Iowa an order striking out an amendment is "an order made affecting a substantial right," etc., under

the statute, and is appealable. *Kay v. Pruden*, 101 Iowa 60.

536. 1. Misnomer of Plaintiff may be cured by amendment. *Wilcox v. American Sav. Bank*, 21 Colo. 348; *Maher v. Interstate Switch Co.*, 58 Kan. 817, 51 Pac. Rep. 286; *Stever v. Brown*, 119 Mich. 196; *First State Bank v. Noel*, 94 Mo. App. 498; *Whitehill v. Keen*, 79 Mo. App. 125; *Miltewallner v. Supreme Lodge, etc.*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 860.

Misnomer of Defendant may be cured by amendment. *Savannah, etc., R. Co. v. Buford*, 106 Ala. 303; *Green v. Supreme Lodge Nat. Reserve Assoc.*, 79 Mo. App. 179; *New York v. Union R. Co.*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 451; *Matter of Georgi*, (Surrogate Ct.) 35 Misc. (N. Y.) 685; *Missouri, etc., R. Co. v. Spellman*, (Tex. Civ. App. 1896) 34 S. W. Rep. 298.

537. 1. Bigelow v. Draper, 6 N. Dak. 152, as to substitution of name of corporation as plaintiff in place of that of receiver, *citing* 1 ENCYC. OF PL. AND PR. 515, 516; *Fargo v. Cutshaw*, 12 Ind. App. 392, holding that it is error to refuse to permit such an amendment where it appears clearly that the justice of the case requires it; *Beckett v. Northwestern Masonic Aid Assoc.*, 67 Minn. 298; *Hulbert v. Hohman*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 248; *Proweeder v. Lewis*, (N. Y. City Ct. Gen. T.) 24 Civ. Pro. (N. Y.) 299, 11 Misc. (N. Y.) 100; *Dean v. Gilbert*, 92 Hun (N. Y.) 427; *McDonald v. Nebraska*, 41 C. C. A. 278, 101 Fed. Rep. 171; *Howard v. U. S.*, 42 C. C. A. 169, 102 Fed. Rep. 77; *Chicago Great Western R. Co. v. Leavenworth First M. E. Church*, 42 C. C. A. 178, 102 Fed. Rep. 85.

Substituting Beneficiary. — *Hamburg v. Liverpool, etc., Ins. Co.*, 42 Fla. 86.

Substituting Holder of Legal Title. — *Germania Bank v. Collins*, 113 Ga. 1010; *Wheeler v. Stapleton*, 99 Ga. 731; *Roush v. Charleston First Nat. Bank*, 102 Ga. 109; *Wright v. Vermont L. Ins. Co.*, 164 Mass. 302.

Entirely New Plaintiff. — *Contra*, *Service v. Farmington Sav. Bank*, 62 Kan. 857.

538. See note 1.

539. See notes 1, 3.

540. See note 1.

c. MISDESCRIPTION OF DEFENDANT — NOMINAL CHANGE. — See notes 2, 3.

541. See note 1.

d. ADDING PLAINTIFFS — Statutory Provisions. — See note 3.

538. 1. *Missouri, etc., R. Co. v. White*, 2 Indian Ter. 23; *Woodram v. Cincinnati, etc., R. Co.*, (Ky. 1897) 38 S. W. Rep. 703; *Glenn v. Gerald*, 64 S. Car. 236; *Middlesex Banking Co. v. Smith*, 52 U. S. App. 406, holding that such amendment is not the statement of a new cause of action. See also *Delisle v. Bourriague*, 105 La. 77.

539. 1. *Cirwithin v. Mills*, 2 Marv. (Del.) 232; *Chicago, etc., R. Co. v. Murphy*, 198 Ill. 462, holding that a claim for personal injuries against a railroad is not assignable, and that a declaration by the plaintiff, "suing for the use of" another, may be amended by striking out this last clause, it being merely surplusage; *Burlington Voluntary Relief Dept. v. Moore*, 52 Neb. 719.

Descriptive Persons may be stricken out. *Atlanta Brewing, etc., Co. v. Bluthenthal*, 101 Ga. 541.

3. *Smith v. Columbia Jewelry Co.*, 114 Ga. 698; *Gewe v. Hanszen*, 85 Mo. App. 136.

Death by Wrongful Act. — *Van Doren v. Pennsylvania R. Co.*, 35 C. C. A. 282, holding that the plaintiff, suing as administratrix of her deceased husband for damages for his death, should be permitted to amend so as to declare as widow, in conformity with the requirement of the state statute, such amendment not changing the cause of action, not affecting the measure of proof, not changing the issue to be tried, and not affecting the amount of the recovery. But see otherwise in *Lower v. Segal*, 60 N. J. L. 99.

So in *Tennessee*, the administrator as plaintiff in such an action is the party entitled to prosecute, the beneficiary is not a party, and to substitute one beneficiary for another is not to set up a new cause of action. *Hooper v. Atlanta, etc., R. Co.*, 107 Tenn. 712. In this case the administrator had previously brought a suit which was removed to the federal court. The United States Court of Appeals held

that such an amendment, under the Tennessee statute, set up a new cause of action, and reversed the judgment of the Circuit Court, with directions to grant a new trial and to sustain the plea of the statute of limitations to the amended declaration (35 C. C. A. 24); but before a new trial was had the plaintiff took a voluntary nonsuit and the cause was dismissed, when he re-brought his suit in the state court, where the point was raised and decided as above indicated.

540. 1. *Mutual L. Ins. Co. v. Inman Park Presb. Church*, 111 Ga. 677.

2. *Adamson v. Bergen*, 15 Colo. App. 396; *Maddox v. Central of Georgia R. Co.*, 110 Ga. 301; *Stuart v. New York Herald Co.*, 73 N. Y. App. Div. 459; *Munzinger v. Courier Co.*, 82 Hun (N. Y.) 575 [approved in *Olney v. Goodwin*, 15 N. Y. App. Div. 627]; *Nelson v. Brenham Compress Oil, etc., Co.*, (Tex. Civ. App. 1899) 51 S. W. Rep. 514.

After a Plea in Abatement has been filed, if it appears that the defendant has been misdescribed an amendment will be allowed. *Tyler v. Mutual Dist. Messenger Co.*, 13 App. Cas. (D. C.) 267.

3. *Haggarty v. Strong*, 10 S. Dak. 585, citing 1 ENCYC. OF PL. AND PR. 517; *Durkee v. Conklin*, 13 Colo. App. 313; *Carlton v. Grissom*, 98 Ga. 118, amendment showing more distinctly that the defendants were liable as partners; *Moore v. Moore*, 44 N. Y. App. Div. 253; *Alker v. Rhoads*, 73 N. Y. App. Div. 158, before trial; *Baker v. Hornick*, 51 S. Car. 313, allowing an amendment to charge the defendants individually instead of as partners; *Courson v. Parker*, 39 W. Va. 521, to correct a variance between the declaration and the writ.

541. 1. *Newport v. Com.*, 106 Ky. 434.

3. *Weedon v. Jones*, 106 Ala. 336; *Murray v. Booker*, 58 S. W. Rep. 788, 22 Ky. L. Rep. 781; *Thillman v. Neal*,

542. c. ADDING DEFENDANTS — At Common Law. — See notes 1, 2.

544. f. STRIKING OUT PLAINTIFFS — Statutory Provisions. — See note 1.

g. STRIKING OUT DEFENDANTS — At Common Law. — See note 2.

545. By Statute. — See note 1.

h. ENTIRE CHANGE OF PARTIES. — See note 3

88 Md. 525; *Mills v. Callahan*, 126 N. Car. 756; *Laughlin v. Tips*, 8 Tex. Civ. App. 649. See also *Tillery v. Candler*, 118 N. Car. 888.

542. 1. Heffern v. Hunt, 8 N. Y. App. Div. 585, *citing* 1 ENCYC. OF PL. AND PR. 542.

2. Rand v. Gibson, 109 Ala. 266; *McKissack v. Witz*, 120 Ala. 412; *Beecher v. Ireland*, 8 Kan. App. 10; *Fears v. Riley*, 148 Mo. 49; *People v. Brooklyn*, 6 N. Y. App. Div. 202.

As to rule restricted to equitable actions, see *Heffern v. Hunt*, 8 N. Y. App. Div. 585.

When Not Allowed. — Under a statutory provision requiring that actions in the municipal court "must be commenced by the voluntary appearance of and joinder of issue by the parties, or by the service of a summons," where there is no appearance on behalf of a person, and no service of summons on him, and he is a necessary party, being a member of the firm intended to be sued, the justice has no right to add his name to the summons after trial and thus attempt to acquire jurisdiction over the partnership firm. *Kest v. Kimmel*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 826.

Effect of Making New Defendant. — After a new party is brought in and files an answer in the nature of a crossbill setting up his legal rights and seeking affirmative relief, the party at whose instance he was brought in cannot amend his pleading so as to prevent a hearing of the case upon its real merits and deprive such new party of the opportunity to establish his right to relief. *Spears v. Scott*, 111 Ga. 745.

No Ground for Dismissal of Action. — Where a township is a party to a suit, the bringing in of its officers as codefendants is not a ground for dismissing the action. *Baldwin v. Ohio Tp.*, 63 Kan. 885, 65 Pac. Rep. 700.

544. 1. Morris v. Wheat, 11 App. Cas. (D. C.) 201; *Constitution Pub. Co. v. Way*, 94 Ga. 120; *Kansas City v.*

King, 65 Kan. 64; *Neher v. Armijo*, 9 N. Mex. 325.

In Appellate Court. — In *Missouri* it is held that on appeal from a judgment of a justice of the peace in favor of three plaintiffs on a joint contract, an amendment in the Circuit Court striking out the names of two of the joint plaintiffs is a change of the cause of action and is not proper. *Slaughter v. Davenport*, 151 Mo. 26.

2. Sels v. Greene, 88 Fed. Rep. 127.

545. 1. Underwriters v. Elbel, 108 Ga. 792; *Mulvane v. Sedgley*, 10 Kan. App. 574, 61 Pac. Rep. 971; *Philadelphia, etc., Coal, etc., Co. v. Butler*, 181 Mass. 468; *Peoples v. Mims*, 64 S. Car. 226; *Sadler v. Nicholson*, 49 S. Car. 7; *Sels v. Greene*, 88 Fed. R. p. 127, under the *California* statute.

Individual Members of a Firm may be stricken out, leaving the partnership by its firm name as the sole defendant. *Vinegar Bend Lumber Co. v. Hamilton-Brown Shoe Co.*, 129 Ala. 271.

Dismissal After Verdict. — The statute allowing parties, by leave of court, to amend at any time before verdict does not authorize an amendment by a dismissal after verdict as to one of two defendants sued jointly. *Holmes v. Tyler*, 8 N. Mex. 613.

3. Daugherty v. Powe, (Ala. 1900) 30 So. Rep. 524; *Hallmark v. Hopper*, 119 Ala. 78, holding that an action in the name of "A B, agent for C D," is the suit of A B, and that the words "agent for C D" are merely descriptive; that an amendment striking out the words "A B, agent for," and leaving the suit to stand in the name of C D, works an entire change of the party plaintiff; *Collins v. Watson*, 1 Penn. (Del.) 397, holding that in an action by three as a firm an amendment by striking out one of the individual members would be to substitute a new plaintiff and is not allowable; *Hallett v. Larcum*, (Idaho 1897) 51 Pac. Rep. 108; *Wildermuth v. Long*, 196 Pa. St. 541; *Lusk v. Kimball*, 87 Fed. Rep. 545;

546. See note 1.

548. 6. Introducing a New Cause of Action or Defense — *a.* PREVALENCE AND EXTENT OF THE RULE FORBIDDING — Under Codes and Statutes. — See note 1.

Person v. Fidelity, etc., Co., 84 Fed. Rep. 759.

By Addition and Subtraction. — *Brooks v. Collier*, 3 Indian Ter. 468.

546. 1. *Denver, etc., R. Co. v. Loveland*, 16 Colo. App. 146; *Hughes v. Diamond Match Co.*, 1 Penn. (Del.) 140; *Erskine v. McClrath*, 60 Minn. 485, holding that the attorney for the defendant has no authority to consent to an amendment which changes the action from one against the defendant as receiver to one against him individually; *Hajek v. Bohemian Slavonian Benev. Soc.*, 66 Mo. App. 568.

Substituting Names of Partners. — *Greer v. Waxelbaum*, 115 Ga. 866, holding that a petition against "A & B" as a firm alleged to be composed of the individuals A and B was not amendable so as to make it an action against a firm described as "C and B," composed of C and B, the two partnerships being different entities.

548. 1. *Alabama.* — For cases holding amendments to be proper so long as they do not introduce entirely new causes of action, see *Central of Georgia R. Co. v. Foshee*, 125 Ala. 199; *Springfield F., etc., Ins. Co. v. De Jarnett*, 111 Ala. 248.

Colorado. — An entirely new cause of action cannot be introduced by an amendment over objection. *Anderson v. Groesbeck*, 26 Colo. 3; *Anthony v. Slayden*, 27 Colo. 144.

Connecticut — *Practice Act.* — See *Goodrich v. Alfred*, 72 Conn. 257; *Dunnett v. Thornton*, 73 Conn. 1.

Georgia. — *Colvard v. Black*, 110 Ga. 642; *Harris v. Moss*, 112 Ga. 95; *Cox v. Henry*, 113 Ga. 259; *Heins v. Savannah, etc., R. Co.*, 114 Ga. 678; *Central of Georgia R. Co. v. Williams*, 105 Ga. 70; *Brooks v. Thrasher*, (Ga. 1902) 42 S. E. Rep. 473; *Georgia R., etc., Co. v. Roughton*, 109 Ga. 604; *Horton v. Smith*, 115 Ga. 66; *Brunswick v. Harvey*, 114 Ga. 733; *Williams v. Hall*, 103 Ga. 796; *Chandler v. Western Union Tel. Co.*, 94 Ga. 442; *Montague v. Chattanooga, etc., R. Co.*, 94 Ga. 668; *Atwater v. Hannah*, (Ga. 1902) 42 S. E. Rep. 1007. But as to setting up new defenses before the Act of 1895, see *Ford v. Williams*, 98 Ga. 238.

Idaho. — Another and distinct cause of action cannot be introduced by way of amendment. *Hallett v. Larcom*, (Idaho 1897) 51 Pac. Rep. 108.

Indiana — *After Cause Is Submitted.* — *Thrall v. Gosnell*, 28 Ind. App. 174; *Matthews v. Rund*, 27 Ind. App. 641.

Kansas. — The statute provides for amendments to conform the pleadings and proceedings to the facts proved when such amendments do not substantially change the claim or defense. *State v. Krause*, 58 Kan. 651. In *Jewett v. Malott*, 60 Kan. 509, the court refused to disturb the action of the lower court in striking an amendment introducing a new and distinct cause of action, saying that the allowance of such an amendment would be unwarranted under the statute.

Kentucky. — An amended petition attempting to set out a cause of action upon an entirely different basis should not be allowed to be filed, and if filed should be ignored. *Huff v. Logan*, 60 S. W. Rep. 483, 22 Ky. L. Rep. 1314.

Maine. — *Nickerson v. Bradbury*, 88 Me. 593; *Willoughby v. Atkinson Fertilizing Co.*, 93 Me. 185; *Jordan v. McAllister*, 91 Me. 481; *Musgrave v. Farren*, 92 Me. 198.

Michigan. — A new and different cause of action is not within the province of an amendment. *Angell v. Pruyn*, 126 Mich. 16.

Missouri. — An amendment is not proper to introduce a new cause of action. *Rice v. McClure*, 74 Mo. App. 379; *Pruett v. Warren*, 71 Mo. App. 84. An amendment introducing a claim inconsistent with the original claim and necessitating a change in the defense refused on the trial. *Carter v. Dilley*, 167 Mo. 564.

Nebraska. — It seems that the court may permit the defendant to set up a different and even inconsistent defense at the trial, at the same time affording to the plaintiff an opportunity to meet it. *Dunn v. Bozarth*, 59 Neb. 244.

New York. — *The Special Term* has power to allow an amendment changing the cause of action, the purpose of the amended and original pleadings being the same. *Deyo v. Morss*, 144 N. Y.

216, which case was said in *Rowell v. Moeller*, 91 Hun (N. Y.) 421, to have effected a sweeping change in the practice relating to amendments; *Goddard v. Cassell*, 84 Hun (N. Y.) 43.

Before Trial. — *Sturges v. Newcombe*, (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 371, in which case the amendment was allowed because "the peculiarities of the litigation placed it within the discretion of the court to determine whether or not there were laches on the part of the plaintiff which should defeat his application to amend." *Following Deyo v. Morss*, 144 N. Y. 216. See also *Ziegler v. Trenkman*, 31 N. Y. App. Div. 305.

On Trial. — *Thilemann v. New York*, 71 N. Y. App. Div. 595; *Abbott v. Meinken*, 48 N. Y. App. Div. 109; *Keating v. Stevenson*, 21 N. Y. App. Div. 604; *Smith v. Smith*, 4 N. Y. App. Div. 227, in which cases the distinction is drawn between the power of the court at special term, upon motion regularly made, and the power of the court upon the trial, in that in the former case an amendment may be allowed substantially changing the issues. See also as to allowing amendments by the trial court: *People v. Bremer*, 69 N. Y. App. Div. 14; *Pennie v. Newburgh Electric R. Co.*, 47 N. Y. App. Div. 635; *Block v. Third Ave. R. Co.*, 60 N. Y. App. Div. 191; *Zimmer v. Chew*, 34 N. Y. App. Div. 504; *Mercantile Bank v. Anderson*, 27 N. Y. App. Div. 94; *Lupcan v. Brainard*, 20 N. Y. App. Div. 212; *Alden v. Clark*, 86 Hun (N. Y.) 357; *United Press v. A. S. Abell Co.*, 73 N. Y. App. Div. 240; *Schoonmaker v. Blass*, 88 Hun (N. Y.) 179; *Stratton v. City Trust, etc.*, *Surety Co.*, 69 N. Y. App. Div. 322; *Craven v. Bloomingdale*, 54 N. Y. App. Div. 266; *Roessel v. Rosenberg* (N. Y. City Ct. Gen. T.) 10 Misc. (N. Y.) 38.

If the amendment cannot be made on the trial because it substantially changes the issue, the party should procure a postponement of the trial and make application upon notice for leave to amend. *Cauchois v. Proctor*, 1 N. Y. App. Div. 16.

What Stage Is Deemed "Before Trial."

— But compare *Stratton v. City Trust, etc.*, Co., 69 N. Y. App. Div. 322.

Municipal Courts. — In *Shirtcliffe v. Wall*, 68 N. Y. App. Div. 375, it was held that under Code Civ. Pro. N. Y., § 2944, municipal courts are empowered to allow amendments involving new

issues; that § 3347, subdiv. 6, extending § 723 to all courts, was not intended to limit the powers of amendment conferred upon municipal courts by § 2944; that this construction does not clothe municipal courts with powers greater than those conferred upon the Supreme Court at its trial and its special terms, for § 2944 makes provision for an adjournment in case a party amends and thus practically affords similar protection to the opposite party as though in an action in the Supreme Court he had been sent from the trial to the special term.

Effect of Stipulation. — *Deyo v. Morss*, 144 N. Y. 216, reversing the decision of the Supreme Court (as cited in this note in the original article) and holding that the stipulation authorized such amendment as the court had power to grant, *i. e.*, the substitution of another cause of action.

North Carolina. — A cause of action "wholly different" from that originally set up cannot be introduced by amendment. *Goodwin v. Caraleigh Phosphate, etc., Works*, 123 N. Car. 162.

North Dakota. — It lies within the discretion of the District Court, either before or after judgment, to allow an amendment of a pleading in furtherance of justice if the amendment does not "change substantially the claim or defense." *Rev. Codes N. Dak. (1895), § 5297. Finlayson v. Peterson*, (N. Dak. 1902) 89 N. W. Rep. 855. See to the same effect *Mares v. Wormington*, 8 N. Dak. 329, *citing* 1 ENCYC. OF PL. AND PR. 548, 549.

Oklahoma. — *Smock v. Carter*, 6 Okla. 300, holding that the phrase of the statute, "when such amendment does not change substantially the claim or defense," relates to and qualifies only the one which immediately precedes, *i. e.*, the words "or conform the pleading or proceeding to the facts proved."

Oregon. — Before trial a new cause of action may be introduced so long as it is germane to the subject-matter of the controversy, as is evident from another clause of the statute which specially restricts the amendments made on the trial to such as do not substantially change the cause of action or defense. *Talbot v. Garretson*, 31 Oregon 256.

Pennsylvania. — *Philadelphia v. Hes-tonville, etc.*, R. Co., 203 Pa. St. 38, with respect to limitations; *Wilder-*

556. b. GENERAL TESTS. — See notes 1, 2, 3.

muth v. Long, 196 Pa. St. 541; *Peterson v. Pennsylvania R. Co.*, 195 Pa. St. 494.

South Carolina. — *Proctor v. Southern R. Co.*, 64 S. Car. 491, holding that the code does not authorize a new cause of action by amendment; *Robert v. Ellis*, 59 S. Car. 137, wherein amendment of answer by introducing a new defense was refused in the appellate court; *McDaniel v. Monroe*, 63 S. Car. 307, holding that the limitation as to the introduction of a new cause of action does not apply to amendments made during the time allowed to a party to amend as of course.

Vermont. — A new cause of action cannot be introduced by additional counts. *Esterbrooks v. Fidelity Mut. F. Ins. Co.*, (Vt. 1902) 52 Atl. Rep. 420.

West Virginia. — An amendment is proper so long as it does not introduce a new substantive cause of action different from that originally declared upon. *Clarke v. Ohio River R. Co.*, 39 W. Va. 732.

Wisconsin. — *A Substantial Change of the "Claim,"* as the term is used in the statute, need only stop short of the substitution of one cause of action for another, as the substitution of a cause of action in equity for one at law, or one sounding in tort for one on contract. Thus, where the subject of the action (the title of land) and the remedy are the same under amended and original complaints, there is no change of the cause of action; though the material facts are changed by the amendment and the character of the evidence required to render the remedy resorted to effective is also changed. *Post v. Campbell*, 110 Wis. 378.

In *Oliver v. Raymond*, 108 Fed. Rep. 927, the court held that there was nothing in the Wisconsin cases to prevent the court, in the exercise of its discretion, from allowing the introduction by amendment of a new cause of action arising out of the same transaction and which might have been joined in the original complaint; and that such amendment might be allowed also under the federal statute.

United States. — In *Magruder v. Belt*, 7 App. Cas. (D. C.) 303, it was held, under Rev. Stat. U. S., § 954, that it is competent for the court to allow a change by amendment of one form of action to another provided the claim

or cause of action sued for is the same in both.

Introduction of Entirely New Cause of Action. — Under this statute it is not permissible to strike out the entire substance of a declaration which does not present a case within the jurisdiction of the court and insert a quite different case or cause of action, though relating to the same subject-matter as that of the first declaration. *Ex p. Mansfield*, 11 App. Cas. (D. C.) 558.

Causes Which Could Have Been Joined.

— In some jurisdictions causes of action which might have been joined originally may be joined by amendment. *Duckwall v. Brooke*, 65 S. W. Rep. 357, 23 Ky. L. Rep. 1459; *Jackson v. Fulton*, 87 Mo. App. 228, as to the practice before justices of the peace; *Tripp v. Yankton*, 10 S. Dak. 516, *citing* 1 ENCYC. OF PL. AND PR. 185, upon the interpretation of the term "transaction"; *Bowen v. Needles Nat. Bank*, 79 Fed. Rep. 49.

Province of Court and Jury. — The construction of pleadings is not to be submitted to the jury, and it is for the court, upon an examination of the pleadings, to decide whether the cause of action set up in additional counts is the same as that set forth in the original declaration. *Chicago, etc., R. Co. v. Ryan*, 165 Ill. 88.

Appeal. — In *Massachusetts* the statute provides that the adjudication of the court allowing the amendment shall be conclusive evidence of the identity of the action. *Driscoll v. Holt*, 170 Mass. 262. But in *Illinois* it is held that the appellate court is not concluded by the finding of the trial court allowing the amendment, such finding being conclusive of the identity of the "action," not of the "cause of action;" and statements in the amended pleading or in a replication to a plea of the statute of limitations that the causes of action are the same do not avoid the statute. *Fish v. Farwell*, 160 Ill. 236.

556. 1. *Messenger v. Northcutt*, 26 Colo. 527; *Hume v. Kelly*, 28 Oregon 398, both of which cases *cited* 1 ENCYC. OF PL. AND PR. 556; *Painter v. New River Mineral Co.*, 98 Fed. Rep. 544, *quoting* 1 ENCYC. OF PL. AND PR. 556, 557, and applying this and the other tests mentioned in the text. And see also *Whalen v. Gordon*, (C. C. A.) 95

557. See notes 1, 2.

c. WHAT AMENDMENTS ARE ALLOWED — (1) *Amplified Statements*. — See note 4.

Fed. Rep. 305; Hinsdale County v. Crump, (Colo. App. 1902) 70 Pac. Rep. 159; McCandless v. Inland Acid Co., 115 Ga. 968; Louisville, etc., R. Co. v. Pointer, 69 S. W. Rep. 1108; 24 Ky. L. Rep. 772; Angell v. Pruyn, 126 Mich. 16; Pennie v. Newburgh Electric R. Co., 47 N. Y. App. Div. 635; Critelli v. Rodgers, 87 Hun (N. Y.) 530; Deyo v. Morss, 74 Hun (N. Y.) 224, cited in this note in the original article, reversed in 144 N. Y. 216.

556. 2. Messenger v. Northcutt, 26 Colo. 527; Proctor v. Southern R. Co., 64 S. Car. 491; J. I. Case Threshing Mach Co. v. Eichinger, 15 S. Dak. 530; Phoenix Lumber Co. v. Houston Water Co., 94 Tex. 456, each of which cases cited 1 ENCYC. OF PL. AND PR. 556. See also the following cases:

Illinois. — Illinois Trust, etc., Bank v. La Touche, 101 Ill. App. 341; Wolf v. Collins, 94 Ill. App. 518, with respect to the statute of limitations.

Indiana. — Thrall v. Gosnell, 28 Ind. App. 174.

Michigan. — Angell v. Pruyn, 126 Mich. 16.

Missouri. — Heman v. Glann, 129 Mo. 325; Burnham v. Tillery, 85 Mo. App. 453.

New York. — Martin v. Home Bank, 30 N. Y. App. Div. 498.

Oregon. — Faste v. Standard L., etc., Ins. Co., 26 Oregon 449.

Texas. — Lynch v. Ortleib, 87 Tex. 590; Stewart v. Robbins, (Tex. Civ. App. 1901) 65 S. W. Rep. 899, with reference to the statute of limitations; Schneider-Davis Co. v. Brown, (Tex. Civ. App. 1898) 46 S. W. Rep. 108.

United States. — Whalen v. Gordon, (C. C. A.) 95 Fed. Rep. 305; Seymour v. Franklin, 92 Fed. Rep. 122.

The Character, not the quantum of the evidence must be the same. Schwab Clothing Co. v. St. Louis, etc., R. Co., 71 Mo. App. 241.

3. Messenger v. Northcutt, 26 Colo. 527, citing 1 ENCYC. OF PL. AND PR. 556; Whalen v. Gordon, (C. C. A.) 95 Fed. Rep. 305.

557. 1. Phoenix Lumber Co. v. Houston Water Co., 94 Tex. 456, citing 1 ENCYC. OF PL. AND PR. 556.

2. Dunnett v. Thornton, 73 Conn. 1; Brunswick v. Harvey, 114 Ga. 733;

Mitchell v. Chase, 87 Me. 172. But see Danielly v. Cheeves, 94 Ga. 263.

4. Armour v. Ross, 110 Ga. 403, citing 1 ENCYC. OF PL. AND PR. 556. See also the following cases:

Alabama. — Tennessee, etc., R. Co. v. Danforth, 112 Ala. 80, as to additional count for other damages arising out of the same transaction; Sheffield v. Harris, 112 Ala. 614.

California. — Matter of Wilson, 117 Cal. 262; Malone v. Johnson, (Cal. 1897) 47 Pac. Rep. 579.

Colorado. — Clough v. Rocky Mountain Oil Co., 25 Colo. 520; Johnson v. Cummings, 12 Colo. App. 17.

Connecticut. — Mechanics' Bank v. Woodward, (Conn. 1902) 51 Atl. Rep. 1084.

Georgia. — Oliver v. Powell, 114 Ga. 592; Western Union Tel. Co. v. Smith, 93 Ga. 635; Danielly v. Cheeves, 94 Ga. 263; Chandler v. Western Union Tel. Co., 94 Ga. 442; Clarke v. East Atlanta Land Co., 113 Ga. 21; Central of Georgia R. Co. v. Mosely, 112 Ga. 914; Wingate v. Atlanta Nat. Bank, 95 Ga. 1; Augusta v. Lombard, 99 Ga. 282; Florida Cent., etc., R. Co. v. Hays, 99 Ga. 290; Craven v. Walker, 101 Ga. 845; Haralson County v. Golden, 104 Ga. 19; Whitley v. Baggett, 104 Ga. 22; Atlanta Land, etc., Co. v. Haile, 106 Ga. 498; Roberts v. Leak, 108 Ga. 806; Macon v. Melton, 115 Ga. 153.

Illinois. — Illinois Steel Co. v. Richter, 82 Ill. App. 45; Belvidere v. Crichton, 81 Ill. App. 595.

Kentucky. — Louisville, etc., R. Co. v. Kice, 60 S. W. Rep. 705, 22 Ky. L. Rep. 1462; Ford Lumber, etc., Co. v. Clark, (Ky. 1902) 68 S. W. Rep. 443; Louisville, etc., R. Co. v. Pointer, 69 S. W. Rep. 1108, 24 Ky. L. Rep. 772, holding, in a cause of action for wrongful death, which arose in another state, that the statute of such state might be pleaded by way of amendment; Ashford v. Tipton, (Ky. 1899) 53 S. W. Rep. 268.

Maine. — South Thomaston v. Friendship, 95 Me. 201.

Michigan. — Hoyt v. Wayne Circuit Judge, 117 Mich. 172; Willet v. Michigan Cent. R. Co., 114 Mich. 411, holding the refusal to permit an amendment to be erroneous; Harris v.

558. *Answers.* — See note 1.

(2) *Correcting Misdescriptions.* — See notes 3, 4.

560. (3) *Making Allegations More Formal or Precise.* — See note 2.

Chamberlain, 126 Mich. 280, holding that an amendment may be allowed to make sufficient an allegation of the assignment of the claim upon which the plaintiff sues.

Missouri. — *Glover v. American Hominy Flakes Co.*, 76 Mo. App. 103.

Montana. — *Murray v. Tingley*, 20 Mont. 260.

Nebraska. — *Monroe v. Reid*, 46 Neb. 316; *Undeland v. Stanfield*, 53 Neb. 120.

North Carolina. — *Rountree v. Blount*, 129 N. Car. 25.

Texas. — *Texas, etc., R. Co. v. Eberhart*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1060; *The Oriental v. Barclay*, 16 Tex. Civ. App. 193; *Tynberg v. Cohen*, (Tex. Civ. App. 1895) 32 S. W. Rep. 157; *Galveston, etc., R. Co. v. Eckles*, (Tex. Civ. App. 1900) 60 S. W. Rep. 830; *Galveston, etc., R. Co. v. English*, (Tex. Civ. App. 1900) 59 S. W. Rep. 626; *Missouri Pac. R. Co. v. Foreman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 834; *Smith v. Connor*, (Tex. Civ. App. 1898) 46 S. W. Rep. 267.

United States. — *Leeds v. Evans*, 99 Fed. Rep. 28.

Narrowing the Complaint. — See *Concannon v. Smith*, 134 Cal. 14; *Causey v. Causey*, 106 Ga. 188; *Roush v. Charleston First Nat. Bank*, 102 Ga. 109; *South Thomaston v. Friendship*, 95 Me. 201; *Rose v. Mitchell*, 21 R. I. 270; *District of Columbia v. Talty*, 182 U. S. 510.

558. 1. *Gloddish v. Godchaux*, 46 La. Ann. 1571; *Meade v. Jones*, 13 Tex. Civ. App. 320; *Brown v. Baruch*, 24 Wash. 572.

Counterclaim. — As long as the pleadings are limited to matters pertaining to the same transaction, amendments are proper. An answer may be amended so as to set up a counterclaim. *Hyman v. Jockey Club Wine, etc., Co.*, 9 Colo. App. 299; *Foster v. Henderson*, 29 Oregon 210; *Ladd v. White*, (Wis. 1902) 92 N. W. Rep. 365. 3. *Gordon v. Mackey*, (Tex. Civ. App. 1895) 30 S. W. Rep. 586.

4. *Armour v. Ross*, 110 Ga. 403, *citing* 1 ENCYC. OF PL. AND PR. 558, 559; *Sanguineit v. Webster*, 153 Mo. 343; *Mitterwallner v. Supreme Lodge, etc.*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.)

860; *Johnson v. Staenglen*, 52 U. S. App. 537.

Misdescription of an Instrument may be corrected by amendment. *Lytle v. Dothan Bank*, 121 Ala. 215; *Chambers v. Talladega Real Estate, etc., Assoc.*, 126 Ala. 296, which latter case is like *Reed v. Scott*, 30 Ala. 640, cited in this note in the original article.

560. 2. *Alabama.* — *Exp. Sullivan*, 106 Ala. 80.

California. — *Frost v. Witter*, 132 Cal. 421; *French v. McCarthy*, 125 Cal. 508; *Stockton Combined Harvester, etc., Works v. American F. Ins. Co.*, 121 Cal. 182.

Colorado. — *Hinsdale County v. Crump*, (Colo. App. 1902) 70 Pac. Rep. 159; *Mullins v. Gilligan*, 12 Colo. App. 13; *Gambrill v. Brown Hotel Co.*, 11 Colo. App. 529.

Delaware. — *Covington v. Simpson*, (Del. 1901) 52 Atl. Rep. 349; *Kirwan Mfg. Co. v. Truxton*, 1 Penn. (Del.) 409.

Georgia. — *Sugarman v. Atlanta Consol. St. R. Co.*, 94 Ga. 604; *Roberts v. Leak*, 108 Ga. 806; *Marietta Paper Mfg. Co. v. Bussey*, 104 Ga. 477; *Roush v. Charleston First Nat. Bank*, 102 Ga. 109; *Allen v. Stephens*, 107 Ga. 733; *King v. McGhee*, 99 Ga. 621; *Savannah, etc., R. Co. v. Pollard*, (Ga. 1902) 42 S. E. Rep. 525; *Travelers Ins. Co. v. Gray*, 115 Ga. 764.

Idaho. — *Keenan v. Washington Liquor Co.*, (Idaho 1902) 69 Pac. Rep. 112.

Illinois. — *Mott v. Chicago, etc., R. Co.*, 102 Ill. App. 412.

Indian Territory. — *Purcell Mill, etc., Co. v. Kirkland*, 2 Indian Ter. 169; *Hunt v. Hicks*, 3 Indian Ter. 275.

Iowa. — *Taylor v. Taylor*, 110 Iowa 207.

Kentucky. — *Griffith v. Blue Grass Bldg., etc., Assoc.*, (Ky. 1900) 57 S. W. Rep. 486.

Maine. — *Jenness v. Barron*, 95 Me. 531.

Massachusetts. — *Lewis v. Jackson*, 165 Mass. 481, as to amendment of complaint in summary process, to perfect description of premises; *Scannell v. Hub Brewing Co.*, 178 Mass. 288.

Michigan. — *Dawson v. Peterson*, 110 Mich. 431, as to amendment set-

562. See note 1.

ting up an assignment to the plaintiff of the claim sued on; *Stanley v. Anderson*, 107 Mich. 384; *Phalen v. Detroit*, 126 Mich. 683. See also *Smalley v. Northwestern Terra-Cotta Co.*, 113 Mich. 141.

Minnesota. — *Niven v. Craig*, 63 Minn. 20.

Missouri. — *Pence v. Gabbert*, 70 Mo. App. 201.

New York. — *National Bank v. Rogers*, 166 N. Y. 380; *Craven v. Bloomingdale*, 54 N. Y. App. Div. 266; *Logeling v. New York El. R. Co.*, 5 N. Y. App. Div. 198; *Moore v. Moore*, 44 N. Y. App. Div. 253.

North Carolina. — *Martin v. Fayetteville Bank*, 131 N. Car. 121.

Oklahoma. — *Lookabaugh v. La Vance*, 6 Okla. 358.

Oregon. — *Osgood v. Osgood*, 35 Oregon 1; *Bailey v. Wilson*, 34 Oregon 186.

South Carolina. — *Tumbleston v. Rumph*, 43 S. Car. 275; *Brown v. Carolina Midland R. Co.*, 58 S. Car. 466.

South Dakota. — *Olson v. Burlington, etc.*, R. Co., 12 S. Dak. 326.

Texas. — *Orange Mill-Supply Co. v. Goodman*, (Tex. Civ. App. 1900) 56 S. W. Rep. 700; *Schneider-Davis Co. v. Brown*, (Tex. Civ. App. 1898) 46 S. W. Rep. 108; *Herring v. Patten*, 18 Tex. Civ. App. 147; *Texas, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1896) 34 S. W. Rep. 186; *Fields v. Ft. Worth, etc., R. Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 255; *Supreme Tent, etc., v. Cox*, (Tex. Civ. App. 1901) 60 S. W. Rep. 971; *Missouri, etc., R. Co. v. McFadden*, (Tex. Civ. App. 1895) 32 S. W. Rep. 18; *Burnett v. Casteel*, (Tex. Civ. App. 1896) 36 S. W. Rep. 782; *Worsham v. Vignal*, 14 Tex. Civ. App. 324; *Texas, etc., R. Co. v. Fuller*, 13 Tex. Civ. App. 151; *Ellis v. Mabry*, (Tex. Civ. App. 1901) 60 S. W. Rep. 571.

United States. — *American Alkali Co. v. Campbell*, 113 Fed. Rep. 398.

Death by Wrongful Act. — *Chicago City R. Co. v. Hackendahl*, 188 Ill. 300; *Love v. Southern R. Co.*, 108 Tenn. 104.

In Ejectment. — *A Misdescription of the land* may be corrected by amendment. *Buchanan v. Larkin*, 116 Ala. 431.

But an amendment embracing land not in the original pleading sets up a

new cause of action. *Bricken v. Cross*, 163 Mo. 449; *East Tennessee Iron, etc., Co. v. Broyles*, 95 Tenn. 612; *Bowles v. Smith*, (Tex. Civ. App. 1896) 34 S. W. Rep. 381; *Taylor v. Brown*, 8 Tex. Civ. App. 261.

New Demise. — The plaintiff may amend a declaration in ejectment, brought upon the joint demise of several, by striking the names of all except one of his lessors, but the same thing is not accomplished by introducing a new and separate demise from himself. *Burbage v. Fitzgerald*, 98 Ga. 582, with respect to the statute of limitations.

In Unlawful Entry and Detainer, under the *Missouri* statute, the description of the property may be amended. *Schworer v. Christophel*, 72 Mo. App. 116.

In Partition an amendment of the complaint may be allowed so as to include specific tracts omitted. *Adams v. Hopkins*, (Cal. 1902) 69 Pac. Rep. 228.

To Meet Different View of Legal Consequences. — Where a pleading erroneously describes the real transaction, an amendment is allowable which in fact presents the same transaction, although by a different mode of statement, founded upon a different view of the legal consequences. *Dunnett v. Thornton*, 73 Conn. 1; *Moran v. Bentley*, 71 Conn. 623; *Lovell v. Hammond Co.*, 66 Conn. 500.

562. 1. *Alabama*. — *Exp. Sullivan*, 106 Ala. 80; *Bibby v. Thomas*, 131 Ala. 350.

Illinois. — *Chicago North Shore St. R. Co. v. Payne*, 192 Ill. 239.

Kentucky. — *H. Feltman Co. v. Thompson*, 58 S. W. Rep. 693, 22 Ky. L. Rep. 757; *Dennis v. Cock*, (Ky. 1899) 50 S. W. Rep. 30, giving more accurate description of land in action to quiet title; *Fuqua v. Bogard*, 62 S. W. Rep. 480, 22 Ky. L. Rep. 1910.

Maine. — *South Thomaston v. Friendship*, 95 Me. 201.

Massachusetts. — *Stewart v. Thayer*, 170 Mass. 560.

Nebraska. — *Swain v. Savage*, 55 Neb. 687; *Weich v. Milliken*, 57 Neb. 86; *Tackaberry v. Gilmore*, 57 Neb. 450.

New York. — *McCready v. Staten Island Electric R. Co.*, 51 N. Y. App. Div. 338; *Blum v. Dabritz*, (N. Y. City

562. (4) *Same Allegations in Different Form.*—See notes 2, 3.

563. (5) *In Actions for Negligence.*—See note 1. See also NEGLIGENCE.

[An amendment may be allowed for the purpose of pleading freedom from contributory negligence. See note 1a.]

564. (6) *In Actions for Slander.*—See note 4. See also LIBEL AND SLANDER.

(7) *Summary Statement of the Rule.*—See note 5.

Ct. Spec. T.) 78 N. Y. Supp. 207, as to amendment of demurrer.

Rhode Island.—Rose v. Mitchell, 21 R. I. 270.

South Carolina.—Bell v. Floyd, 64 S. Car. 246.

Texas.—McRae v. White, (Tex. Civ. App. 1897) 42 S. W. Rep. 793; Texas, etc., R. Co. v. Grimes, (Tex. Civ. App. 1895) 29 S. W. Rep. 1104; St. Louis Type Foundry v. Taylor, (Tex. Civ. App. 1901) 65 S. W. Rep. 677.

562. 2. Chicago City R. Co. v. McMeen, 102 Ill. App. 318.

3. Adamson v. Bergen, 15 Colo. App. 396; Chicago, etc., R. Co. v. Ryan, 165 Ill. 88; Ohio, etc., R. Co. v. Stein, 140 Ind. 61; Driscoll v. Holt, 170 Mass. 262.

563. 1. Chicago Gen. R. Co. v. Carroll, 189 Ill. 273; Wolf v. Collins, 94 Ill. App. 518; Wade v. City, etc., R. Co., 36 Oregon 311; Austin, etc., R. Co. v. Flannagan, (Tex. Civ. App. 1897) 40 S. W. Rep. 1043; Cincinnati, etc., R. Co. v. Gray, 41 C. C. A. 535, 101 Fed. Rep. 623.

Alleging Different Defect.—See also Caswell v. Hopson, (Tex. Civ. App. 1898) 47 S. W. Rep. 54; Texas, etc., R. Co. v. Buckalew, (Tex. Civ. App. 1896) 34 S. W. Rep. 165. But see Chicago, etc., R. Co. v. Scanlan, 170 Ill. 106.

Additional Specifications of Negligence do not create a new cause of action with respect to the statute of limitations. Cross v. Evans, 52 U. S. App. 720, 86 Fed. Rep. 1; Swift v. Foster, 163 Ill. 50.

As to Instances of Improper Amendments, such as setting up new causes, see Chicago City R. Co. v. Leach, 182 Ill. 359; Box v. Chicago, etc., R. Co., 107 Iowa 660; Byard v. Palace Clothing House Co., 85 Minn. 363.

Changing the Degree of Negligence is not the statement of a different cause of action. Roseberry v. Newport News, etc., R. Co., (Ky. 1897) 39 S. W.

Rep. 407. And an amendment changing the allegation of negligent killing to one of wanton and wilful killing does not introduce an entirely new cause of action. Central of Georgia R. Co. v. Foshee, 125 Ala. 199.

1a. Chicago City R. Co. v. Cooney, 196 Ill. 466; Illinois Cent. R. Co. v. Weiland, 179 Ill. 609; Taylor v. Star Coal Co., 110 Iowa 40; Willet v. Michigan Cent. R. Co., 114 Mich. 411; Pratt v. Davis, 105 Mich. 499.

564. 4. See Phelan v. Rycroft, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 48.

5. Strang v. Branch Circuit Judge, 108 Mich. 229; Detroit v. Wayne Circuit Judge, 125 Mich. 634; Pratt v. Davis, 105 Mich. 499; Richardson v. Carbon Hill Coal Co., 18 Wash. 368, each of which cases cited 1 ENCYC. OF PL. AND PR. 564. See also the following cases:

Alabama.—Topscott v. Gibson, 129 Ala. 503.

Colorado.—Kilham v. Western Bank, etc., Co., (Colo. 1902) 70 Pac. Rep. 409; Lemp v. Ryus, 7 Colo. App. 37.

Georgia.—Liverpool, etc., Ins. Co. v. Ellington, 94 Ga. 785.

Illinois.—Griffin Wheel Co. v. Markus, 180 Ill. 391; Illinois Cent. R. Co. v. Souders, 178 Ill. 586; Hanchett v. Ives, 171 Ill. 122; Chicago, etc., R. Co. v. Henneberry, 153 Ill. 354; Illinois Cent. R. Co. v. Campbell, 58 Ill. App. 275.

Kansas.—Emporia Nat. Bank v. Layfeth, 63 Kan. 17.

Kentucky.—Adams Oil Co. v. Christmas, 101 Ky. 564. See also Bright v. First Nat. Bank, 106 Ky. 702.

Missouri.—Ross v. Cleveland, etc., Mineral Land Co., 162 Mo. 317; Lawrence v. Atchison, etc., R. Co., 61 Mo. App. 62.

New Hampshire.—Chase v. Corson, 67 N. H. 598.

North Carolina.—Pender v. Mallett, 123 N. Car. 57.

567. See note 1.

d. WHAT AMENDMENTS ARE NOT ALLOWED — (1) *Changing Contract to Tort, and Vice Versa.* — See notes 4, 5.

568. (2) *Changing Legal to Equitable Action, and Vice Versa.* — See note 2.

North Dakota. — *Finlayson v. Peterson*, (N. Dak. 1902) 89 N. W. Rep. 855.
Oklahoma. — *Swope v. Burnham*, 6 Okla. 736.

Pennsylvania. — *Little v. Fairchild*, 195 Pa. St. 614.

Tennessee. — *Fry v. McCord*, 95 Tenn. 678.

Texas. — *Sherman Oil, etc., Co. v. Stewart*, 17 Tex. Civ. App. 59; *Campbell v. Nicoloni*, (Tex. Civ. App. 1896) 35 S. W. Rep. 74; *Southern Pac. Co. v. Wellington*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1114; *Moses v. Union Pac. R. Co.*, (Tex. Civ. App. 1897) 41 S. W. Rep. 154; *Moore v. Williams*, (Tex. Civ. App. 1901) 62 S. W. Rep. 377, with respect to the statute of limitations; *Texas Cent. R. Co. v. Frazier*, (Tex. Civ. App. 1896) 34 S. W. Rep. 564.

Virginia. — *New River Mineral Co. v. Painter*, 100 Va. 507.

Common Counts and Special Contract. — *Fish v. Farwell*, 160 Ill. 236, and *Flint, etc., R. Co. v. Wayne Circuit Judge*, 108 Mich. 80, which cases are like *People v. Judge*, 27 Mich. 138, cited in this note in the original article.

Adding Count on Judgment. — In an action of contract upon an account annexed, a count may be added upon a judgment obtained in another state upon the same account. The technical change to *res judicata* does not prevent its being "the cause for which it [the action] was intended to be brought," as these words are used in the statute. *H. C. Miner Lithographic Co. v. Wagner*, 177 Mass. 404.

Seeking an Additional Recovery only as an incident to the suit originally brought does not constitute the setting up of a new cause of action. *Fidelity, etc., Co. v. Allibone*, 15 Tex. Civ. App. 178.

An Addition of an Item of Damage does not introduce a new cause of action. *Connell v. McNett*, 109 Mich. 329. See also *Mahon v. New York*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 664; *Frankfurter v. Home Ins. Co.*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 157.

Contradictory Matter. — That the defendant's trial amendment contains

allegations contradictory of allegations in his answer is not a ground of demurrer. *Fields v. Haley*, (Tex. Civ. App. 1899) 52 S. W. Rep. 115.

The Prayer for Relief may be changed. *Mullen v. McKim*, 22 Colo. 468; *Waterbury v. Fisher*, 5 Colo. App. 362; *Hooks v. Booker*, 94 Ga. 712; *Wood v. Bewick Lumber Co.*, 103 Ga. 235.

Replevin to Trover. — In an action of replevin, it is not an abuse of discretion to allow the plaintiff to amend his pleading on the trial after the evidence is closed but before final submission of the cause, so as to support a recovery for a conversion, where it appears that he could not have judgment for possession of the property because the defendant had disposed of it before the action was begun, and it does not appear that the plaintiff knew this when he brought suit. *Henderson v. Hart*, 122 Cal. 332; *Craven v. Russell*, 118 N. Car. 564.

567. 1. *Frost v. Witter*, 132 Cal. 421, referring to cases cited in 1 ENCYC. OF PL. AND PR. 463.

4. *In New York.* — See *Martin v. Home Bank*, 30 N. Y. App. Div. 498, holding that the particular amendment did not change the action from one for negligence to one on contract.

5. *M. V. Monarch Co. v. Terre Haute First Nat. Bank*, 105 Ky. 336; *Southern Lumber Co. v. Wireman*, (Ky. 1897) 41 S. W. Rep. 297, holding that the court must require an election; *Buerstetta v. Tecumseh Nat. Bank*, 57 Neb. 504, with respect to, statute of limitations; *Missouri, etc., R. Co. v. Levy*, 23 Tex. Civ. App. 686, where different facts are relied on; *Blalock v. Equitable L. Assur. Soc.*, 73 Fed. Rep. 655.

But it is otherwise in *Texas*, where the facts relied on in the original and the amended pleadings are the same. *Gulf, etc., R. Co. v. Richards*, 11 Tex. Civ. App. 95.

So in *Connecticut* such an amendment, relating merely to the manner of stating the same cause of action, is permissible. *Lovell v. Hammond Co.*, 66 Conn. 500.

568. 2. *Gibbons v. Denver Brokerage, etc., Co.*, (Colo. App. 1902) 67 Pac.

569. See note 1.

(3) *Changing Common-law Action to Statutory, and Vice Versa.* — See note 2.

570. See note 1.

(4) *Libel, Slander, Malicious Prosecution, False Imprisonment, Etc.* — See note 9.

Rep. 913; *Maloney v. Real Estate Bldg., etc., Assoc.*, 57 Mo. App. 384; *Blalock v. Equitable L. Assur. Soc.*, 73 Fed. Rep. 655.

New York. — But see *Truman v. Lester*, 71 N. Y. App. Div. 612, holding, upon the authority of *Deyo v. Morss*, 144 N. Y. 216, that an amendment changing the form of the action into a suit in equity might be allowed.

Georgia. — But under the Georgia statute heirs at law may sue an administrator and his sureties upon his bond, and as courts of equity have concurrent jurisdiction with the courts of ordinary in the settlement of the accounts of administrators, an amendment may be allowed in such an action praying for an accounting and settlement with the administrator. *Williams v. Lancaster*, 113 Ga. 1020.

When an Original Petition Prays Equitable Relief, a motion to strike an amended petition on the ground that it is an attempt to convert a pretended cause of action in tort into a pretended cause of action in equity should be overruled. *Baldwin v. Ohio Tp.*, 63 Kan. 885.

569. 1. *P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa 402, citing 1 ENCYC. OF PL. AND PR. 569; *Porter v. Fillebrown*, 119 Cal. 235; *Merrill v. Beckwith*, 168 Mass. 72; *Scroggin v. Johnston*, 45 Neb. 714; *Raymond v. Toledo*, etc., R. Co., 57 Ohio St. 271.

In New Hampshire either party may file a bill in equity as an amendment to his pleading in an action at law. *Tripp v. Forsaith Mach. Co.*, 69 N. H. 233. See also *Davison v. Davison*, 71 N. H. 180.

An Amendment in the Form of the Pleading, to conform to the requirements of the statute providing one form for both legal and equitable actions, is permissible. *Savannah, etc., R. Co. v. Atkinson*, 94 Ga. 780.

Application of Statute Referring to Actions at Law. — In *King v. Howes*, 181 Mass. 445, it was held that while the statute permitting an amendment which "may enable the plaintiff to sustain the action for the cause of

which it was intended to be brought" did not apply in terms to suits in equity, it did apply to an amendment whereby an action at law was changed into a suit in equity, and was in accordance with the general principles applicable to bills in equity.

A Petition for Leave to File Information in quo Warranto is not of itself either an action at law or a bill in equity, and there may be some doubt whether it falls within the statute allowing amendments, changing an action at law into a bill in equity. *Haupt v. Rogers*, 170 Mass. 71.

2. *Charleston, etc., R. Co. v. Miller*, 113 Ga. 15; *Atchison, etc., R. Co. v. Schroeder*, 56 Kan. 731; *Sears v. Missouri Mortg. Loan Co.*, 56 Mo. App. 122. See also *Kansas City v. Hart*, 60 Kan. 684; *Mayo v. Spartanburg, etc., R. Co.*, 43 S. Car. 225; *Union Pac. R. Co. v. Wyler*, 158 U. S. 285; *Boston, etc., R. Co. v. Hurd*, 47 C. C. A. 615, 108 Fed. Rep. 116.

Amendment to Make Fuller Statement. — But where the form of the action indicates the intention of the pleader to recover under the statute, an amendment may be allowed by adding an averment showing that he sues for the statutory recovery. *Mitchell v. Chase*, 87 Me. 172.

570. 1. *Walker v. Hester*, 9 Kan. App. 201.

9. Changing Ground of Liability. — In an action against an officer for fraud in refusing to turn over money collected, in which the plaintiff is entitled to a twenty-five per cent. penalty upon proof of his case and in which demand upon the officer is necessary, an amendment setting up a cause for negligence in failing to collect in which no demand is necessary and no penalty is recoverable states an independent cause of action. *Lambert v. McKenzie*, 135 Cal. 100.

Additional Item. — See *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185.

Wilful Tort—Negligence. — An amendment changing a cause of action for a wilful tort to a cause of action for negligence makes a different case and is

572. *c.* OBJECTION, HOW TAKEN. — See notes 2, 4.

573. See notes 1, 3.

f. WAIVER OF OBJECTION. — See note 4.

574. *g.* METHOD OF DETERMINING THE QUESTION. — See note 3.

h. REVIEW OF DECISION OF TRIAL JUDGE. — See note 5.

properly refused. *Proctor v. Southern R. Co.*, 64 S. Car. 491.

Negligence — Trover. — A cause based upon negligent failure of duty cannot be changed into an action for conversion of a specific chattel. *Pruett v. Warren*, 71 Mo. App. 84.

Negligence — Assault. — In an action for injuries resulting from the negligence of the defendant, its servants and agents, an amendment alleging a malicious assault by one of the defendant's servants states a new cause, such as cannot be introduced on the trial. *Block v. Third Ave. R. Co.*, 60 N. Y. App. Div. 191.

Renewals of a Bond are new and distinct contracts, and causes of action thereon are new and distinct with reference to the cause of action on the original. *Brunswick v. Harvey*, 114 Ga. 733.

Amendment to Confer Jurisdiction. — Where a justice had no jurisdiction of a claim as alleged in the original pleading, on account of the amount involved, the filing of an amendment to the original pleading is the institution of a new suit, because until that time the court had not obtained jurisdiction. *Ball v. Hagy*, (Tex. Civ. App. 1899) 54 S. W. Rep. 915.

Grounds for Divorce. — A petition for divorce on one ground cannot be amended by adding another and distinct ground. *Ring v. Ring*, 112 Ga. 854.

Libel — Different Publication. — An amendment declaring upon another and distinct publication is properly rejected as setting up a new cause of action. *Colvard v. Black*, 110 Ga. 642.

Matters Not Amendatory of Contest in Probate Proceedings. — Amendments to a written contest in a proceeding for the probate of a will, making averments as to undue influence which constitute a new cause of contest, are not amendatory or in amplification of anything in the original contest and cannot be allowed when the time for making such a contest has expired. *Matter of Wilson*, 117 Cal. 262.

572. 2. See *Pender v. Mallett*, 123 N. Car. 57.

4. *Stovall v. Hibbs*, (Ky. 1895) 32 S. W. Rep. 1087.

Allowance Without Objection. — After an amendment is allowed without objection, and the petition as amended states a cause of action, it should not be dismissed on motion. *Dyson v. Southern R. Co.*, 113 Ga. 327.

573. 1. When Too Late. — By answering the party acquiesces in the amendment, and cannot then object. *Johnson v. Cummings*, 12 Colo. App. 17. And an objection made for the first time on appeal is too late. *Rush v. Kansas City First Nat. Bank*, 36 U. S. App. 248, 71 Fed. Rep. 102.

3. *James v. Vicors*, 119 Ala. 32; *Goodrich v. Alfred*, 72 Conn. 257.

4. *Grotte v. Nagle*, 50 Neb. 363, where the defendant answered and went to trial after his objection was overruled, the court citing 1 ENCYC. OF PL. AND PR. 573. See also the following cases:

Alabama. — *Tennessee, etc.*, R. Co. v. *Danforth*, 112 Ala. 80.

Colorado. — *Durkee v. Conklin*, 13 Colo. App. 313; *Mullen v. McKim*, 22 Colo. 468.

Missouri. — *Sanguinett v. Webster*, 153 Mo. 343; *Liese v. Meyer*, 143 Mo. 547; *Bricken v. Cross*, 163 Mo. 449; *Bender v. Zimmerman*, 135 Mo. 53; *Stone v. Halstead*, 62 Mo. App. 136; *Williams v. Sanders*, 69 Mo. App. 608.

Vermont. — *Reynolds v. Chynoweth*, 68 Vt. 104. See also *Neher v. Armijo*, 9 N. Mex. 325.

Withdrawal of Answer. — The court may, in its discretion, permit the defendant to withdraw his answer to an amended complaint and move to strike it from the files. *James v. Vicars*, 119 Ala. 32.

574. 3. *Driscoll v. Holt*, 170 Mass. 262.

Contra, *Kansas City v. Hart*, 60 Kan. 684, holding that the effect of a pleading must be determined by its averments.

5. In Massachusetts. — See *Russia*

574. 7. Changing the Form of Action. — See note 7.

575. See notes 2, 3.

576. 8. Matter Arising Pendente Lite — Amended and Supplemental Complaint. — See note 1.

577. 9. To Obviate a Variance or Conform to Proof — *a.* TO OBTAIN A VARIANCE. — See note 4.

578. See notes 1, 2.

Time to Answer Amendment. — See note 3.

b. TO CONFORM TO PROOF — (1) *The Rule Stated* — Power, How Derived. — See note 5.

Authority to Allow. — See note 6.

Cement Co. v. Le Page Co., 174 Mass. 349.

574. 7. Morse v. Glover, 68 N. H. 119; Jaquith v. Benoit, 70 N. H. 1; Barker v. Almy, 20 R. I. 367; Jackson Bank v. Irons, 18 R. I. 718.

In *Maine* it is not permitted to change the form of action. Assumpsit cannot be changed to case. Knight v. Trim, 89 Me. 469; Flanders v. Cobb, 88 Me. 488. Trespass *quare clausum* cannot be changed to case. The statute abolishing the distinction between trespass and case relates to the form only, and such an amendment is more than a matter of form. Lawry v. Lawry, 88 Me. 482.

575. 2. Illinois. — Knight v. Thompsonville, 74 Ill. App. 550.

3. Indian Territory. — In Rutherford v. McDonald, 3 Indian Ter. 512, the plaintiff was allowed on the trial to change the name of his action from forcible entry and detainer to ejectment.

Nebraska. — Scroggin v. Johnston, 45 Neb. 714, so long as identity of cause of action remains.

576. 1. Guptill v. Red Wing, 76 Minn. 129, citing 1 ENCYC. OF PL. AND PR. 576; Banigan v. Nyack, 25 N. Y. App. Div. 150; Merz v. Interior Conduit, etc., Co., (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 378.

A New Cause of Action arising after the institution of the suit cannot be introduced by amendment. Goodrich v. Stanton, 71 Conn. 418; Lennox v. Vandalia Coal Co., 158 Mo. 473.

577. 4. Southern R. Co. v. Wells, 103 Ga. 209; Carnahan v. Lloyd, 4 Kan. App. 605; Norfolk Beet-Sugar Co. v. Hight, 59 Neb. 100; Jones v. New York Cent., etc., R. Co., 46 N. Y. App. Div. 47c; Mew v. Charleston, etc., R. Co., 55 S. Car. 90; McIlhenny v. Planters', etc., Nat. Bank, (Tex. Civ.

App. 1898) 46 S. W. Rep. 282; Swerdfeger v. Hopkins, 67 Vt. 136; Vanarsdale v. Hax, 47 C. C. A. 31, 107 Fed. Rep. 878.

578. 1. Wilcox v. American Sav. Bank, 21 Colo. 348; Weiland v. Ehlers, 107 Iowa 186; Ernst v. Fox, 26 Wash. 526; Voelker v. Chicago, etc., R. Co., 116 Fed. Rep. 867, referring to the code provision in *Iowa*.

2. Langhorne v. Richmond City R. Co., 91 Va. 364, holding a refusal to permit an amendment of this nature to be erroneous; Ernst v. Fox, 26 Wash. 526.

3. If time to meet the amendment is offered to the opposite party, but he does not avail himself of the offer, he cannot complain. Thompson v. Whitney, 20 Utah 1.

5. A Bill of Particulars may be so amended. Sogge v. Schwartz, 116 Mich. 635.

To Conform to Proof Made by Adversary. — Where the plaintiff, after introducing evidence which supports particular allegations of his declaration, during the argument amends the allegations so as to conform to proof on the point made by the defendant, objection of variance between the proof and the amended declaration is not available to the defendant. Ross v. Shanley, 185 Ill. 390.

To Conform to Agreed Statement of Facts. — Pleadings may be amended to conform to an agreed statement of facts upon which the case is submitted, but not to change the terms of the submission. Richards v. Hartford L., etc., Ins. Co., 68 Mo. App. 585.

6. Alabama. — Tapscott v. Gibson, 129 Ala. 503.

Arkansas. — Nicklace v. Dickerson, 65 Ark. 422, holding that the amendment should be considered as made.

California. — Firebaugh v. Burbank, 121 Cal. 186.

581. See notes 1, 2.

(2) *At What Stage of Proceedings.* — See notes 4, 5.

Colorado. — Kilham v. Western Bank, etc., Co., (Colo. 1902) 70 Pac. Rep. 409; Gelwicks v. Todd, 24 Colo. 494.

Georgia. — Hooks v. Hooker, 93 Ga. 712; Central of Georgia R. Co. v. Lake, 112 Ga. 244; Hudgins v. Bloodworth, 109 Ga. 197, during the argument.

Indiana. — Efroymsen v. Smith, (Ind. App. 1902) 63 N. E. Rep. 328.

Iowa. — Taylor v. Star Coal Co., 110 Iowa 40.

Kansas. — Tullock v. Mulvane, 61 Kan. 650.

Kentucky. — Harris-Seller Banking Co. v. Bond, (Ky. 1898) 47 S. W. Rep. 764.

Missouri. — Chance v. Jennings, 159 Mo. 544; Harlan v. Moore, 132 Mo. 483; Howard v. Shirley, 75 Mo. App. 150; Dorsey v. Atchison, etc., R. Co., 83 Mo. App. 528.

Montana. — Montana Ore Purchasing Co. v. Boston, etc., Consol. Copper, etc., Min. Co., (Mont. 1902) 70 Pac. Rep. 1114.

Nebraska. — Scroggin v. Johnston, 45 Neb. 714; German Ins. Co. v. Frederick, 57 Neb. 538; Chicago, etc., R. Co. v. Shaw, 63 Neb. 380, holding that it is discretionary with the lower court.

New York. — Martin v. Home Bank, 30 N. Y. App. Div. 498, *affirmed* 160 N. Y. 190; Lyman v. Kurtz, 166 N. Y. 274; Schoonmaker v. Hilliard, 55 N. Y. App. Div. 140; Russell v. Corning Mfg. Co., 49 N. Y. App. Div. 610; Hayes v. Kerr, 39 N. Y. App. Div. 529; Shanley v. Shanley, 22 N. Y. App. Div. 375; Alden v. Clark, 86 Hun (N. Y.) 357.

North Carolina. — Nims Mfg. Co. v. Blythe, 127 N. Car. 325; Craven v. Russell, 118 N. Car. 564.

Oregon. — Clemens v. Hanley, 27 Oregon 326; Hammer v. Downing, 39 Oregon 504; South Portland Land Co. v. Munger, 36 Oregon 457; Nunn v. Bird, 36 Oregon 515.

South Carolina. — Interstate Bldg., etc., Assoc. v. Waters, 50 S. Car. 459, holding the allowance or refusal to be a matter of discretion; Booth v. Langley Mfg. Co., 51 S. Car. 412.

Utah. — Walker v. Bamberger, 17 Utah 239.

Washington. — Edmunds v. Black, 13 Wash. 490, holding that where after

such amendment the matter of the amendment is admitted for the purpose of obtaining the right to open and close, no complaint can be made on the score of the allowance of the amendment; Morrissey v. Faucett, 28 Wash. 52.

Wisconsin. — Slater v. Cook, 93 Wis. 104; Thompson v. Caledonia F. Ins. Co., 92 Wis. 664.

United States. — Patent-Button Co. v. Pilcher, 95 Fed. Rep. 479.

Harmless Error. — See also Pape v. Ferguson, 28 Ind. App. 298.

Error or Abuse of Discretion in refusing such amendment was held in the following cases: Southern Ins. Co. v. Hastings, 64 Ark. 253, holding it to be error to refuse to permit an amendment according to facts disclosed by the testimony on behalf of the opposite party; Kleimelr v. Covington Perpetual Bldg., etc., Assoc., 70 S. W. Rep. 41, 24 Ky. L. Rep. 735; Louisville, etc., R. Co. v. Bocock, 107 Ky. 223; Rice v. Longfellow Bros. Co., 78 Minn. 394; King v. Dorman, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 133, a case of reversible error for refusal to allow the amendment; Anderson v. Grand Forks First Nat. Bank, 5 N. Dak. 80.

581. 1. Illinois. — Hanchett v. Ives, 171 Ill. 122.

Massachusetts. — Locke v. Kennedy, 171 Mass. 204.

Michigan. — Willet v. Michigan Cent. R. Co., 114 Mich. 411; Rathbun v. Parker, 113 Mich. 594; Hathaway v. Detroit, etc., R. Co., 124 Mich. 610; Phalen v. Detroit, 126 Mich. 683.

New Hampshire. — Sartwell v. Mack, 70 N. H. 636; Whitten v. Stockwell, 68 N. H. 602.

Pennsylvania. — Wall v. Royal Soc. of Good Fellows, 179 Pa. St. 355.

Rhode Island. — Prefontaine v. Roberge, 20 R. I. 418.

See also Wade v. Curtis, 96 Me. 309.

2. Carter v. Lothian, 133 Cal. 451;

Mack v. Porter, 25 U. S. App. 595.

4. Amendment Confined to Proof. — Amendments of this kind must rest upon the proof and cannot go beyond it. They are not made for the purpose of framing issues, and if there is no evidence in the record to support an amendment made after the trial, it will be regarded as idle and will not be

582. See notes 1, 2, 3, 4.

583. (3) *Confined to Original Cause of Action.*—See note 1.

deemed to be admitted by a failure to answer it. *McDougald v. Argonaut Land, etc., Co.*, 117 Cal. 87.

After Motion for a Peremptory Instruction on account of a variance, the court may permit the amendment of the pleading to cure the variance, which did not appear to have misled the other party in presenting his defense upon the merits. *Southern Express Co. v. Platten*, 36 C. C. A. 46, 93 Fed. Rep. 936.

Reserving a Motion to Dismiss the Complaint, made at the trial, until after trial on the merits, and after such trial permitting amendment of the complaint to conform to the proof, is a proper exercise of discretion. *National Bank v. Rogers*, 166 N. Y. 380.

581. 8. See *Austin First Nat. Bank v. Sharpe*, 12 Tex. Civ. App. 223.

582. 1. *Johnson v. Johnson*, (Colo. 1902) 70 Pac. Rep. 692; *Milwaukee Mechanics Ins. Co. v. Schallman*, 188 Ill. 213, holding that the material consideration in applications to amend after verdict is whether the opposite party is taken by surprise or is in any way prejudiced or injured by the amendment; *Nichols, etc., Co. v. Dedrick*, 61 Minn. 513; *Cagle v. Chillicothe Town Mut. F. Ins. Co.*, 78 Mo. App. 431; *Frankfurter v. Home Ins. Co.*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 157; *Post v. Wise Tp.*, 101 Fed. Rep. 204, under a statute in *South Carolina*, adopted as a rule of court by the United States Circuit Court; *Baker v. Barber Asphalt Pav. Co.*, 92 Fed. Rep. 117.

Discretion of Court.—It is not an abuse of discretion to refuse to allow an amendment at this stage. *Ankrum v. Marshalltown*, 105 Iowa 493; *Neimick v. American Ins. Co.*, 16 Mont. 318.

2. *Chaffee v. Rutland R. Co.*, 71 Vt. 384 [citing 1 ENCYC. OF PL. AND PR. 582]; *Waters v. Waters*, 125 N. Car. 590.

3. *Howell v. Grand Trunk R. Co.*, 93 Hun (N. Y.) 423.

4. *Arkansas.*—*Malvern Bank v. Burton*, 67 Ark. 426.

Indiana.—*Decatur v. Grand Rapids, etc.*, R. Co., 146 Ind. 577; *Kohli v. Hall*, 141 Ind. 411.

Kansas.—*Carnahan v. Lloyd*, 4 Kan. App. 605.

Michigan.—*Robinson v. Lake*

Shore, etc., R. Co., 103 Mich. 607; *Thomas v. Ann Arbor R. Co.*, 114 Mich. 59.

Montana.—*Nyhart v. Pennington*, 20 Mont. 158.

New Jersey.—*U. S. Pipe Line Co. v. Delaware, etc.*, R. Co., 62 N. J. L. 254.

New York.—*Rifenburgh v. Ham*, 44 N. Y. App. Div. 620; *Smith v. Wetmore*, 41 N. Y. App. Div. 290; *Van Orden v. Morris*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 497.

Oklahoma.—*Carson v. Butt*, 4 Okla. 133.

Oregon.—*Lazelle v. Miller*, 40 Oregon 549.

Pennsylvania.—*Fisher v. Fidelity Mut. L. Assoc.*, 188 Pa. St. 1, where the admission of evidence was held to be equivalent to an amendment, and proper.

583. 1. *Anderson v. Groesbeck*, 26 Colo. 3; *Western Cornice, etc., Works v. Meyer*, 55 Neb. 440; *Cox v. Halloran*, 64 N. Y. App. Div. 550; *Block v. Third Ave. R. Co.*, 60 N. Y. App. Div. 191; *Clements v. Beale*, 53 N. Y. App. Div. 416; *Steiner v. Fargo*, 3 N. Y. App. Div. 460; *Sanford v. American Dist. Tel. Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 88; *Shafarman v. Jacobs*, (N. Y. Super. Ct. Gen. T.) 15 Misc. (N. Y.) 10, affirmed 157 N. Y. 699; *Burns v. Walsh*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 699; *Mares v. Wormington*, 8 N. Dak. 329.

Complaint Stating No Cause of Action.—*Wheeler v. Hall*, 54 N. Y. App. Div. 49.

Facts Occurring After Suit Brought.—In an action for damages for personal injuries, the allowance of an amendment at the trial, and proof thereunder, showing that the plaintiff still suffers pain from the injury, is not erroneous as introducing a new cause of action for permanent injuries, it appearing that it was done merely for the purpose of illustrating the extent of the pain and suffering and the court having so confined it by instruction. *Central of Georgia R. Co. v. Lake*, 112 Ga. 244.

Same Act Relied Upon.—A petition for damages to property by reason of acts done for the purpose of repairing a way may be amended to a petition for damages occasioned by the laying out of the way, if when the proceed-

- 584.** See note 1.
585. (4) *Only in Furtherance of Justice.* — See notes 1, 2.
Sufficiency of Proof. — See note 4.
586. (5) *Where the Evidence Was Objected To.* — See note 1.
 (6) *Failure of Proof.* — See note 2.
587. 10. *Amendment of the Ad Damnum* — *a.* NOT A NEW CAUSE OF ACTION. — See note 1.
b. BEFORE TRIAL — *By Increasing or Reducing.* — See note 3.
588. *Filling a Blank.* — See note 1.
c. ON THE TRIAL. — See note 3.

ings were begun the petitioner had the right to the latter remedy and if the work upon the way relied upon in support of the amended petition was the cause of action relied upon in the original petition, and notwithstanding the allowance of the amendment will deprive the respondent of a defense which is purely technical. *Gray v. Everett*, 163 Mass. 77.

Substantial Change of the Cause of Action as originally presented is not permissible after trial without giving to the defendant the right to file new pleadings and to have a trial of the new case presented. *Moran v. Bentley*, 69 Conn. 392.

584. 1. *Denzler v. Rieckhoff*, 97 Iowa 75; *Shawyer v. Chamberlain*, 113 Iowa 742; *State v. Krause*, 58 Kan. 651; *Clark v. St. Louis Transfer R. Co.*, 127 Mo. 255, as to amendment of answer; *Everard v. New York*, 89 Hun (N. Y.) 425, after verdict directed; *Davis v. Hannon*, 30 Oregon 192, where the amendment was held not to change the defense substantially; *Pickett v. Fidelity, etc., Co.*, 60 S. Car. 477; *Robert v. Ellis*, 59 S. Car. 137, as to defense; *Harrington v. Wilson*, 10 S. Dak. 606. See also *Price Baking-Powder Co. v. Rinear*, 17 Wash. 95.

Rule Applied in Appellate Court. — See *Scott v. Spencer*, 44 Neb. 93.

Issues Not Litigated. — The rule permitting an amendment to conform to the proof rests upon the acquiescence of both parties, and no such acquiescence is established when evidence competent, relevant, and even indispensable under the issues which the pleadings create, incidentally tends to prove another fact not within the issues. *Buxton v. Sargent*, 7 N. Dak. 503. See to the same effect *Mowatt v. Wilkinson*, 110 Wis. 176.

585. 1. **Useless Amendment.** — *Schlageck v. Widhalm*, 59 Neb. 541.

2. *Ryans v. Hospes*, 167 Mo. 342, where the refusal to allow the amendment was held proper; *McElheny v. Minneci*, 44 N. Y. App. Div. 640.

4. **Weight of Evidence.** — In *Retan v. Sherwood*, 120 Mich. 496, in which case it was held to be reversible error to refuse to permit an amendment.

586. 1. *Walker v. O'Connell*, 59 Kan 306, [citing 1 ENCYC. OF PL. AND PR. 585]; *Bossert v. Poerschke*, 51 N. Y. App. Div. 381; *Bishop v. Baisley*, 28 Oregon 119, holding, however, that the trial court may obviate such objection by allowing further evidence touching the matters in the amended pleadings; as by referring the case back to the referee for this purpose; *Mendenhall v. Harrisburg Water-Power Co.*, 27 Oregon 38.

2. *Ullman v. Jacobs*, 86 Hun (N. Y.) 186.

587. 1. *Pape v. Ferguson*, 28 Ind. App. 298; *Luddington v. Goodnow*, 168 Mass. 223; *Supreme Tent, etc., v. Cox*, (Tex. Civ. App. 1901) 60 S. W. Rep. 971; *Majors v. Goodrich*, (Tex. Civ. App. 1900) 54 S. W. Rep. 919; *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729.

3. *Autrey v. Bowen*, 7 Colo. App. 408, as to value of property in replevin.

588. 1. *Hare v. Dean*, 90 Me. 308, like *McLellan v. Crofton*, 6 Me. 307, cited in this note in the original article.

3. *Kreuger v. Sylvester*, 100 Iowa 647, allowing an amendment claiming exemplary damages on facts already pleaded; *Shields v. Orr Extension Ditch Co.*, 23 Nev. 349; *Zimmer v. Third Ave. R. Co.*, 36 N. Y. App. Div. 265.

Interest Added to Amount of Counterclaim. — *Minneapolis Threshing Mach. Co. v. Darnall*, 13 S. Dak. 279.

589. d. AFTER VERDICT OR REFEREE'S REPORT — Upon Relinquishing the Verdict. — See note 3.

After Merits Fully Litigated. — See note 6.

590. 11. At What Stage of Proceedings — a. BEFORE TRIAL — (1) In General. — See note 3.

After Change of Venue. — See note 7.

591. [Pending Motion for Judgment on the Pleadings it is not too late to allow the opposite party to amend. See note 8a.]

592. (2) After Demurrer — The General Rule. — See notes 2, 3, 4.

589. 3. Excelsior Electric Co. v. Sweet, 59 N. J. L. 441.

6. Rule Limited. — It is not in furtherance of justice to allow a party to allege the value of a thing in controversy at such a sum as his adversary is willing to admit as fair, offering no evidence in relation thereto, and then, after it is too late for the opposite party to contradict it, to secure a larger sum by amendment. *Home Ins. Co. v. Wagner, 9 Kan. App. 93.*

590. 3. Keenan v. Washington Liquor Co., (Idaho 1902) 69 Pac. Rep. 112, wherein an amendment was allowed before issue joined; *Walden v. Citizens' Sav. Bank, (Ky. 1897) 43 S. W. Rep. 488,* holding it to be error to refuse to allow an amended answer to be filed at rule day after a jury had failed to agree and the cause had been continued for a new trial.

Before Return Day. — In *Peterson v. Chicago, etc., R. Co., 108 Fed. Rep. 561,* it was held, under the statutes of *Missouri* giving the right to amend as of course at any time before answer, etc., and also requiring notice to the adverse party or his attorney of the time of filing the amendment when it is filed in vacation, that an amendment filed of course must be filed in open court, or if the plaintiff is not ready at the return term of the writ to file his amended petition he may obtain leave of court to file it in vacation; also that the plaintiff cannot, between the day of summons on a petition filed in vacation and the return day of the summons, file an amendment with the clerk and, by giving notice to the adverse party or his attorney, require him to plead to the amendment.

By Whom. — In an action by a creditor which inured to the benefit of all creditors, as the original plaintiff could have made the petition good by amendment at any time before trial, a creditor who had come into the suit might do the

same thing though the original plaintiff had quit the suit. *Slusher v. Simpkinson, 101 Ky. 594.*

7. Fears v. Riley, 148 Mo. 49.

591. 8a. Bryant v. Davis, 22 Mont. 534.

592. 2. Harris v. Higden, (Tex. Civ. App. 1897) 41 S. W. Rep. 412, holding that if a pleading is still open for action on a demurrer, it is equally open for amendment. See also *Bastrop State Bank v. Levy, 106 La. 586.*

3. "At Any Stage of the Cause" means while the cause is still in court, and though the judge has determined to sustain a demurrer and dismiss the case, and has dictated to a stenographer the matter which is to form the judgment of dismissal, an amendment offered before the judgment is written out and signed is in time. *Freeman v. Brown, 115 Ga. 23.*

4. Reynolds v. Roth, 61 Ark. 317, holding the refusal to allow the amendment to be reversible error; *Recknagel v. Steinway, 58 N. Y. App. Div. 352; Woodcock v. Bostic, 128 N. Car. 243; Willis v. Tozer, 44 S. Car. 1; Guarantee Co. of North America v. Lynchburg First Nat. Bank, 95 Va. 480.*

Discretion of Court. — *Barnes v. Crawford, 115 N. Car. 76,* holding that the court may in its discretion refuse to allow the plaintiff to amend his complaint after demurrer thereto sustained and judgment rendered.

Where the Amendment Is Not Submitted to the Court it is a matter resting in the discretion of the court to refuse or allow it. *Chicago Architectural Iron Works v. McKev, 93 Ill. App. 244.*

After Steps Taken to Appeal. — Where an objection to the jurisdiction is treated by the court as a demurrer and the cause is dismissed for want of jurisdictional averments, the plaintiff indicating his intention to abide by his petition by giving notice of a proceeding to review the decision, it is too late

594. Under Code Provisions. — See note 1.

595. See note 1.

Amendment of Demurrer. — See note 2.

596. (3) *After Issue Joined.* — See note 1.

597. See note 1.

(4) *Before Announcing Ready for Trial.* — See notes 4, 5.

to move to amend after the bond for reviewing the case has been fixed, on the plaintiff's motion, and while the parties are preparing the bills of exceptions. *Shaw v. American Tobacco Co.*, 48 C. C. A. 68.

After Expiration of the Term at which judgment sustaining a demurrer to a declaration is entered the court is powerless to allow an amendment of the declaration. *Van Doren v. Pennsylvania R. Co.*, 35 C. C. A. 282; *Pratt v. Gibson*, 96 Ga. 807. *Contra*, *Grand Prairie Co-operative Grain Assoc. v. Riordan*, 61 Ill. App. 457.

Effect of Stay of Proceedings. — Where the defendant filed a demurrer to a complaint pending his petition in bankruptcy and procured a stay of the action under the bankruptcy act after filing such demurrer, upon sustaining the demurrer the court may grant leave to amend, as the stay does not embrace the right to have the action left without sufficient pleadings to support the plaintiff's claim. *Wakeman v. Throckmorton*, 74 Conn. 616.

A Different Cause of Action cannot be set up by way of amendment in such case. *Kehoe v. Booe*, (Ky. 1900) 54 S. W. Rep. 826.

594. 1. South Carolina. — Refusal to allow an amendment is within the court's discretion. *Jarrell v. Charleston, etc.*, R. Co., 58 S. Car. 491.

After the expiration of the time within which to serve an amended complaint, as fixed by the order sustaining a demurrer to the original complaint, another judge cannot extend the time for making the amendment. *Brown v. Easterling*, 59 S. Car. 472.

595. 1. Prince v. Lamb, 128 Cal. 120; *Durrell v. Dooner*, 119 Cal. 411; *Smith v. Ferries, etc.*, R. Co., (Cal. 1897) 51 Pac. Rep. 710; *Wilson v. Com.*, 99 Ky. 167. *Compare* *Finch v. White*, 190 Pa. St. 86.

Amendment Contradicting Facts. — *Williamson v. Joyce*, 137 Cal. 151, holding that where a demurrer to an original verified complaint is sustained because the allegation as to the time of

the occurrence of material facts shows the action to be barred by limitations, it is not error to sustain a demurrer to an amended complaint, without leave to amend, for failure to allege the time of occurrence of the said material facts, as the court has the right to assume that the date was correctly given in the original verified pleading and that the amended complaint could not be truthfully amended in that respect.

Where Decision Is Reserved the court need not give to the party an opportunity to amend before the decision is actually rendered. *Ripley v. Eady*, 106 Ga. 422.

2. Dunbar v. Canyon County. (Idaho 1897) 49 Pac. Rep. 409, upon leave first obtained; *Murphy v. Russell*, (Idaho 1901) 67 Pac. Rep. 421.

596. 1. Additional Pleas. — *Merchants' Nat. Ins. Co. v. Pearce*, 84 Ill. App. 255, holding the refusal to permit filing of an additional plea to be reversible error.

597. 1. Osmun v. Winters, 30 Oregon 177.

4. Krueger v. Klinger, 10 Tex. Civ. App. 576. But see *Dublin v. Taylor, etc.*, R. Co., 92 Tex. 535; *White v. Provident Nat. Bank*, (Tex. Civ. App. 1901) 65 S. W. Rep. 498; *Gulf, etc.*, R. Co. v. *Butler*, (Tex. Civ. App. 1896) 34 S. W. Rep. 756; *Austin First Nat. Bank v. Sharpe*, 12 Tex. Civ. App. 223; *Merchants L. Assoc. v. Yoakum*, 39 C. C. A. 56, holding that the provision that all amendments to pleadings must, while the court is in session, be filed under leave of the court upon such terms as the court may prescribe, before the parties announce ready for trial, limits the right which it confers, but does not take away the discretion which the courts had prior to the statute to admit amendments in order that justice might be done, but that an application to amend pending trial is addressed to the sound discretion of the court.

Review of Discretion. — In the absence of an abuse of discretion, the refusal to permit an amendment after announce-

598. (5) *On the Eve of Trial.* — See note 2.

b. ON THE TRIAL — (1) *In General* — *Formal Errors.* — See note 3.

599. *Making a New Cause of Action.* — See note 1.

Liberal Allowed. — See notes 2, 3.

ing ready for trial will not be disturbed. *Hurd v. Texas Brewing Co.*, 21 Tex. Civ. App. 296.

Harmless Error. — The allowance of a trial amendment after announcing ready for trial is not reversible error, if error at all, when the amendment was unnecessary. *King County Land, etc., Co. v. Thomson*, 21 Tex. Civ. App. 473.

597. 5. *Gulf, etc., R. Co. v. Butler*, (Tex. Civ. App. 1896) 34 S. W. Rep. 756; *Blain v. Popper*, (Tex. Civ. App. 1898) 49 S. W. Rep. 129, holding that the discretion of the court will not be disturbed unless it has been abused; *Armstrong v. Emmett*, 16 Tex. Civ. App. 242, holding that if special exceptions are overruled the court should not thereafter exclude evidence offered under the pleadings, but should permit the party to withdraw his announcement and amend if the pleading is subject to special exceptions. In *Greeley-Burnham Grocery Co. v. Carter*, (Tex. Civ. App. 1895) 30 S. W. Rep. 487, and in *Ford v. Liner*, 24 Tex. Civ. App. 353, the refusal to permit withdrawal of the announcement was held to be error.

598. 2. *Great Western Tel. Co. v. Mears*, 154 Ill. 437; *Jester v. Lipman*, 40 Oregon 408.

The Court Has a Wide Discretion as to whether leave shall be granted to file additional pleas on the day the case stands for trial. *Anderson Transfer Co. v. Fuller*, 174 Ill. 221.

3. *David v. David*, 52 La. Ann. 711; *McTiver v. Grant Tp.*, (Mich. 1902) 91 N. W. Rep. 736; *Conklin v. McCauley*, 41 N. Y. App. Div. 452; *Schoonmaker v. Blass*, 88 Hun (N. Y.) 179; *Dent v. South Bound R. Co.*, 61 S. Car. 329. See also *Stratton v. City Trust, etc.*, Co., 60 N. Y. App. Div. 322.

599. 1. *Changing Theory of Case.* — *McIntosh v. Coulthard*. (Iowa 1902) 88 N. W. Rep. 1069.

Amendment After Submission, Requiring Reopening of Case. — Where an action in equity was submitted and thereafter the plaintiff filed an amendment to his petition and a motion to strike the amendment was not acted upon, it was not error to refuse to grant relief under

the amendment, the case not having been tried on the issue presented by the amendment and the relief so prayed being such that it could not be given without opening the case for further proceedings. *Burkhardt v. Burkhardt*, 107 Iowa 369.

2. *Marr v. Rhodes*, 131 Cal. 267; *McDougald v. Hulet*, 132 Cal. 154; *Cowdery v. McChesney*, 124 Cal. 363, holding a refusal to permit the amendment to be erroneous; *Corn Palace, etc., Assoc. v. Hornick*, 100 Iowa 578, holding it to be erroneous to refuse to permit the amendment of an answer by denying the signature to a subscription paper sued on, the amendment being offered when the paper was introduced in evidence and the first opportunity was presented of ascertaining the genuineness of the signature, and the original answer not admitting the signing of the identical paper sued on; *Robinson v. O'Brien*, 58 S. W. Rep. 820, 22 Ky. L. Rep. 769, holding a refusal to permit the filing of an amended reply to be reversible error; *Sarmiento v. The Catherine C.*, 110 Mich. 120, holding that the statute relating to a special proceeding and providing that an amendment could not be made to a complaint except within ten days after the filing and service of the answer or demurrer must be construed in connection with the general statute of amendments, and did not preclude the court from allowing, at the trial, an amendment in furtherance of justice.

3. *California.* — *Lee v. Murphy*, 119 Cal. 364, where the plaintiff was permitted to amend after the cause was heard and submitted; *Andrus v. Smith*, 133 Cal. 78, where, after trial and submission, but before findings had been filed or judgment given, the plaintiff was allowed to amend, the submission being set aside and the defendant allowed to answer and present further evidence.

Colorado. — *Gambrill v. Brown Hotel Co.*, 11 Colo. App. 529.

Indiana. — *Diltz v. Spahr*, 16 Ind. App. 591.

Iowa. — *Clough v. Bennett*, 99 Iowa 69; *Weis v. Morris*, 102 Iowa 327.

600. Question First Raised on the Trial. — See note 3.

601. Laches of Applicant. — See note 1.

Only in Furtherance of Justice. — See notes 3, 4.

Kentucky. — Metropolitan L. Ins. Co. v. Smith, 59 S. W. Rep. 24, 22 Ky. L. Rep. 868; Mattingly v. Bank of Commerce, (Ky. 1899) 53 S. W. Rep. 1043.

Nebraska. — Stratton v. Wood, 45 Neb. 629.

North Carolina. — Woodbury v. Evans, 122 N. Car. 779.

Oregon. — Christenson v. Nelson, 38 Oregon 473.

Washington. — Ogle v. Jones, 16 Wash. 319; McDonough v. Great Northern R. Co., 15 Wash. 244; Newman v. Buzard, 24 Wash. 225.

Wisconsin. — Schaller v. Chicago, etc., R. Co., 97 Wis. 31.

No Prejudice. — Case v. Moorman, 25 Ind. App. 293; Withee v. Simon, 104 Wis. 116. See also Belvidere v. Crichton, 81 Ill. App. 595.

The defendant cannot complain where the option of a continuance is given to him and he declines it, as he is not in a position to allege prejudice. Jaroszewski v. Allen, (Iowa 1902) 91 N. W. Rep. 941.

In Carroll v. Fethers, 102 Wis. 436, it was held to be no abuse of discretion to allow the defendant to amend his answer on the trial of an action for conversion to allege the records of a former action by the plaintiff whereby he waived the tort by suing on an implied contract; that it was in furtherance of justice that the plaintiff should abide by the record he had himself made in a controversy over the same subject-matter; and that the amendment did not operate as a surprise.

Presumption of Propriety. — Chamberlin v. Loewenthal, (Cal. 1902) 70 Pac. Rep. 932; Carter v. Lethian, 133 Cal. 451; Smith, etc., Corp. v. Byers, 20 Ind. App. 51; Taylor v. Star Coal Co., 110 Iowa 40; Kocher v. Palmetier, 112 Iowa 84; Arndt v. Bourke, 120 Mich. 263; Bennett v. Tillmon, 18 Mont. 28; Chicago, etc., R. Co. v. Martelle, (Neb. 1902) 91 N. W. Rep. 364; Murphy v. Ganey, 23 Utah 633; Morrissey v. Faucett, 28 Wash. 52.

Withdrawal from Jury. — Brown v. Carolina Midland R. Co., 58 S. Car. 466, granting an order withdrawing the case from the jury and continuing it for the purpose of allowing the plaintiff to amend.

600. 3. Gage v. West, 62 Neb. 612.

See also Woolsey v. Shaw, 34 N. Y. App. Div. 405.

In Arndt v. Bourke, 120 Mich. 263, it was held not to be error to allow an amendment under such circumstances, the defendant not asking for delay.

601. 1. Phenix Ins. Co. v. Caldwell, 187 Ill. 73; Berkowsky v. Specter, 79 Ill. App. 215; Emerson v. Converse, 106 Iowa 330, refusing to disturb the action of the trial court in disallowing an amendment; National Horse Importing Co. v. Novak, 105 Iowa 157; Faulkner v. Keeney, (Ky. 1899) 52 S. W. Rep. 819; Spurr v. Batchelor, 102 Ky. 606, as to refusal to permit filing of additional plea; Louisville Ins. Co. v. Monarch, 99 Ky. 578; Dennison v. Musgrave, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 871, affirmed (Supm. Ct. App. T.) 29 Misc. (N. Y.) 627; Stephens v. McAlpin, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 832; McGregor v. Skinner, (Tex. Civ. App. 1898) 47 S. W. Rep. 398; Merchants' L. Assoc. v. Yoakum, 39 C. C. A. 56, 98 Fed. Rep. 251. See also Brittan v. Oakland Sav. Bank, 124 Cal. 282.

Knowledge of Defense. — Greenlee v. Home Ins. Co., 103 Iowa 484; Western Assur. Co. v. Kilpatrick-Koch Dry Goods Co., 54 Neb. 241; McGregor v. Skinner, (Tex. Civ. App. 1898) 47 S. W. Rep. 398.

3. Statute of Limitations. — Dulle v. Lally, 167 Ill. 485, as to additional plea five years after general issue pleaded. See also *supra*, III. 3. g. *Unconscionable Defenses — Usury and Limitation.*

4. Carnahan v. Thompson, (Ky. 1899) 52 S. W. Rep. 931, refusing to disturb the action of the trial court in disallowing an amendment; Felton v. Dunn, 60 S. W. Rep. 298, 22 Ky. L. Rep. 1224; Rawlings v. Fisher, 110 Mich. 19, refusing to disturb the discretion of the trial court in disallowing an amendment; Baker v. Michigan Mut. Protective Assoc., 118 Mich. 431; Harrington v. Connor, 51 Neb. 214; Edge v. Third Ave. R. Co., 57 N. Y. App. Div. 29, holding it to be reversible error to allow, at the trial, an amendment which admitted evidence of special damage and which the defendant was not prepared to meet; Fields v. Rye, 24 Tex. Civ. App. 272, refusing to disturb the discretion of the

602. (2) *At What Stage of the Trial—After Jury Sworn.*—See note 1.

Re-swearing the Jury.—See note 2.

trial court in disallowing an amendment at the trial.

Amendment of Complaint Denied.—In the following cases the rulings of the lower courts in disallowing amendments were not disturbed: *Petterson v. Stockton*, etc., R. Co., 134 Cal. 244; *Richard v. Hupp*, (Cal. 1894) 37 Pac. Rep. 920; *Edmonson v. Kentucky Cent. R. Co.*, (Ky. 1898) 46 S. W. Rep. 679.

Amendments of Answer Denied.—For cases where the denial of leave to amend was held to be proper, or where the appellate court refused to interfere with the discretion of the lower court, see *Woodland Bank v. Heron*, 122 Cal. 107; *Gallagher v. Head*, 108 Iowa 588; *Pierson v. Chicago G. W. R. Co.*, 116 Iowa 601; *Rosenburger v. Marsh*, 108 Iowa 47; *Marsh v. Chown*, 104 Iowa 556; *Wallbridge v. Tuller*, 125 Mich. 218; *Pierce v. Brennan*, (Minn. 1902) 92 N. W. Rep. 507; *Ginsburg v. Von Seggern*, 59 N. Y. App. Div. 505.

Amendments Improperly Allowed.—See *Joyce v. Growney*, 154 Mo. 253; *Gould v. Gleason*, 10 Wash. 476.

No Evidence to Support Amendment.—It is not error to refuse to permit the amendment of a complaint where there is no evidence to support the amendment. *Dickson v. Pritchard*, 111 Wis. 310.

Right to Open and Close.—It could not well be an abuse of discretion to refuse an amendment for the purpose of taking the right to open and close from the plaintiff and giving it to the defendant after the plaintiff, who had the burden of proof under the original issues, had proved his case and rested. *Studebaker Bros. Mfg. Co. v. Langson*, 89 Wis. 200.

In *Parrish v. Sun Printing, etc., Assoc.*, 6 N. Y. App. Div. 585, an allowance of such an amendment was held to be erroneous under the particular circumstances.

So where a party technically has the affirmative at the opening of the trial and his adversary makes an admission of fact which he had denied in his pleading, it is discretionary with the court to permit an amendment of the pleading thereafter, for the purpose of shifting the right to open and close, and a refusal to permit an amendment

will not be disturbed. *Bannon v. Insurance Co. of North America*, (Wis. 1902) 91 N. W. Rep. 668.

But on the other hand it is not error to permit the defendant, at the trial term, to amend his plea of payment by admitting a *prima facie* case in the plaintiff's favor, and to take the right to open and close. *Massengale v. Pounds*, 108 Ga. 762. And where a defendant, for the purpose of obtaining the right to open and close, makes an admission under which he assumes the burden of proof, he will not be allowed to withdraw such admission after he has failed to carry the burden of proof so assumed, so as to deprive the adverse party of the benefit of the admission. *Fisher v. George S. Jones Co.*, 108 Ga. 490.

Denying Admitted Allegation.—It is not error to refuse to allow the defendant to amend by striking an admission from his answer after the evidence is closed. *McIntosh v. Coulthard*, (Iowa 1902) 88 N. W. Rep. 1060. But see *Cauchois v. Proctor*, 1 N. Y. App. Div. 16.

Matter Waived by Failure to Plead It cannot be pleaded by way of amendment after going to trial upon the issues raised by the pleadings. *Wright v. Wilmington City R. Co.*, 2 Marv. (Del.) 141. See also *Martin v. Fowler*, 51 S. Car. 164.

After Death of Original Party.—It is unjust to permit an executrix in whose name as plaintiff the action was revived to amend on the trial the original reply to the defendant's counterclaim for services rendered by the defendant to the original plaintiff, by inserting the defense that the services were rendered at the direction and request of others than the plaintiff's testator, there being no intimation of such a defense in the original reply and the defendant being precluded from testifying as to communications with the original plaintiff in relation to the services. *Woolsey v. Shaw*, 34 N. Y. App. Div. 405.

602. 1. *Knefel v. Flanner*, 166 Ill. 147, under statute allowing amendment at any time before judgment; *North British, etc., Ins. Co. v. Rudy*, 26 Ind. App. 472.

2. *Where the Amendment Does Not*

- 603.** *After Submission to Jury.* — See note 3.
After Motion for Nonsuit. — See notes 4, 5.
c. AFTER REPORT OF REFEREE. — See note 7.
- 604.** *d. AFTER VERDICT.* — See notes 2, 3, 4, 5.
- 605.** See note 2.
e. AFTER JUDGMENT. — See note 7.

Change the Issue the rule is otherwise. *Smith, etc., Corp. v. Byers*, 20 Ind. App. 51.

603. 3. *Abbott v. Mobile*, 119 Ala. 595; *Browne v. Stecher Lith. Co.*, 24 N. Y. App. Div. 480.

After a Mistrial, in *New York*, an application for leave to amend the complaint should not be granted by the trial court, but that court should merely allow the plaintiff to apply at special term for the amendment. *Wood v. McGuire*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 200.

4. *Koshland v. Fire Assoc.*, 31 Oregon 362. See also *Hooks v. Booker*, 94 Ga. 712.

Changing Admission to Denial After Motion Overruled. — It is not in furtherance of justice to allow a defendant, after motion for nonsuit is denied, to convert admissions in his verified answer into denials of the facts thus admitted. *Cuthbert v. Brown*, 49 S. Car. 513.

5. *Higgins v. Wilmington*, (Del. 1902) 51 Atl. Rep. 1, refusing to disturb the discretion of the lower court in denying a motion for leave to amend at this stage.

7. *Marsh v. Hix*, 110 Ga. 888; *Ætna Ins. Co. v. Glasgow Electric Light, etc., Co.*, 107 Ky. 77, holding a refusal to permit the filing of an amended answer to be erroneous.

604. 2. *Adding Material Allegations.* — In *Indiana* *Heddens v. Younglove*, 46 Ind. 212, in so far as it lays down the broad rule that the court possesses no power to permit an amendment to be made after verdict, is *overruled*. *Raymond v. Wathen*, 142 Ind. 367.

3. See *Casey v. Kimmel*, 181 Ill. 154; *Benson v. Arnold*, 75 Ill. App. 610; *Federal L. Assor. v. Smith*, 86 Ill. App. 427; *American Bonding, etc., Co. v. Scott*, 10 Kan. App. 574, 61 Pac. Rep. 873; *Frost v. Courtis*, 172 Mass. 401; *Felty v. Deaven*, 166 Pa. St. 640; *Robinson v. Eau Claire Book, etc., Co.*, 110 Wis. 369. But see *O'Gorman v. Sabin*, 62 Minn. 46, wherein, while holding that there was no error in permitting

an amendment of complaint after trial and special findings, the amendment not changing the cause of action or the position of the defendant with regard to his defenses, the practice was denominated "mongrel and irregular."

To Support the Verdict, not to overthrow it, such amendments are permissible. *Dunham v. Brown*, 9 Kan. App. 889, 58 Pac. Rep. 232.

To Conform to Stipulation of Parties. — After verdict an amendment of the pleading of the successful party is proper to conform the pleadings to the case as modified by the parties by stipulation, such amendment being one in aid of the verdict and judgment. *Granby Min., etc., Co. v. Davis*, 156 Mo. 422.

Changing the Issues Litigated is not permissible at such stage. *Omaha Bottling Co. v. Theller*, 59 Neb. 257; *Habel v. Union Depot R. Co.*, 140 Mo. 159; *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441.

Defect of Parties. — In *Gilland v. Union Pac. R. Co.*, 6 Wyo. 185, it was held that an application to amend an answer by alleging a defect of parties plaintiff came too late after verdict.

4. *Raymond v. Wathen*, 142 Ind. 367, *citing 1 ENCYC. OF PL. AND PR.* 604, 605.

5. *Burt v. Florida Southern R. Co.*, (Fla. 1901) 31 So. Rep. 265.

605. 2. *Chicago, etc., R. Co. v. Eselin*, 86 Ill. App. 94.

7. *Iowa Brick Co. v. Campbell*, (Iowa 1900) 82 N. W. Rep. 772, where an amendment was allowed; *Pfefferkorn v. Haywood*, 65 Minn. 429, recognizing the right to allow amendments in furtherance of justice after judgment; *Parker v. Stephens*, (Tex. Civ. App. 1899) 48 S. W. Rep. 878, wherein it was conceded that an amended petition cannot be filed after final judgment, yet since in the case before the court such petition was filed after an agreed severance, and was not stricken from the record, it was held that the effect of the institution of a new suit should be given to the filing of such petition. See also *Smith v. Farmers' Bank*, (Ky.

607. Pending Appeal or Writ of Error. — See note 4. See also APPEALS.

f. IN APPELLATE COURTS — (1) *Where the Cause Is Tried upon the Record.* — See notes 5, 6.

1899) 51 S. W. Rep. 451, and *Winburn v. Fidelity Loan, etc., Assoc.*, 110 Iowa 374, where the amendments came too late.

Laches of Applicant. — See *Morgan v. King*, 27 Colo. 539.

After Nonsuit. — In *Gilliam v. Brown*, 126 Cal. 160, the appellate court could not say that there was error in refusing to permit the amendment at such stage, but as the judgment was reversed on other grounds, it was suggested that if before another trial the plaintiff should apply for leave to amend, it should be granted.

After Default an amendment will not authorize a judgment different from that sought by the original pleading, *Heins v. Wicke*, 102 Iowa 396; and the plaintiff cannot amend in a material matter and at the same time hold his default against the defendant, *Haggin v. Lorenz*, 15 Mont. 309; but an amendment may be allowed after default, an opportunity being afforded to the defendant either to plead to the complaint or to present evidence touching the matter of the amendment, *La Barre v. Waterbury*, 69 Conn. 554.

Substantial Change of Cause of Action or Defense, after judgment, would not be in furtherance of justice and will not be allowed. *Pitkin v. New York, etc., R. Co.*, 64 Conn. 482; *Wymore First Nat. Bank v. Myers*, 44 Neb. 306; *Scott v. Spencer*, 44 Neb. 93; *Marsh v. Kaye*, 44 N. Y. App. Div. 68.

After Personal Judgment and Judgment of Sale, where there has been a personal judgment and a judgment of sale to enforce a chattel mortgage, the court having no further jurisdiction save to collect and apply the proceeds of the sale to the satisfaction of the judgment, it is error to permit an amendment by a defendant raising a new issue. *Russell v. Howerton*, 60 S. W. Rep. 916, 22 Ky. L. Rep. 1468.

Striking Out Sworn Admission. — In *New York* it was held that after trial and decision of the cause by the court, the exercise of the discretion of the trial court in regard to amendments cannot be extended to the striking out from an answer a verified admission of the fact. *Randall v. Brodhead*, 60 N. Y. App. Div. 567.

"At Any Stage of the Cause" is not broad enough to allow amendments after a judgment which has not been set aside or vacated. *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296.

After Severance by Consent of two defendants, after judgment in their favor and in favor of other defendants had been set aside and a new trial granted as to such other defendants, the plaintiff may file an amended petition setting up after-acquired title as to the two defendants agreeing to the severance. *Parker v. Stephens*, (Tex. Civ. App. 1899) 48 S. W. Rep. 878.

607. 4. *Western Wheel-Scraper Co. v. Drinnen*, 79 Fed. Rep. 820, denying the power *Contra*, *Leiferman v. Osten*, 64 Ill. App. 578, *affirmed* 167 Ill. 93. See also *Harlan v. Moore*, 132 Mo. 483, upholding the power to make a correction of a mistake *nunc pro tunc*.

5. A Technical Defect which could have been amended by the record in the lower court if attention had been called thereto will be ordered to be amended by the appellate court. *C. & C. Electric Co. v. St. Clair*, 182 Pa. St. 274.

6. *Dobbs v. Purington*, (Cal. 1901) 65 Pac. Rep. 1091; *Locke v. Kennedy*, 171 Mass. 204; *Reynolds v. Pascoe*, 24 Utah 219.

Making New Issues. — *Ottumwa Brick, etc., Co. v. Ainley*, 109 Iowa 386, where an amendment to an answer in the Supreme Court was stricken out because the case must be heard in the appellate court upon the same issues tried below.

On Case Reserved the entry must be according to the terms of the reservation, which being that "if, upon the facts stated in the petition, the petitioners are not entitled to file an information as prayed, then the entry shall be 'demurrer sustained and petition dismissed,'" upon such a finding the petition must be dismissed. *Haupt v. Rogers*, 170 Mass. 71.

Withdrawing Admission of Plaintiff's Capacity. — Where the defendant had admitted the plaintiff's capacity to sue as administrator, after judgment for the plaintiff and appeal by the defendant a motion for an order suspending the hearing of the appeal and giving to the defendant leave to move the lower

608. The Statute of Jeofails. — See note 3.

609. See note 1.

610. See notes 1, 2.

611. Complaint Bad on Demurrer. — See note 1.

Neglect to Apply for Leave. — See note 2.

To Conform to Proof. — See note 3.

Amendments Considered as Made. — See note 4.

(2) *Where the Trial Is De Novo.* — See note 5.

court for an order vacating the judgment, and for a new trial with leave to amend the answer by withdrawing the admission of the plaintiff's capacity and denying it, was overruled. *Martin v. Fowler*, 51 S. Car. 164.

608. 3. Changing Form of Action. — In an action improperly brought in form, as for money had and received when the real cause was for breach of bond, the defendant having taken the point on the pleadings in the trial court and the judge not being able to certify that the defendant did not rely upon his position and go into the evidence less fully than he would have done in a suit upon the bond, exceptions will be sustained and a verdict for the plaintiff cannot be saved by an amendment in the appellate court. *Field v. Banks*, 177 Mass. 36.

Judgment by Default — Substantial Defects. — The statute of amendments and jeofails does not extend to cure defects which are clearly matters of substance, and a declaration so defective will not support a judgment by default. *Schueler v. Mueller*, 193 Ill. 402.

609. 1. *Indiana.* — *Praigg v. Western Paving, etc., Co.*, 143 Ind. 358; *Decatur v. Grand Rapids, etc., R. Co.*, 146 Ind. 577; *Kohli v. Hall*, 141 Ind. 411.

Nebraska. — *Bee Pub. Co. v. World Pub. Co.*, 59 Neb. 713.

New York. — *Douai v. Lutjens*, 21 N. Y. App. Div. 254, *affirmed* 165 N. Y. 622.

Washington. — *Allend v. Spokane Falls, etc., R. Co.*, 21 Wash. 324.

Formal Defect of Party. — In the United States Circuit Court of Appeals the name of the proper plaintiff will be substituted. *Howard v. U. S.*, 42 C. C. A. 169, 102 Fed. Rep. 77; *Chicago G. W. R. Co. v. Leavenworth First M. E. Church*, 42 C. C. A. 178, 102 Fed. Rep. 85.

To Conform to Findings. — An amendment of the complaint may be allowed in order to conform the allegations to

the findings and judgment. *Tannenbaum v. Armeny*, 81 Hun (N. Y.) 581.

Where Rule Inapplicable. — Where the complaint is fatally defective, and the plaintiff, when the defect was called to his attention on the trial, did not ask leave to amend but invoked and obtained a determination of the trial court in his favor, the defendant has a right to rely, at his own risk, upon his objection and exception, and it would not be in furtherance of justice to regard the defect as amended on appeal. *Gill v. Etna Live Stock Ins. Co.*, 82 Hun (N. Y.) 363.

610. 1. *Howell v. Grand Trunk R. Co.*, 92 Hun (N. Y.) 423.

2. **Omission of Necessary Allegation.** — *Ure v. Bunn*, (Neb. 1902) 90 N. W. Rep. 904.

611. 1. *Howard v. Mutual Reserve Fund L. Assoc.*, 125 N. Car. 49, where the amendment involved questions of fact and a matter of law entirely foreign to the case as made up on appeal.

2. *Decatur v. Simpson*, 115 Iowa 348.

3. **Where Motion to Dismiss Was Made at the Close of the Evidence**, it is too late on appeal to amend the complaint to conform to the proofs. *Scheuer v. Rosenbaum*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 768.

4. *Columbus Constr. Co. v. Crane Co.*, 98 Fed. Rep. 946, 40 C. C. A. 35, as to notice of defense.

5. **Connecticut.** — *Lovell v. Hammond Co.*, 66 Conn. 500, holding that an amendment was properly allowed.

Kansas. — *St. Louis, etc., R. Co. v. Bryan Fruit Co.*, 1 Kan. App. 551, upholding an amendment as not changing the cause of action.

Michigan. — *On Appeal from Justice of the Peace.* — The oral declaration in the justice's court may be amended on appeal to allege the assignment of the claim sued on. *Farnam v. Doyle*, 128 Mich. 696.

Missouri. — *A New Cause of Action* cannot be introduced by amendment.

613. See note 1.

615. See notes 1, 3.

Slaughter v. Davenport, 151 Mo. 26; *Powell v. Shipps*, 85 Mo. App. 467; *Rippee v. Kansas City, etc.*, R. Co., 71 Mo. App. 557.

To Make Definite and Certain. — An amendment may be allowed to make the complaint more definite and certain. *Cameron v. Hart*, 57 Mo. App. 142; *Bradley v. Sweiger*, 61 Mo. App. 419.

Names of Parties. — *Evans-Smith Drug Co. v. White*, 86 Mo. App. 540, misnomer of defendant may be corrected.

Oregon. — The discretion of the Circuit Court in refusing to allow an amendment offered there for the first time will not be disturbed in the absence of abuse. *Watson v. Buckler*, 29 Oregon 235.

Wisconsin. — On appeal to the Superior Court of Milwaukee from a justice of the peace, the action is triable as if brought originally in the former court, and that court may permit an amendment bringing in another party. *Marlett v. Docter*, 89 Wis. 347.

613. 1. Alabama. — Change from contract of tort not permissible. *James v. Vicors*, 119 Ala. 32.

Conceding that an additional count filed on such an appeal introduces a new cause of action, if before the conclusion of the argument the court permits the plaintiff to amend again, by which amendment the case is returned to the status held by it before the justice of the peace, any objection to the first amendment becomes unavailing. *Farley v. Bay Shell Road Co.*, 125 Ala. 184.

Arkansas. — An amendment is proper if it does not introduce a new cause of action. *Freeman v. Lazarus*, 61 Ark. 247.

Georgia — Defendant Not Appealing. — Where an appeal by one of several defendants from a judgment rendered against all removes the whole case so that a judgment in the appellate court will bind all, those not joining in the appeal have the right to amend their pleadings in the appellate court. *Murray v. Marshall*, 106 Ga. 522.

Indian Territory. — Annot. Stat. Ind. Terr. (1899), § 2831 (Mansf. Dig., § 4151), provides that "the same cause of action, and no other, that was tried before the justice, shall be tried in the

Circuit Court upon the appeal," under which it was held that whether an amendment is considered as an amendment to the original cause of action or as a new cause of action, the plaintiff may, on appeal in an action of replevin for the possession of cattle, amend so as to recover the increase, though it was further held that this was not in fact the statement of a new cause of action. *Simon v. Aubrey*, 3 Indian Ter. 680.

Kentucky. — No new action can be introduced on such appeal. *Roberts v. Abner*, (Ky. 1897) 42 S. W. Rep. 337; *Southern Lumber Co. v. Wireman*, (Ky. 1897) 41 S. W. Rep. 297.

Nebraska. — Causes must be tried on appeal to the District Court on the same issues as in the court from which the appeal is taken. *Western Cornice, etc., Works v. Meyer*, 55 Neb. 440; *German Nat. Bank v. Aultman*, 63 Neb. 324; *Ball v. Beaumont*, 63 Neb. 215, modified in (Neb. 1902) 92 N. W. Rep. 170, in the application of the rule. See also *Livingston v. Moore*, (Neb. 1902) 89 N. W. Rep. 289, holding the particular change to be proper.

North Carolina — Appeals from Justices. — Amendment of summons to show the jurisdiction of the justice, after the defendant has appeared and gone to trial, is within the authority of the Superior Court on appeal. *McBride v. Welborn*, 119 N. Car. 508.

Oklahoma. — The statute allows amended pleadings to be filed, in furtherance of justice. *Pinson v. Prentise*, 8 Okla. 143.

Texas. — Amendment may be made if it does not introduce a new cause of action. *Fergus v. Dodson*, (Tex. Civ. App. 1895) 33 S. W. Rep. 273. See also *Clements v. McCain*, (Tex. Civ. App. 1899) 49 S. W. Rep. 122, holding that the amendment in question did not set up a counterclaim different from that set up in the justice's court.

615. 1. Limit as to Amount. — The power of amendment in the appellate court is limited to the highest sum for which judgment could have been rendered below. *Plano Mfg. Co. v. Nordstrom*, 63 Neb. 123. See also JUSTICES OF THE PEACE.

3. Loranger v. Davidson, 110 Mich. 605; *Carlson v. Stocking*, 91 Wis. 432.

616. See note 2.

617. *g.* REMAND WITH DIRECTIONS TO AMEND. — See note 1.

618. See note 1.

[But even upon affirming a judgment determining the insufficiency of a pleading, the appellate court will sometimes grant permission to the party to apply to the court below for leave to amend. See note 1*a*.]

h. AFTER REMAND — (1) *Where Remand Is General.* — See note 2.

Transfer Equivalent to Change of Action. — In *Jackson v. Gorman*, 70 Ark. 88, on appeal to the Circuit Court in proceedings commenced in the probate court, the Circuit Court properly refused to transfer the cause to the chancery court because the jurisdiction of the latter court can be invoked only by original bill or in cases in which the statute provides for a transfer of cases commenced on the law side of the Circuit Court by mistake, and to transfer a case on appeal when the appellate court tries *de novo* is to change the cause of action by amendment.

616. 2. Iowa. — Amendments which do not set up any demand or counterclaim are allowable in cases appealed to the District Court at any time before the commencement of the trial. *Boos v. Dulin*, 103 Iowa 331.

617. 1. Georgia. — *Bradwell v. Bainbridge Bank*, 103 Ga. 242; *Jones v. Hurst*, 95 Ga. 286, holding that where the judgment of the lower court in overruling a demurrer is reversed, with directions that an amendment be permitted, the court, upon remand, properly allows the amendment, whatever may be its opinion as to the propriety thereof under the strict rules of practice.

Indiana. — *Bucklen v. Cushman*, 145 Ind. 51, reversing with instructions to sustain demurrer and with leave to amend.

Maine. — *Jenness v. Barron*, 95 Me. 531.

Missouri. — *Smoot v. Judd*, 161 Mo. 673.

Montana. — *Wyman v. Jensen*, 26 Mont. 227.

United States. — *Great Southern F. Proof Hotel Co. v. Jones*, 177 U. S. 449. See also *Strauss v. National Parlor Furniture Co.*, 76 Miss. 343; *Wisconsin Marine, etc., Ins. Co. Bank v. Mann*, 100 Wis. 596.

Remand Merely Advisory. — In *Ocean*

Steamship Co. v. Anderson, 112 Ga. 835, where the trial judge had refused to permit an amendment because he was erroneously of opinion that there was nothing in the original pleading to amend by, upon remanding the cause for a rehearing upon another ground the appellate court gave direction that the court below could pass upon the question of allowing the amendment without regard to the reason upon which the former ruling was based.

Where Original Pleading Held to Be Good in Substance. — Where a pleading is held by the appellate court to be substantially good though inartificially drawn, and that it should be reformed so as to state the cause of action in a clear and comprehensive manner, the lower court, after remand, should not sustain a demurrer to an amended pleading which is as good in substance as the original though even more inartificially drawn. *Brashears v. Letcher County Ct.*, 61 S. W. Rep. 285, 22 Ky. L. Rep. 1763.

Effect of General Leave. — Where the leave given to file an amendment, when remanding a cause, is not special, the party is not precluded from filing any other amendment than that which he had asked leave to file during the first trial. *Pottkamp v. Buss*, (Cal. 1896) 46 Pac. Rep. 169.

618. 1. *Sealy v. Cook*, 51 La. Ann. 723.

North Carolina. — See *North v. Bunn*, 122 N. Car. 766.

1a. Fleming v. Courtenay, 95 Me. 128; *Moran v. Dunphy*, 177 Mass. 485; *Recknagel v. Steinway*, 58 N. Y. App. Div. 352; *Finch v. White*, 100 Pa. St. 86; *Lawton v. South Bound R. Co.*, 61 S. Car. 548; *Privett v. Wilmington, etc., R. Co.*, 54 S. Car. 98. See also *Jackson Bank v. Irons*, 18 R. I. 718; *People v. Roe*, 25 N. Y. App. Div. 107; *2. Jones v. Stoddart*, (Idaho 1902) 67

619. See note 1.

Discretionary. — See note 2.

620. (2) *Where the Remand Is Limited.* — See note 1.

Pac. Rep. 650, *citing* 1 ENCYC. OF PL. AND PR. 489. See also the following cases: *Heidt v. Minor*, 113 Cal. 385; *Richards v. Bradley*, 129 Cal. 670; *Martin v. Shannon*, 101 Iowa 620; *Cahn v. Tootle*, 58 Kan. 260; *Tradesmen's Nat. Bank v. Curtis*, 63 N. Y. App. Div. 14, holding that the fact that the court of last resort did not place the reversal simply upon a defect in the pleading, but considered the whole evidence in the record and held that upon such evidence the alleged contract relied upon by the defendant was not proven, and that the verdict was not supported by the evidence, does not require a reversal of the order allowing an amendment of the answer to meet the view of the pleading expressed by the court of last resort; *Parker v. Harden*, 122 N. Car. 111; *Jennings v. Parr*, 54 S. Car. 109; *Richardson v. Carbon Hill Coal Co.*, 18 Wash. 368; *Wisconsin Marine, etc., Ins. Co. Bank v. Mann*, 100 Wis. 596, wherein the judgment in the mandate of the appellate court in effect granted a new trial of a particular issue upon condition that the trial court should, in its discretion, permit an amendment of an answer so as properly to present the issue; *Edwards v. Bates County*, 79 Fed. Rep. 56. See further *Meyer v. Covington*, 64 S. W. Rep. 444. 23 Ky. L. Rep. 843.

Raising New Issues. — The party seeking to amend cannot change the theory upon which he has failed and set up a new cause of action. *Missouri Pac. R. Co. v. Henrie*, 63 Kan. 330. See also *Allen v. Davenport*, 115 Iowa 20.

Application by the Successful Party on the first appeal to amend his pleadings on the second trial was denied in *Cottrhan v. Knight*, 47 S. Car. 245, as coming too late.

After Verdict Set Aside on Case Reported. — Where a case is reported to the court of last resort upon a verdict directed, and the verdict is set aside and, according to the terms upon which the case was reported, the case is ordered to stand for trial on a particular issue, the trial court may allow an amendment setting up a defense not inconsistent with any question of law decided by the appellate court on

the case reported. *Frost v. Courtis*, 172 Mass. 401.

After Reservation and Judgment Advised. — Where a case has been reserved to the Supreme Court, which advises what judgment should be rendered, and before such judgment is actually rendered, the amendment of the pleading is entirely in the discretion of the trial court. *Trustees of Donations, etc., v. Parish of Christ Church*, 68 Conn. 369.

After Affirmance of an Order Overruling a Demurrer to a complaint, the lower court may allow an amendment. *Bomar v. Means*, 47 S. Car. 190.

619. 1. *Savannah, etc., R. Co. v. Chaney*, 102 Ga. 814.

2. *Congdon v. Bryan*, 9 Kan. App. 650; *Continental Ins. Co. v. Moore*, 62 S. W. Rep. 517, 23 Ky. L. Rep. 72, where leave to file an amended answer after reversal of a judgment in favor of the defendant was properly confined to new matter not in conflict with the former answer; *Troup v. Horbach*, 57 Neb. 644; *Heine v. Rohner*, 33 N. Y. App. Div. 633; *Consolidated Steel, etc., Co. v. Burnham*, 8 Okla. 514; *Interstate Sav., etc., Assoc. v. Knapp*, 20 Wash. 230; *Chapman v. Yellow Poplar Lumber Co.*, 61 U. S. App. 499. See also *Louisville v. Muldoon*, (Ky. 1899) 49 S. W. Rep. 791.

Changing Admission to Denial. — *Babbitt v. Gibbs*, 54 N. Y. App. Div. 634; *Valentine v. Healey*, 1 N. Y. App. Div. 502.

New Cause of Action. — *Lennox v. Vandalia Coal Co.*, 158 Mo. 473, sustaining the action of the lower court in striking out a count attempting to introduce an entirely new cause of action by amendment.

Such an amendment, after reversal with directions to sustain a demurrer to the complaint, is not a matter of right, and the refusal to allow it is not error. *Thomas v. Hawkins*, 13 Ind. App. 318.

Contradicting Original Pleading. — Amendments contradicting the original pleading are properly denied after the party has failed on the original issue in the appellate court. *Davidson v. Dishman*, 59 S. W. Rep. 326, 22 Ky. L. Rep. 940.

620. 1. *Compare Troup v. Horbach*,

620. *Res Adjudicata.* — See note 2.

621. *12. Effect of Amendments — a. RETROACTIVE EFFECT — (1) In General.* — See note 2.

(2) Statute of Limitations — Where Amendment Does Not Introduce a New Cause of Action. — See note 3.

57 Neb. 644. And see *Matthews v. People*, 59 Ill. App. 146.

Striking Out Admissions. — Where the allegations in an answer to a libel for a collision constitute such an admission of facts as to require a different decree from that rendered in the court below, and in the appellate court the same allegations are insisted upon, after reversal with directions to enter a different decree an application to amend the answer by striking out such allegations is without equity. *The Horace B. Parker*, (C. C. A.) 74 Fed. Rep. 640.

620. 2. Farrow v. Eclipse Bicycle Co., 18 App. Cas. (D. C.) 101.

Where Question Not Res Judicata. — See *Talle v. De Monasterio*, 50 La. Ann. 940, where the defendant was held not to be precluded from pleading certain matters purely defensive.

Pleading Same Matter for Different Purpose. — Where on appeal a judgment sustaining a demurrer to an answer adjudicates only that the matter pleaded did not constitute a defense going to the whole right of the plaintiff to recover, and leave is given to the defendant to plead over, he may set up the same matter in an amended answer, as a partial defense and in reduction of damages. *Gabay v. Doane*, 77 N. Y. App. Div. 413.

621. 2. Anthony Invest. Co. v. Arnett, 63 Kan. 879, 64 Pac. Rep. 1024; *Long v. Hubbard*, 6 Kan. App. 878; *Wheeler v. Monett Milling Co.*, 73 Mo. App. 672, as to relation back of amendment of petition to enforce a mechanic's lien, to effectuate the lien; *Swain v. Savage*, 55 Neb. 687; *State v. Collins*, 68 N. H. 46; *San Antonio, etc., R Co. v. Barnett*, (Tex. Civ. App. 1900) 57 S. W. Rep. 600; *Carter-Crume Co. v. Peurrung*, 40 C. C. A. 150, 99 Fed. Rep. 888; *Nevada Co. v. Farnsworth*, 89 Fed. Rep. 164.

Effect as to Costs. — Where a motion to direct a verdict for the plaintiff might well have been sustained before the amendment, the filing of the amendment by the plaintiff does not affect the costs, which should be taxed against the defendant upon directing

the verdict. *Osborne v. Metcalf*, 112 Iowa 540.

New Process is not necessary. *Niehoff v. People*, 171 Ill. 243, which case was decided under a statute. See also *Griffith v. Blue Grass Bldg., etc., Assoc.*, (Ky. 1900) 57 S. W. Rep. 486, decided under a statute relating to proceedings for the enforcement of liens which was declaratory of the law as previously announced in that state; *Three Forks City Co. v. Com.*, (Ky. 1898) 45 S. W. Rep. 353, holding that where the amendment is not a substantial charge in the cause of action or relief prayed new process is not necessary, but it is otherwise where the amendment seeks other and different relief. See also on the last point, *Garrett v. Ashcraft*, (Ky. 1897) 39 S. W. Rep. 51; *Pena v. Pena*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1027. But where a defendant had answered an original petition, and is in court and shows his notice of the cause of the action declared upon by the amendment by answering to it fully, he has notice of everything of which a citation could inform him and service of citation would be useless. *Brown v. Viscaya*, (Tex. Civ. App. 1897) 42 S. W. Rep. 309. And objection by a defendant in open court to the filing of an amended petition is equivalent to a general demurrer. *H. Feltman Co. v. Thompson*, 58 S. W. Rep. 693, 22 Ky. L. Rep. 757.

Where the Defendant Does Not Appear the plaintiff must recover according to the case made by his original pleading. *Heins v. Wicke*, 102 Iowa 396. See also *Geer v. Holcomb*, 92 Wis. 661.

3. Chambers v. Talladega Real-Estate, etc., Assoc., 126 Ala. 296; *Pratt v. Davis*, 105 Mich. 499; *Love v. Southern R. Co.*, 108 Tenn. 104; *Billings v. Parsons*, 17 Utah 22, each of which cases cited 1 ENCYC. OF PL. AND PR. 621. See also the following cases: *Alabama*. — *Sheffield v. Harris*, 112 Ala. 614; *Illinois Car. etc., Co. v. Walch*, 132 Ala. 490; *Manchester F. Assur. Co. v. Feibelman*, 118 Ala. 308; *Louisville, etc., R. Co. v. Woods*, 105 Ala. 561; *Taylor v. Smith*, 104 Ala. 537.

California. — *Kent v. San Francisco Sav. Union*, 130 Cal. 401; *Hoffman v. Keeton*, 132 Cal. 195; *Frost v. Witter*, 132 Cal. 421; *Esrey v. Southern Pac. R. Co.*, 103 Cal. 541; *Malone v. Johnson*, (Cal. 1897) 47 Pac. Rep. 579; *Stockton Combined Harvester, etc., Works v. American F. Ins. Co.*, 121 Cal. 152.

Colorado. — *Mullen v. McKim*, 22 Colo. 468.

District of Columbia. — *Howard v. Chesapeake, etc., R. Co.*, 11 App. Cas. (D. C.) 300.

Georgia. — *Roberts v. Leak*, 108 Ga. 806; *Augusta v. Lombard*, 99 Ga. 282; *Craven v. Walker*, 101 Ga. 845.

Illinois. — *Chicago City R. Co. v. Cooney*, 106 Ill. 466; *Chicago North Shore St. R. Co. v. Payne*, 192 Ill. 239; *Swift v. Foster*, 163 Ill. 50; *Chicago, etc., R. Co. v. Ryan*, 165 Ill. 88; *Chicago, etc., R. Co. v. Scanlan*, 170 Ill. 106; *Illinois Cent. R. Co. v. Souders*, 178 Ill. 586; *Hanchett v. Ives*, 171 Ill. 122; *Chicago, etc., R. Co. v. Gillison*, 173 Ill. 264; *Griffin Wheel Co. v. Markus*, 180 Ill. 391; *Chicago City R. Co. v. Hackendahl*, 188 Ill. 300; *Chicago Gen. R. Co. v. Carroll*, 189 Ill. 273; *Illinois Cent. R. Co. v. Weiland*, 179 Ill. 609; *Chicago, etc., R. Co. v. Henneberry*, 153 Ill. 354; *New York L. Ins. Co. v. People*, 95 Ill. App. 136, *affirmed* 195 Ill. 430; *Mott v. Chicago, etc., R. Co.*, 102 Ill. App. 412; *Chicago City R. Co. v. McMeen*, 102 Ill. App. 318; *Illinois Trust, etc., Bank v. La Touche*, 101 Ill. App. 341; *Wolf v. Collins*, 94 Ill. App. 518; *Cicero, etc., St. R. Co. v. Brown*, 89 Ill. App. 318, *affirmed* 193 Ill. 274; *Elgin v. Anderson*, 89 Ill. App. 527; *Kingman v. Chicago, etc., R. Co.*, 85 Ill. App. 138; *Illinois Cent. R. Co. v. Swisher*, 74 Ill. App. 164, *affirmed* 182 Ill. 533; *Lake Shore, etc., R. Co. v. Ryan*, 70 Ill. App. 45; *Liebold v. Green*, 69 Ill. App. 527; *Bennett v. Balrd*, 67 Ill. App. 422; *Illinois Steel Co. v. Szutenboch*, 64 Ill. App. 642; *Louisville, etc., R. Co. v. Wurl*, 62 Ill. App. 381; *Illinois Cent. R. Co. v. Campbell*, 58 Ill. App. 275.

Indiana. — *Springfield Engine, etc., Co. v. Michener*, 23 Ind. App. 130. See also *Trueblood v. Shellhouse*, 19 Ind. App. 91.

Kansas. — *Hillyer v. Douglass*, 56 Kan. 97; *Kansas City v. King*, 65 Kan. 64; *Keys v. Lardner*, 59 Kan. 545.

Kentucky. — *Louisville v. Selva*, (Ky. 1902) 66 S. W. Rep. 376; *Turner v. Mitchell*, 61 S. W. Rep. 468, 22 Ky.

L. Rep. 1784; *Louisville, etc., R. Co. v. Pointer*, 69 S. W. Rep. 1108, 24 Ky. L. Rep. 772; *Roseberry v. Newport News, etc., R. Co.*, (Ky. 1897) 39 S. W. Rep. 407.

Maryland. — *State v. Reilly*, 89 Md. 162.

Michigan. — *Belden v. Blackman*, 124 Mich. 667; *Detroit v. Wayne Circuit Judge*, 125 Mich. 634.

Missouri. — *Long v. Long*, 141 Mo. 352; *Courtney v. Blackwell*, 150 Mo. 245, where the amendment set up the same claim which had been made previously by replication.

Nebraska. — *Norfolk Beet-Sugar Co. v. High*, 59 Neb. 100; *Merrill v. Wright*, 54 Neb. 517.

New York. — *Loggell v. New York El. R. Co.*, 5 N. Y. App. Div. 198; *Critelli v. Rodgers*, 87 Hun (N. Y.) 530; *Truman v. Lester*, 71 N. Y. App. Div. 612.

South Carolina. — *Bell v. Floyd*, 54 S. Car. 246.

Tennessee. — *Hooper v. Atlanta, etc., R. Co.*, 107 Tenn. 712.

Texas. — *Moore v. Williams*, (Tex. Civ. App. 1901) 62 S. W. Rep. 977; *St. Louis Type Foundry v. Taylor*, (Tex. Civ. App. 1901) 65 S. W. Rep. 677; *Galveston, etc., R. Co. v. English*, (Tex. Civ. App. 1900) 59 S. W. Rep. 626; *Galveston, etc., R. Co. v. Eckles*, (Tex. Civ. App. 1900) 60 S. W. Rep. 830; *Orange Mill-Supply Co. v. Goodman*, (Tex. Civ. App. 1900) 56 S. W. Rep. 700; *International, etc., R. Co. v. Dalwight*, (Tex. Civ. App. 1900) 56 S. W. Rep. 136; *Herring v. Patten*, 18 Tex. Civ. App. 147; *Triplett v. Morris*, 18 Tex. Civ. App. 50; *Schneider-Davis Co. v. Brown*, (Tex. Civ. App. 1898) 46 S. W. Rep. 108; *Missouri Pac. R. Co. v. Foreman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 834; *Caswell v. Hopson*, (Tex. Civ. App. 1898) 47 S. W. Rep. 54; *Hanrick v. Gurley*, 93 Tex. 458; *Nelson v. Brenham Compress Oil, etc., Co.*, (Tex. Civ. App. 1899) 51 S. W. Rep. 514; *Worsham v. Vignal*, 14 Tex. Civ. App. 324; *Texas Cent. R. Co. v. Frazier*, (Tex. Civ. App. 1896) 34 S. W. Rep. 664; *Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 565; *Campbell v. Nicolini*, (Tex. Civ. App. 1896) 35 S. W. Rep. 74; *Texas, etc., R. Co. v. Buckalew*, (Tex. Civ. App. 1896) 34 S. W. Rep. 165; *Texas, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1896) 34 S. W. Rep. 186; *Sherman Oil, etc., Co. v. Stewart*, 17 Tex. Civ. App. 59; *Fidelity*,

622. Where Amendment Introduces a New Cause of Action. — See note 1.

etc., *Co. v. Allibone*, 15 Tex. Civ. App. 178; *Austin, etc., R. Co. v. Flannagan*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1043; *Texas, etc., R. Co. v. Eberhart*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1060; *Moses v. Union Pac. R. Co.*, (Tex. Civ. App. 1897) 41 S. W. Rep. 154; *The Oriental v. Barclay*, 16 Tex. Civ. App. 193; *Missouri, etc., R. Co. v. McFadden*, (Tex. Civ. App. 1895) 32 S. W. Rep. 18; *Tynberg v. Cohen*, (Tex. Civ. App. 1895) 32 S. W. Rep. 157; *Gordon v. Mackey*, (Tex. Civ. App. 1895) 30 S. W. Rep. 586; *Texas, etc., R. Co. v. Grimes*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1104; *Burnett v. Casteel*, (Tex. Civ. App. 1896) 36 S. W. Rep. 782; *Southern Pac. Co. v. Wellington*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1114; *Texas, etc., R. Co. v. Fuller*, 13 Tex. Civ. App. 151.

Washington. — *Richardson v. Carbon Hill Coal Co.*, 18 Wash. 368.

West Virginia. — *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 729.

United States. — *Atlantic, etc., R. Co. v. Laird*, 164 U. S. 393; *Middlesex Banking Co. v. Smith*, 52 U. S. App. 406, 83 Fed. Rep. 133; *Johnson v. Staenglen*, 52 U. S. App. 537, 85 Fed. Rep. 603; *Cincinnati, etc., R. Co. v. Gray*, 41 C. C. A. 535, 101 Fed. Rep. 623; *Cross v. Evans*, 52 U. S. App. 720, 86 Fed. Rep. 1; *McDonald v. Nebraska*, 41 C. C. A. 278, 101 Fed. Rep. 171; *Painter v. New River Mineral Co.*, 98 Fed. Rep. 544.

622. 1. *Schwartz v. Stock*, (Nev. 1901) 65 Pac. Rep. 357; *Love v. Southern R. Co.*, 108 Tenn. 104, each of which cases cited 1 ENCYC. OF PL. AND PR. 622. See also the following cases:

Alabama. — *Williams v. McKissack*, 125 Ala. 544.

California. — *Lambert v. McKenzie*, 135 Cal. 100; *Campbell v. Campbell*, 133 Cal. 33. See also *Matter of Wilson*, 117 Cal. 262.

Georgia. — *Burbage v. Fitzgerald*, 98 Ga. 582.

Illinois. — *Fish v. Farwell*, 160 Ill. 230; *Chicago, etc., R. Co. v. Scanlan*, 170 Ill. 106; *Illinois Cent. R. Co. v. Campbell*, 170 Ill. 163; *Secord-Hopkins Co. v. Lincoln*, 173 Ill. 357; *Chicago City R. Co. v. Leach*, 182 Ill. 359; *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185; *Dalton v. Chicago City R. Co.*, 93 Ill. App. 7; *Richter v. Michigan Mut. L. Ins. Co.*, 66 Ill. App. 606; *Mosier v.*

Flanner-Miller Lumber Co., 66 Ill. App. 630; *Simons v. Hawley*, 53 Ill. App. 287; *Illinois Steel Co. v. Eylenfeldt*, 62 Ill. App. 552; *Harper v. Illinois Cent. R. Co.*, 74 Ill. App. 74; *Field v. French*, 80 Ill. App. 78; *Baumgartner v. Hoeft*, 64 Ill. App. 449.

Iowa. — *Box v. Chicago, etc., R. Co.*, 107 Iowa 660; *Brooks v. Seevers*, 112 Iowa 480; *Whalen v. Gordon*, (C. C. A.) 95 Fed. Rep. 305, holding that the statutory provision in *Iowa* that "if, after the commencement of an action, the plaintiff for any cause except negligence in its prosecution fails therein, and a new one is brought within six months thereafter," the second suit can be considered a continuance of the first, applies only to a case in which no judgment upon the merits is rendered and the second suit is upon the same cause of action as the first.

Kansas. — *Atchison, etc., R. Co. v. Schroeder*, 56 Kan. 731; *Missouri, etc., R. Co. v. Bagley*, 65 Kan. 188; *Walker v. Hester*, 9 Kan. App. 201; *Kansas City v. Hart*, 60 Kan. 684; *Emporia Nat. Bank v. Layfeth*, 63 Kan. 17.

Maryland. — *Hamilton v. Thirston*, 94 Md. 253.

Missouri. — *Bricken v. Cross*, 163 Mo. 449.

Nebraska. — *Buerstetta v. Tecumseh Nat. Bank*, 57 Neb. 504.

North Carolina. — *Sams v. Price*, 121 N. Car. 392.

Oklahoma. — *Butt v. Carson*, 5 Okla. 160.

Oregon. — *Montgomery v. Shaver*, 40 Oregon 244.

Pennsylvania. — *Grier v. Northern Assur. Co.*, 183 Pa. St. 334, as to limitations fixed by a contract which is the foundation of the action; *Philadelphia v. Hestonville, etc., R. Co.*, 203 Pa. St. 38.

South Carolina. — *Mayo v. Spartanburg, etc., R. Co.*, 43 S. Car. 225.

Tennessee. — *East Tennessee Iron, etc., Co. v. Broyles*, 95 Tenn. 612.

Texas. — *Lynch v. Ortleib*, 87 Tex. 590; *Missouri, etc., R. Co. v. Levy*, 23 Tex. Civ. App. 686; *Phoenix Lumber Co. v. Houston Water Co.*, 94 Tex. 456; *Stewart v. Robbins*, (Tex. Civ. App. 1901) 65 S. W. Rep. 899; *Jones v. Bull*, (Tex. Civ. App. 1896) 36 S. W. Rep. 501; *Bowles v. Smith*, (Tex. Civ. App. 1896) 34 S. W. Rep. 381; *Estey v. Fisher*, (Tex. Civ. App. 1897) 44 S. W.

623. Question, How Raised. — See note 1.

Where New Parties Are Introduced. — See note 2.

624. See note 1.

c. AS A WAIVER OF ERROR IN PREVIOUS RULINGS.

— See note 4.

626. d. ORIGINAL PLEADING SUPERSEDED — The Original Complaint. — See note 1.

Rep. 555; Santleben v. Froboese, 17 Tex. Civ. App. 626; Ball v. Hagy, (Tex. Civ. App. 1899) 54 S. W. Rep. 915; Nelson v. Brenham Compress Oil, etc., Co., (Tex. Civ. App. 1899) 51 S. W. Rep. 514; Taylor v. Brown, 8 Tex. Civ. App. 261; Cotton v. Rand, 93 Tex. 7.

Wisconsin. — See O'Connor v. Chicago, etc., R. Co., 92 Wis. 612.

United States. — Boston, etc., R. Co. v. Hurd, 47 C. C. A. 615, 108 Fed. Rep. 116.

Consent to the Amendment covers only the right to file the amendment and does not change the rule stated in the text. Union Pac. R. Co. v. Wyler, 158 U. S. 285.

Declaration Stating No Cause of Action. — Where a declaration states no cause of action whatever, an amendment must be treated as filed at the time of the amendment and does not relate back to the date of the beginning of the suit. Doyle v. Sycamore, 193 Ill. 501; Foster v. St. Luke's Hospital, 191 Ill. 94.

623. 1. Goodwin v. Caraleigh Phosphate, etc., Works, 123 N. Car. 162. But see Brooks v. Seevers, 112 Iowa 480.

The Illinois Practice Act providing that "the adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action" does not change the rule that the statute of limitations must be pleaded, and such objection cannot be raised by an exception to the order of the court allowing the amendment to be filed. Chicago City R. Co. v. Cooney, 196 Ill. 466.

Objection to Filing in Advance. — The court may refuse leave to file the amendment, upon objection being made, and need not permit the amendment with leave to the adverse party to plead the statute of limitations. Peiser v. Griffin, 125 Cal. 9.

2. Beaty v. Atlanta, etc., R. Co., 100 Ga. 123.

Substitution of Holder of Legal Title. — In Comrey v. East Union Tp., 202

Pa. St. 442, it was held that in an action by the holder of an order, in his own name, an amendment to make the suit in the name of the payee to the use of the holder is improperly allowed after the lapse of the period of limitations as against such payee.

624. 1. Cable v. Jackson, 16 Tex. Civ. App. 579.

4. Hamer v. White, 110 Ga. 300; Hershberger v. Kerr, (Ind. 1902) 65 N. E. Rep. 4; Hedrick v. Whitehorn, 145 Ind. 642; Krause v. Lloyd, 100 Iowa 666; Long v. Hubbard, 6 Kan. App. 878; Atkeson v. Salyer, 64 S. W. Rep. 443, 23 Ky. L. Rep. 836; Heman v. Glann, 129 Mo. 325; Sun Printing, etc., Assoc. v. Abbey Effervescent Salt Co., 62 N. Y. App. Div. 54; Kingman v. Pixley, 7 Okla. 351; Baker v. Hornick, 51 S. Car. 313.

Amendment of Plea or Answer After Demurrer Sustained. — Chicago, etc., R. Co. v. Bozarth, 91 Ill. App. 68, holding, however, that if the amended plea presents a defense it is error to strike it out, though it is substantially like the original plea.

By Filing a Substituted Pleading the party loses any right to a review of the ruling that the original pleading was insufficient. Botsford v. Wallace, 72 Conn. 195; Goodrich v. Stanton, 71 Conn. 418; Goodrich v. Alfred, 72 Conn. 257.

Amendment After Demurrer Overruled. — An amended complaint filed after a demurrer to the original complaint has been overruled takes the original complaint out of the record, and no error can be assigned on the action of the court in overruling a demurrer thereto. Weaver v. Apple, 147 Ind. 304.

Waiver of Ruling on Evidence. — Baum v. Raley, 53 S. Car. 32.

626. 1. Cohoon v. Fisher, 146 Ind. 583, upon the question of election between inconsistent remedies; Hershberger v. Kerr, (Ind. 1902) 65 N. E. Rep. 4; Indianapolis, etc., R. Co. v. Center Tp., 143 Ind. 63; Mowry v. Wareham, 101 Iowa 28; Aberdeen v. Bradford, 94 Md. 670; Hastay v.

626. [The mere addition, by amendment, of a count to others on file is in no sense an abandonment of the original counts. See note 2a.]

627. An Amended Answer. — See note 1.

Banness, 84 Minn. 120; Logeling v. New York El. R. Co., 5 N. Y. App. Div. 198; John W. Simmons Co. v. Costello, 63 N. Y. App. Div. 428; Thorburn v. Darra, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 70; Grand Forks First M. E. Church v. Fadden, 8 N. Dak. 162; Raymond v. Toledo, etc., R. Co., 57 Ohio St. 271, as to an amended pleading changing an equitable into a legal action; Sengfelder v. Hill, 16 Wash. 355, holding, under the express provisions of the statute, that the allegations of an original pleading could not aid an amended pleading; Sidway v. Missouri Land, etc., Co., 116 Fed. Rep. 381, referring to the statute in *Missouri*.

Contra. — Nagle v. Reutlinger, (Ky. 1897) 40 S. W. Rep. 677, holding that the original and amended petitions were to be considered together in determining the sufficiency of the amended pleading.

Original Complaint as Evidence. — In order to make the original pleading evidence it must be introduced in evidence regularly. Leach v. Hill, 97 Iowa 81; Galveston, etc., R. Co. v. English, (Tex. Civ. App. 1900) 59 S. W. Rep. 626.

Rule Qualified. — When an amended pleading is presented for filing, the original may be examined to see if the amendment is proper. Anthony v. Slayden, 27 Colo. 144.

Where Original Not Superseded. — A. M. Holter Hardware Co. v. Ontario Min. Co., 24 Mont. 184, applying to a rule similar to that in *North Carolina*.

Immaterial that Prior Amended Complaint Shows Another Action Pending. — It is not ground for demurrer to a second amended complaint that a prior amended complaint shows another action for the same cause pending between the same parties. Only the facts which appear on the pleading itself can be determined in considering the question whether the pleading is or is not demurrable. Budd v. Hardenbergh, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 90.

Original Taken Out of Record. — An amended pleading takes the original pleading out of the record. Hedrick v. Whitehorn, 145 Ind. 642; Weaver v. Apple, 147 Ind. 304; Barnes v. Pel-

ham, 18 Ind. App. 166; Andrews v. Sellers, 11 Ind. App. 301.

On Appeal the amended complaint must be in record. Barnes v. Pelham, 18 Ind. App. 166.

Upon Question of Limitation. — While ordinarily a petition which has been substituted by an amendment is to be left out of the record, express exception is made in cases where it is necessary to look to the superseded pleading upon a question of limitation. Stewart v. Robbins, (Tex. Civ. App. 1901) 65 S. W. Rep. 899. But see Galveston, etc., R. Co. v. English, (Tex. Civ. App. 1900) 59 S. W. Rep. 626.

Amendment Operating as Dismissal as to Party. — Where the plaintiff, under leave to amend his declaration, files an amended declaration against one of the two original defendants, this operates as a dismissal of the action as to the other defendant. MacLachlan v. Pease, 171 Ill. 527.

626. 2a. Graver v. Nimick, 190 Ill. 471.

627. 1. Greenthal v. Lincoln, 67 Conn. 372; Berry v. Rowley, 11 N. Y. App. Div. 396; New York Insulated Wire Co. v. Westinghouse Electric, etc., Co., 85 Hun (N. Y.) 269; Wilson v. Vick, (Tex. Civ. App. 1899) 51 S. W. Rep. 45. But see Threadgill v. Anson County, 116 N. Car. 616.

Original as Evidence. — Admissions in the original answer may be introduced in evidence by the plaintiff, and the defendant may explain and disprove them. Alabama Midland R. Co. v. Guilford, 114 Ga. 627; Willis v. Tozer, 44 S. Car. 1. Compare McBrayer v. Mills, 62 S. Car. 36.

The original answer must be introduced in evidence, otherwise it cannot be considered as evidence in the record. Longley v. McVey, 109 Iowa 666; Woodworth v. Thompson, 44 Neb. 311.

It is only evidence, and is no more conclusive than any other written admission which might be read in evidence. Berry v. Rowley, 11 N. Y. App. Div. 396.

In *California* it is held that admissions in an answer which has been superseded by an amended pleading cannot be received or considered by

627. [An Amended Reply likewise supersedes and takes the place of the original reply. See note 2a.]

Effect of Striking Out. — See note 3.

e. RIGHT TO PLEAD DE NOVO — **Substantial Amendments.**

— See note 4.

the court. *Ralphs v. Hensler*, 114 Cal. 196. But a verified answer which has been superseded by an amended answer may be admitted, upon cross-examination of the party as a witness, for the purpose of impeaching his credibility. *Matter of O'Connor*, 118 Cal. 69.

Delay in Filing Answer to Amendment.

— Where the plaintiff is permitted to amend on the trial before the submission of the cause to the jury, and the defendant has leave to answer *instantly*, the latter cannot complain of his own delay in filing his answer until after the cause is submitted. *Stratton v. Wood*, 45 Neb. 629.

627. 2a. *Tague v. Owens*, 11 Ind. App. 200. See also *Roane v. Hamilton*, 101 Iowa 250.

3. Withdrawal of Amendment. —

Where an amendment to an answer to a petition in intervention is withdrawn, evidence is admissible in support of the claim made in the original answer. *Kassing v. Walter*, (Iowa 1896) 65 N. W. Rep. 832.

A party may abandon an amended pleading and revive the original without writing the latter again. *Gardiner v. Griffith*, (Tex. Civ. App. 1900) 56 S. W. Rep. 558.

4. Schwartz v. Stock, (Nev. 1901) 65 Pac. Rep. 351 [citing 1 ENCYC. OF PL. AND PR. 627]; *Fox v. Hale*, etc., *Silver Min. Co.*, (Cal. 1898) 53 Pac. Rep. 32, holding that when the complaint is amended so as to present new questions upon which issue may be taken the court cannot limit the defenses which may be interposed, though it is otherwise in the case of a formal amendment not changing the issues; *Calhoun v. Mosley*, 114 Ga. 641; *Lillianthal v. Levy*, 4 N. Y. App. Div. 90, holding that a stipulation that the original answer may stand as to the amended complaint does not deprive the defendant of his right to answer the amended complaint. See also the order in *American Alkali Co. v. Campbell*, 113 Fed. Rep. 398.

Amendment Tendering No New Issue.

— Where the amended petition only corrected mistakes in the amount sued for and tendered no new issue, the de-

fendant is not entitled as of right to answer anew. *Colston v. Chenault*, (Ky. 1898) 45 S. W. Rep. 664.

Objection on Appeal. — *Compare Hayes v. Kerr*, 39 N. Y. App. Div. 529.

Defendant Not Prejudiced by Refusal. —

As a rule, when an amendment is made after the issues are formed and the evidence has been heard, time, when requested, should be given to file an answer to the amendment, but refusal to open up the issues is not prejudicial to the defendant when an opportunity is offered to him to present evidence in contradiction of the amendments made in the complaint. *Trueblood v. Shellhouse*, 19 Ind. App. 91.

The defendant should ask for leave to plead anew, else he cannot complain of failure to give him time. *Hughes v. Richter*, 161 Ill. 409; *Knefel v. Flanner*, 166 Ill. 147; *Fitzgerald v. Lorenz*, 181 Ill. 411.

Time to Answer. — The statutory requirement that the defendant must answer an amended complaint within twenty days does not confer the right to have twenty days to answer, but merely limits the time within which the answer must be made in the absence of an order providing a shorter time, and it is discretionary with the court to prescribe a shorter time. *Lockwood v. Charleston Bridge Co.*, 60 S. Car. 492.

Pleading Matter Stricken from Complaint by Amendment. — Matter alleged in a complaint need not be pleaded in the answer, and if such matter is stricken from the complaint by amendment after both parties have rested, the defendant may amend his answer to conform to the proof in regard to such matter. *Flinn v. Mowry*, 131 Cal. 481.

A Demurrer may be filed to an amended pleading. *Isenburger v. Hotel Reynolds Co.*, 177 Mass. 455. But after a demurrer to an original petition has been overruled and the defendant has answered, an amendment not materially changing the cause does not reopen the case to another demurrer. *Gibson v. Thornton*, 107 Ga. 545.

628. See note 2.

629. **Formal Amendments.** — See notes 1, 2.

13. Leave to Amend — *a.* **AMENDMENTS OF COURSE** —

(1) **Statutory Provisions** — **Absolute Right.** — See note 4.

630. See notes 2, 3.

So after answering, if a count is added a demurrer must be confined to the amendment. *Lynn Safe Deposit, etc., Co. v. Andrews*, 180 Mass. 527.

628. 2. *Pease v. Bartlett*, 97 Ill. App. 492; *James v. Kansas City, etc., R. Co.*, 69 Mo. App. 431, where no new cause was introduced. But see *Thompson v. Morgan*, (Indian Ter. 1902) 69 S. W. Rep. 920, holding that where a demurrer to an amended complaint was erroneously sustained and the only answer on file was an answer to the original complaint, it was error to render judgment for the defendant.

When New Answer Required. — *Gettings v. Buchanan*, 17 Mont. 581, holding that where the defendant elects to plead anew and obtains time in which to plead, and fails to do so, he cannot rely on his original answer to defeat a judgment by default.

In Iowa. — In an action for an accounting, the court properly refused to regard as an admission the failure to respond to an amendment setting up additional claimed credits, filed after the evidence was all in, to correct a supposed variance between the pleading and proof, the case having been tried and submitted on the theory of a controversy as to any indebtedness on the part of the defendant. *Willeys v. Ida County Sav. Bank*, (Iowa 1902) 90 N. W. Rep. 729.

And where an amendment does not state a complete cause of action and is not filed as a separate count, but merely as an addition to the original pleading, failure to answer the matter of the amendment can be taken as an admission of that matter only. *Peacock v. Gleason*, (Iowa 1902) 90 N. W. Rep. 610.

Amendment Repeating Original Allegations. — Where an amended answer is a substantial reiteration of the averments of the original answer, an additional denial is not required. *Schmidt v. Mitchell*, 101 Ky. 570. To the same effect see *Brossard v. Morgan*, (Idaho 1900) 61 Pac. Rep. 1031.

Refiling Original Pleading. — Where new matter set up in an amended answer is put in issue by the original

reply which is refiled, there is no foundation for the claim that such new matter is admitted by the pleadings. *Crosby v. Bastedo*, 57 Neb. 15.

Plea Not Responsive. — In *Florida*, by statute, a plea pleaded to the original declaration may stand to the amended declaration, if responsive to the latter, but if not responsive it will be treated as a nullity. *Jordan v. John Ryan Co.*, 35 Fla. 259.

A Demurrer to an Original Complaint has no relation to an amended complaint unless reinterposed in the latter. *Browne v. Mobile*, 122 Ala. 159; *Louisville, etc., R. Co. v. Woods*, 105 Ala. 561; *Efroymson v. Smith*, (Ind. App. 1902) 63 N. E. Rep. 328; *Kelly v. Chicago, etc., R. Co.*, 93 Iowa 436.

629. 1. *Cherokee, etc., Coal, etc., Co. v. Britton*, 3 Kan. App. 292.

When an Amendment Is Allowed After Verdict to conform the declaration to the proof, and it requires no other proof than that already in the record, it is not error to refuse leave to plead to the amendment unless it is shown that the defendant has a defense which is inadmissible under the general issue already pleaded. *Milwaukee Mechanics' Ins. Co. v. Schallman*, 188 Ill. 213.

2. Judgment by Default cannot be taken when good pleas are on file to the original declaration and the amendment is not material. *Pease v. Bartlett*, 97 Ill. App. 492.

4. See *Peterson v. Chicago, etc., R. Co.*, 108 Fed. Rep. 561, decided under a statute of *Missouri*.

In Iowa the plaintiff may amend his petition without leave at any time before the answer is filed. *Kay v. Pruden*, 101 Iowa 60.

New Jersey. — The practice act authorizes an amendment without leave at any time before a pleading in answer is filed. See *Rix v. New York Cent., etc., R. Co.*, 67 N. J. L. 503.

Amendments of Course After Demurrer. — *Young v. Fink*, 119 Cal. 107, holding that an amended complaint may be filed as of course where there has been no trial on the issue of law.

630. 2. *Swank v. Barnum*, 63 Minn.

631. (2) *Waiver of Right.* — See note 1.

632. (3) *What Amendments May Be Made* — By the Plaintiff.
— See note 1.

633. (5) *Once Only.* — See note 6.

634. (6) *For the Purpose of Delay.* — See notes 1, 3.

(7) *Remedy for Unauthorized Amendment.* — See notes 4, 6.

635. *b. WHEN LEAVE IS NECESSARY — IMPLIED LEAVE.* — See note 1.

636. *When Allowed to Stand.* — See note 1.

447; *Tripp v. Yankton*, 10 S. Dak. 516, *overruled* on another point of practice in 11 S. Dak. 353.

New York. — *Seaman v. McClosky*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 445, holding that under Code Civ. Pro. N. Y., § 542, a reply to an answer containing a counterclaim is an answer to a pleading.

630. 3. *Pending Motion for Change of Venue.* — *Kay v. Pruden*, 101 Iowa 60.

631. 1. *Tripp v. Yankton*, 10 S. Dak. 516 [*overruled*, on rehearing, but on another point of practice, in 11 S. Dak. 353], *citing* 1 ENCYC. OF PL. AND PR. 631. *Compare Kay v. Pruden*, 101 Iowa 60.

But there can be no error on the part of the court in permitting the plaintiff to do what he had a legal right to do without such permission. *Swank v. Barnum*, 63 Minn. 447.

632. 1. See *Sims v. Ohio River, etc., R. Co.*, 56 S. Car. 30. But see otherwise in *Thomas v. Hawkins*, 13 Ind. App. 318, and see *supra*, III. 6, *a. Prevalence and Extent of the Rule Forbidding*, par. *Under Codes and Statutes*, note.

633. 6. *Where Leave to Plead Anew Is Granted to the Defendant* upon sustaining a demurrer to his answer, he may amend such new answer within twenty days under Code Civ. Pro. N. Y., § 542. *Rodkinson v. Gantz*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 268.

634. 1. *Offer to Go to Trial.* — It is error to strike out the amended pleading when the party resisting the motion offers to go to trial at the term at which the cause is noticed for trial. *Harney v. Provident Sav. L. Assur. Soc.*, (Supm. Ct. App. Div.) 29 Civ. Pro. (N. Y.) 315.

3. *Taylor v. Carson*, 53 N. Y. App. Div. 627.

When Defendant Has Delayed Answering. — In filing an amended complaint all the additional allegations of which

are essential and pertinent to the cause set up in the original complaint, desire for delay cannot be imputed to the plaintiff where the defendant has taken five months to serve his answer. *Pritchard v. Nederland L. Ins. Co.*, 38 N. Y. App. Div. 111.

4. See *White v. Rodemann*, 44 N. Y. App. Div. 503.

Defective Service. — In *Durham v. Chapin*, 13 N. Y. App. Div. 94, it was held that defective service was not waived by a defendant who had not appeared in the action, by failure to return an amended complaint.

6. *Colgin v. U. S. Mercantile Reporting Co.*, 8 N. Y. App. Div. 617; *Millar v. Salt Springs Nat. Bank*, 46 N. Y. App. Div. 633, holding that the special term had the power to strike out an amended answer notwithstanding it had not been returned within twenty-four hours after it was served. See also *Lange v. Hirsch*, 38 N. Y. App. Div. 176.

635. 1. *Anthony v. Slayden*, 27 Colo. 144; *Rix v. New York Cent., etc., R. Co.*, 67 N. J. L. 503; *Goodwin v. Caraleigh Phosphate, etc., Works*, 121 N. Car. 91; *Tripp v. Yankton*, 10 S. Dak. 516, *overruled* on rehearing, on another point of practice, 11 S. Dak. 353; *O'Connor v. Chicago, etc., R. Co.*, 92 Wis. 612.

In Vacation an amendment cannot be filed except by leave of court. *Brashears v. Letcher County Ct.*, 61 S. W. Rep. 285, 22 Ky. L. Rep. 1763.

What Is Not Leave. — Leave extending, from the appearance to the trial term of cases, the right of a particular attorney at law to resist motions to strike petitions or pleas filed by him does not, of itself, confer upon him the right at the trial term to amend his pleadings in any case. *Norton v. Scruggs*, 108 Ga. 802.

636. 1. *Hopkins v. Seay*, (Tex. Civ. App. 1894) 27 S. W. Rep. 899.

636. Waiver of Irregularity. — See note 2.

Implied Leave. — See note 3.

c. APPLICATION FOR LEAVE — Suggestion by the Court. —

See note 6.

637. Proposed Amendment. — See note 1.

Grounds Shown by Affidavit. — See note 4.

638. See note 1.

No Affidavit Is Necessary. — See note 2.

Prima Facie Case Sufficient. — See note 4.

636. 2. *Whitefoot v. Leffingwell*, 90 Wis. 182, by receiving the amended pleading without objection and retaining it.

Consent. — When it appears that an amended pleading was filed by consent of the parties, it is not an abuse of discretion to overrule a motion to strike out the pleading because it was not filed within the time allowed by the court. *Radford v. Gaskill*, 20 Mont. 293.

3. *Grotte v. Nagle*, 50 Neb. 363.

6. *La Barre v. Waterbury*, 69 Conn. 554.

637. 1. *Todhunter v. Klemmer*, 134 Cal. 60, wherein it was declared that it is in the discretion of the court to refuse the application when the amendment is not in writing; *Wilcox v. Wilmington City R. Co.*, 2 Penn. (Del.) 158, requiring the application to present the amendment in writing; *Ridgely Nat. Bank v. Fairbank*, 54 Ill. App. 296; *Camp v. Pollock*, 45 Neb. 771; *Abbott v. Meinken*, 48 N. Y. App. Div. 109; *Jenkins v. Warren*, 25 N. Y. App. Div. 569, holding that the original complaint should be before the court on an application to amend the complaint; *Lamoille County Nat. Bank v. Hunt*, 72 Vt. 357.

After Several Unsuccessful Attempts to amend no error can be based on the refusal to permit another amendment, the last proposed amendment not having been presented to the court for inspection. *Dukes v. Kellogg*, 127 Cal. 563. See also *Smith v. Ferries*, etc., R. Co., (Cal. 1897) 51 Pac. Rep. 710.

4. *Western Assur. Co. v. Kilpatrick-Koch Dry Goods Co.*, 54 Neb. 241, [quoting 1 ENCYC. OF PL. AND PR. 637]; *Foerst v. Empire L. Ins. Co.*, 40 N. Y. App. Div. 631.

638. 1. *Diehl v. Robinson*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 234; *Thompson v. Malloy*, 104 Ga. 684; *Newman v. Scofield*, 102 Ga. 810; *Par-*

rott v. Dyer, 105 Ga. 93. The cases here cited from *Georgia* are under a statute requiring a particular affidavit where the amendment is offered after the expiration of time for answering. But the statute does not apply to actions pending at the time the act was passed and the appearance term of which had expired. *Snyder v. Webb*, 101 Ga. 793.

An Affidavit of the Attorney is sufficient where all the facts are within his knowledge. *Truman v. Lester*, 71 N. Y. App. Div. 612.

But where the right to file an amended pleading depends upon the ignorance or knowledge of the facts of the party himself, his own affidavit is necessary, for the attorney might not have had knowledge of the facts, although the party was not ignorant thereof at the time his original pleading was filed. *Tompkins v. Continental Nat. Bank*, 71 N. Y. App. Div. 330; *Ryan v. Duffy*, 54 N. Y. App. Div. 199; *Rhodes v. Lewin*, 33 N. Y. App. Div. 369; *Parke v. New York*, 43 N. Y. App. Div. 617; *Ackman v. Third Ave. R. Co.*, 54 N. Y. App. Div. 632. See also *Phelan v. Rycroft*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 48; *Aborn v. Waite*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 317.

Absence of Party. — Where the party is absent and his pleading is verified by his attorney, the court may accept such absence as a sufficient reason why the affidavit in support of the motion for leave to amend is not made by the party instead of by his attorney. *Everett v. Everett*, 48 N. Y. App. Div. 475.

2. *Millan v. Southern R. Co.*, 54 S. Car. 485.

4. *Montgomery v. Boyd*, 63 N. Y. App. Div. 190; *Everett v. Everett*, 48 N. Y. App. Div. 475; *Paddock v. Barnett*, 88 Hun (N. Y.) 381; *Dudley v. Broadway Ins. Co.*, 42 N. Y. App. Div.

638. [Parties to Application. — Two defendants cannot unite in amending the independent answer of one of them. See note 4a.]

639. d. NOTICE OF MOTION — When Required. — See note 1.

Service of Proposed Amendment. — See note 2.

640. e. ORDERS GRANTING LEAVE — General Leave. — See notes 4, 5.

555; *Farmers' Nat. Bank v. Underwood*, 15 N. Y. App. Div. 626; *Edwards v. Bates County*, 79 Fed. Rep. 56.

638. 4a. Equitable Bldg., etc., *Assoc. v. Holloway*, 114 Ga. 780.

639. 1. In the Absence of Statutory Provisions. — *Nichoff v. People*, 171 Ill. 243. See also *Poundstone v. Baldwin*, 145 Ind. 139.

In *Colorado* a party has a right, in vacation, to file an amended pleading as of course, by duly serving a copy on the adverse party or his attorney, and no notice that the amendment will be filed is necessary. *King v. Gardner*, 25 Colo. 395.

But in a case in which the party has not the right to file the amendment as of course, the adverse party is entitled to notice of the application for leave. *Nance v. People*, 25 Colo. 252.

In *Kentucky* the notice required by the statute applies only to amendments filed without leave within five days before the beginning of that term at which the defendant is summoned to answer, and has no application to pleadings filed in term time by leave of court. *Bryant v. Cooney*, (Ky. 1897) 40 S. W. Rep. 918.

In *Missouri*. — See *Peterson v. Chicago, etc., R. Co.*, 108 Fed. Rep. 561, decided under a Missouri statute requiring notice when the amendment is filed in vacation.

In *Pennsylvania*. — *Comrey v. East Union Tp.*, 202 Pa. St. 442.

Waiver of Notice. — *Anthony v. Slayden*, 27 Cal. 144.

No Prejudice from Want of Notice. — In *Baker v. Southern California R. Co.*, 114 Cal. 501, it was held that while notice of the motion to amend should have been given, yet as from aught that appeared the motion should have been granted had notice been given, there was no prejudice.

Matters Not Included in Notice. — It does not furnish cause to complain that the court granted to the plaintiff leave to amend the complaint in the respects named in the notice and also in respects not so named, where it does not appear that the defendant

was injured. *Wells v. Law*, (Cal. 1894) 38 Pac. Rep. 523.

Sureties on Attachment Bond. — Under the statute providing that the adjudication of the court allowing an amendment shall be conclusive of the identity of the cause, but that no subsequent attaching creditor or purchaser of property attached in the suit, or bail, or any person other than the parties to the record, shall be bound by such adjudication unless he has had due notice of the application for leave to amend, etc., sureties on an attachment bond are not discharged by reason of want of such notice to them when the amendment does not change the cause of action or their liability on the bond. *Driscoll v. Holt*, 170 Mass. 262.

2. *Jenkins v. Warren*, 25 N. Y. App. Div. 569.

640. 4. *Brown v. Carolina Midland R. Co.*, 58 S. Car. 466, holding that such an order is not objectionable as allowing the plaintiff to introduce an entirely different or new cause of action.

In *New York*. — See *Abbott v. Minken*, 48 N. Y. App. Div. 109; *Wood v. McGuire*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 200.

Waiver of Objection to Order. — By answering the amended pleading, any objection that could have been raised to the scope of the order permitting the amendment is waived. *Ruberg v. Brown*, 50 S. Car. 397.

Effect of Order on Nature of Action. — The nature of the action must be determined by the pleading itself, and not by the order of the court directing the pleading to be amended so as to authorize a particular kind of relief. *White v. Rodemann*, 44 N. Y. App. Div. 503.

5. Amendment Acquiesced In. — Though the order does not expressly direct an amendment as to parties, yet if it is broad enough to include such an amendment, and the amendment is made and is subsequently treated by the court and parties as properly made, it will be taken to have been properly allowed. *Hamburg v. Liverpool, etc., Ins. Co.*, 42 Fla. 86.

640. [Matter Not Presented by Application.—It is error to pass upon, and to include in the order the determination of, matters not before the court on the application to amend. See note 10a.]

14. Method of Making Amendments—*a.* ACTUAL AND IMPLIED AMENDMENTS — *Actual Amendment.* — See note 12.

641. *Implied Amendment.* — See note 1.

642. *b.* BY INTERLINEATION. — See note 2.

640. 10a. In New York — Allowance Without Prejudice to Depositions. — After reversal of a judgment in favor of the plaintiff in an action against a widow individually and as administratrix of her deceased husband's estate, because the heirs of the decedent were not parties and the plaintiff failed to allege and prove the execution of a will, it was held that though amendments were properly allowed to cure these defects it was error to insert in the order that the amendment was without prejudice to depositions of the plaintiff theretofore taken in the case, the question as to the admissibility of the testimony being one for the trial court, and not being before the special term on this application. *Moore v. Moore*, 44 N. Y. App. Div. 253.

12. West Chicago St. R. Co. v. McCallum, 169 Ill. 240; Sinsheimer v. William Skinner Mfg. Co., 165 Ill. 116; Chicago, etc., R. Co. v. Smith, 81 Ill. App. 364; Charlton v. Rose, 24 N. Y. App. Div. 485. But see Moffett-West Drug Co. v. Byrd, 1 Indian Ter. 612.

Subsequent Order. — In *Dunn v. Bozarth*, 59 Neb. 244, the court granted an application to file an amendment to an answer, and the trial proceeded with the understanding that the amendment should be reduced to writing and filed at the noon recess. The amendment was prepared but was not at any time during the trial physically attached to the answer, though the evidence tended to show that it was placed with the answer among the files. It was held that the court might afterwards order it to be brought into the record as a part of the answer.

Oral Pleadings can be amended orally. *Stirlen v. Pettibone*, 77 Ill. App. 72. See also to the same effect *Farnam v. Doyle*, 128 Mich. 606.

Where there is No Prejudice on account of a failure to make an amendment, the opposite party cannot complain. *Chicago, etc., R. Co. v. Beaver*, 96 Ill. App. 558.

Texas — Trial Amendment. — In Texas

a rule required that if a case was not tried at the term at which a trial amendment was filed the party should replead by amendment. It was held that where, upon the trial of a case at a term subsequent to that at which a trial amendment was filed, the court allowed the party to refile the trial amendment or to write another, but the opposite party, while excepting to the action of the court, agreed that the said trial amendment might be refilled instead of writing a new one, in order to save time, the rule was not violated. *Missouri, etc., R. Co. v. Wells*, 24 Tex. Civ. App. 304.

Upon Discontinuance as to Part of the Defendants, it is not error to fail to make the amendment on the declaration. *Chicago Great Western R. Co. v. Mitchell*, 70 Ill. App. 183; *Thom v. Hess*, 51 Ill. App. 274.

641. 1. *French v. McCarthy*, 125 Cal. 508, as to correction of record to conform with the order permitting the amendment; *Hoffman v. Keeton*, 132 Cal. 195; *Johnston v. Farmers' F. Ins. Co.*, 106 Mich. 96; *Oberg v. St. Joseph Town Mut. F. Ins. Co.*, 82 Mo. App. 64; *Hammer v. Downing*, 39 Oregon 504. See also *Phalen v. Detroit*, 126 Mich. 683; *McCready v. Staten Island Electric R. Co.*, 51 N. Y. App. Div. 342.

Or the amendment may be made on the hearing of a rule to show cause why a new trial should not be granted. *O'Neill v. Leeds*, (N. J. 1899) 43 Atl. Rep. 650.

642. 2. *Eshelman v. People*, 52 Ill. App. 621, as to amendment of complaint in bastardy proceedings, when the motion is supported by affidavit of the truth of the fact to be added, and dispensing with necessity of reswearing to the complaint.

Harmless Error. — When an amendment is permitted to be made by interlining words which are not necessary to the sufficiency of the pleading, instead of supplying the words by a trial amendment, there is no prejudice,

643. *c.* BY A SEPARATE PLEADING. — See note 5.

644. *d.* FORM OF AMENDED PLEADING — **Averments.** — See notes 1, 2.

Verification. — See note 6.

645. 15. Service of Amended Pleadings. — See notes 1, 2.

646. 16. Terms — *a.* POWER TO IMPOSE OR DISPENSE WITH. — See notes 4, 6.

Ortiz v. Navarro, 10 Tex. Civ. App. 195.

643. 5. Fitzgerald v. Lorenz, 181 Ill. 411.

Where the Amendment Is a Mere Addition to a count and not a complete count in itself, it is sufficient to state that "by leave of the court," etc., the pleader "comes and makes an amendment to the declaration," etc., "by adding to the said declaration as follows," followed by the new averments without inserting "in a further plea of the case, whereupon," or words of like import. Saxe v. Burlington, 70 Vt. 449.

644. 1. Foster v. Adler, 84 Ill. App. 654, holding that an amended declaration cannot be aided or affected by anything in the original to which a general demurrer has been sustained. See also Triplett v. Morris, 18 Tex. Civ. App. 50.

Reference to Original Count. — Where the contract sued on is set out *in hac verba*, an amended count may refer to the original without setting out the contract *in hac verba*. Consolidated Coal Co. v. Schneider, 163 Ill. 393.

In *Washington* the statute requires the amended pleading to be complete in itself without reference to the original. Sengfelder v. Hill, 16 Wash. 355.

After Original Held Bad. — The court may refuse to permit the filing of an answer setting up substantially the same defense already held to be insufficient on demurrer to the original answer. Recknagel v. Steinway, 58 N. Y. App. Div. 624.

But where an amended petition is filed after demurrer sustained to the original, the amendment setting up additional facts to overcome one of the grounds of the demurrer to the original, it is error to strike out the amended pleading and to render judgment against the plaintiff "because of the want of petition." Krause v. Lloyd, 100 Iowa 666.

2. Atlantic, etc., R. Co. v. Laird, 164 U. S. 393.

6. In Iowa, where no new cause of action or no counterclaim is introduced by the amendment, it need not be verified under the statute. Thompson v. Brown, 106 Iowa 367; Boos v. Dulin, 103 Iowa 331.

645. 1. See Atlantic, etc., R. Co. v. Laird, 164 U. S. 393.

2. California. — See Linott v. Rowland, 119 Cal. 452. But when the amendment is not in matter of substance, but is in the nature of a bill of particulars, the case is not within the rule requiring service of the amended pleading. Woodward v. Brown, 119 Cal. 283.

The amended pleading may be served on the attorney of record of the adverse party. Young v. Fink, 119 Cal. 107.

New York. — Where the defendant has no attorney, not having appeared, there is no authority for serving an amended pleading upon him except by order of the court. Durham v. Chapin, 13 N. Y. App. Div. 94.

646. 4. Gabriel v. Tonner, (Cal. 1902) 70 Pac. Rep. 1021, requiring payment of the probable costs of continuance; National Dredging Co. v. Grand Trunk R. Co., 1 Penn. (Del.) 446; McClure v. Bigstaff, (Ky. 1896) 37 S. W. Rep. 294; Coyle v. Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 345; Grayson v. State, 35 Tex. Crim. 629.

Even though the Plaintiff Sues in Forma Pauperis, the court has the right to impose terms when it allows a motion to amend the complaint. Coyle v. Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 345.

When the Appellate Court Grants Leave to Amend upon reversing a judgment and remanding a cause, the lower court has no right to attach a condition to the right to amend. Dixon v. Risle, 114 Cal. 204.

6. Delaware. — State v. Hancock, 2 Penn. (Del.) 253; Covington v. Simpson, (Del. 1901) 52 Atl. Rep. 349.

Pennsylvania. — Hileman v. Hileman, 172 Pa. St. 323.

647. See note 2.

b. DISCRETIONARY — REVIEW FOR ABUSE. — See note 3.

648. *Objections to Rulings.* — See note 1. See also **EXCEPTIONS AND OBJECTIONS.**

Effect of Accepting Terms. — See note 2.

649. *c. PROPER TERMS — There Is No Precise Rule.* — See note 5.

650. *Where Prejudice or Surprise.* — See note 2.

651. *Controlling Considerations.* — See note 1.

647. 2. *Marlett v. Docter*, 89 Wis. 347, holding that to allow one party to correct his own error and at the same time impose terms on the other party is an abuse of discretion.

3. *California.* — *Wise v. Wakefield*, 118 Cal. 107.

Georgia. — *Haskins v. Throne*, 101 Ga. 126.

Idaho. — *Jones v. Stoddardt*, (Idaho 1902) 67 Pac. Rep. 650, holding that if the party declines to accept the terms he cannot complain, in the absence of an abuse of discretion; *Lowe v. Long*, (Idaho 1896) 47 Pac. Rep. 93.

New York. — *Van Allan v. Gordon*, 92 Hun (N. Y.) 500.

Pennsylvania. — *Hileman v. Hileman*, 172 Pa. St. 323.

Texas. — *Watson v. Boswell*, (Tex. Civ. App. 1901) 61 S. W. Rep. 407, where it was held that the court had abused its discretion.

648. 1. *Noncompliance with Terms — Pending Disposition of Exceptions.* — Where the defendant takes exceptions to the ruling of the court upon sustaining a demurrer to a declaration that an amendment is allowable, the statutory requirement of the payment of costs as a condition of an amendment at such stage need not be complied with until the exceptions are disposed of and the question is determined in favor of the plaintiff and the case is remanded for trial. *Hare v. Dean*, 90 Me. 308.

Holding Party to His Election. — After a refusal to comply with the terms on which an amendment was allowed, the court has a right to hold the party to his election, and having taken the chance of a favorable judgment, which turned out to be adverse to him, it will not be held that the court abused its discretion in then refusing to allow the party to comply with the terms first offered. *Brinkman v. Akers*, 59 Kan. 778, 54 Pac. Rep. 688.

2. *Supreme Lodge, etc., v. Davis*, 26 Colo. 252 [*citing* 1 ENCYC. OF PL. AND PR. 648]; *Van Allan v. Gordon*, 92 Hun (N. Y.) 500.

649. 5. *Postponement of Time of Commencement of Action.* — There is no well-founded reason for imposing, as a condition of amending a complaint, that the time of the commencement of the action be deemed postponed beyond that when it was commenced, for the purposes of the defense of the statute of limitations, the amendment setting up no new cause of action. *Critelli v. Rodgers*, 87 Hun (N. Y.) 530.

650. 2. *Miller v. Salt Springs Nat. Bank*, 46 N. Y. App. Div. 633; *Bates v. Salt Springs Nat. Bank*, 43 N. Y. App. Div. 321; *Tradesmen's Nat. Bank v. Curtis*, 63 N. Y. App. Div. 14, wherein the order of the lower court allowing the amendment was modified so as to require as a condition the payment of all taxable costs to date, including costs of the appeal; *People v. Clausen*, 61 N. Y. App. Div. 184, modifying an order allowing amendment of writ of mandamus, because the terms were inadequate.

651. 1. For cases in which the terms imposed were governed by the considerations mentioned, see *Haskins v. Throne*, 101 Ga. 126; *Hayes v. Kerr*, 39 N. Y. App. Div. 529; *Thileman v. New York*, 71 N. Y. App. Div. 595; *Frisbie v. Averell*, 87 Hun (N. Y.) 217; *Richardson, etc., Co. v. Gudewill*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 858; *National Pipe Bending Co. v. Fisher*, 87 Hun (N. Y.) 175; *Weeks v. O'Brien*, (N. Y. Super. Ct. Gen. T.) 13 Misc. (N. Y.) 503; *Walton v. Mather*, (N. Y. City Ct. Gen. T.) 10 Misc. (N. Y.) 216; *Ruellan v. Stillwell*, (Supm. Ct. Spec. T.) 28 Civ. Pro. (N. Y.) 243; *Alexander Lumber Co. v. Abrahams*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 674.

653. Without Terms. — See note 1.

654. 17. Amendments in Miscellaneous Proceedings — *a.* GREAT LATITUDE ALLOWED. — See note 2.

b. AFFIDAVITS. — See note 3.

655. *c.* PETITIONS. — See notes 3, 4.

653. 1. *Lancaster v. Richardson*, (Tex. Civ. App. 1898) 45 S. W. Rep. 409; *Weill v. Metropolitan R. Co.*, (N. Y. Super. Ct. Spec. T.) 10 Misc. (N. Y.) 72, 24 Civ. Pro. (N. Y.) 85.

654. 2. *Matter of Ibert*, 48 N. Y. App. Div. 510.

Special Statutory Proceedings are amendable. *Sarmiento v. The Catharine C.*, 110 Mich. 120; *Rogers v. Sattler*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 242; *People v. Roe*, 25 N. Y. App. Div. 107.

Answer of Garnishee is amendable. *Dunn v. Detroit Sav. Bank*, 118 Mich. 547; *Rock v. Collins*, 99 Wis. 630.

The Warrant in Forcible Entry and Detainer may be amended. *Bailey v. Kelley*, (Ky. 1896) 38 S. W. Rep. 139.

In *Replevin* the pleadings may be amended in furtherance of justice as in other cases. *Hudelson v. Tobias First Nat. Bank*, 56 Neb. 247. See also *REPLEVIN*.

Quo Warranto. — Under the statute in *Missouri* there is no difference in the right to amend a return in a proceeding in the nature of *quo warranto*, brought in the Circuit Court on the relation of a private citizen, and the right to amend an answer in any kind of a civil suit. *State v. Beechner*, 160 Mo. 78, distinguishing the case of *quo warranto* brought by the attorney-general *ex officio* in the Supreme Court, in that in the latter proceeding the statute relating to amendments did not apply, being confined to proceedings in the Circuit Court. See also *QUO WARRANTO*.

The Warrant in Bastardy Proceedings may be amended. *Com. v. Cantrell*, (Ky. 1898) 45 S. W. Rep. 72, holding it to be reversible error to refuse to allow the amendment in a case where such refusal works a miscarriage of justice. See also *BASTARDY*.

Bankruptcy. — In separate proceedings in bankruptcy against individuals as such who were also members of a partnership, in which proceedings a trustee was appointed for the individuals only, after the adjudication against and discharge of the bankrupts, a pe-

tition to have the partnership adjudicated *nunc pro tunc* as of the date of the original adjudication of the two members, for the purpose of bringing in the firm assets, cannot be allowed as an amendment in the proceedings against the individuals. A separate petition must be filed against the partnership. Proper amendments may be made at any stage of the bankruptcy proceedings, but the right to amend can go no further than to bring forward and make effectual that which in some shape is already in the record. *In re Mercur*, 116 Fed. Rep. 655.

3. *Norton v. Scruggs*, 108 Ga. 802; *Weaver v. Lockwood*, 2 Kan. App. 62, as to defective affidavit for publication; *Chapman v. H. D. Lee Mercantile Co.*, 60 Kan. 858, 56 Pac. Rep. 749, holding an affidavit for an order of arrest to be amendable by leave of court.

An Affidavit in *Replevin* may be amended to conform to allegations properly to be made in the petition by way of amendment. *Tackaberry v. Gilmore*, 57 Neb. 450; *Swain v. Savage*, 55 Neb. 687; *German Nat. Bank v. Aultman*, 63 Neb. 324; *Thorn v. Lazarus*, 39 N. Y. App. Div. 508. See also *REPLEVIN*.

Jurat. — An affidavit for a writ of provisional seizure may be amended by supplying the signature of the officer before whom the affidavit was made. *State v. Downing*, 48 La. Ann. 1420.

In *Delaware* the court refuses to allow affidavits to be amended. *Valley Paper Co. v. Smalley*, 2 Marv. (Del.) 289; *Philadelphia Nat. Bank v. Morgan*, 1 Marv. (Del.) 265.

655. 3. *National Docks, etc., R. Co. v. Pennsylvania R. Co.*, 57 N. J. L. 637, under express statute providing for amendments in such proceedings on appeal from the award of commissioners; *Syracuse v. Stacey*, 86 Hun (N. Y.) 441, under the condemnation law which made the general statutes relating to the power to amend pleadings applicable to such proceedings.

4. *Thrall v. Gosnell*, 28 Ind. App. 174; *Beard v. Henniker*, 69 N. H. 279.

- 656.** See notes 1, 5, 6.
d. MISCELLANEOUS. — See note 21.
- 658.** IV. OF PROCESS — 1. Of Writ or Summons — *a.* IN GENERAL. — By the Common Law. — See note 7.
- 659.** Under the Modern Statutes. — See note 3.
- 663.** *c.* MISNOMER — By Statute. — See note 4.
- 665.** The Want of an Appearance. — See note 1.
 Retroactive Effect. — See note 2.
f. IN RESPECT OF PARTIES — **Misdescription.** — See note 3.
- 666.** Adding Parties. — See note 7.
g. THE RETURN TIME OR PLACE. — See note 8.
- 668.** *h.* THE AD DAMNUM. — See notes 3, 5.
- 669.** *i.* THE TESTE — The Date. — See note 3.
 Signature. — See note 4.
- 656.** 1. Dodge *v.* Hall, 168 Mass. 435; Murphy *v.* Guish, 22 R. I. 588. See also Smalley *v.* Northwestern Terra-Cotta Co., 113 Mich. 141.
- 5.** See Matter of Ibert, 48 N. Y. App. Div. 510.
- 6.** Poundstone *v.* Baldwin, 145 Ind. 139.
- 21.** McCambridge *v.* Warlaven, 88 Md. 378, where leave was refused on the ground of laches.
- 658.** 7. A Writ Rendered Void by Alteration cannot be amended. Denison *v.* Crafts, 74 Conn. 38.
- 659.** 3. Writ of Replevin. — The writ cannot be amended so as to introduce a new cause of action and increase the aggregate value of the property. Musgrave *v.* Farren, 92 Me. 198. See also REPLEVIN.
- Facts Justifying Mode of Service.** — In a cross-action against a foreign corporation the writ may be amended so as to show facts to justify its service upon the attorney of the corporation in the original suit, as the justification lies in the facts and not in the allegations thereof, and after such amendment the writ need not be re-served. Aldrich *v.* Blatchford, 175 Mass. 369.
- 663.** 4. *Ex p.* Howard-Harrison Iron Co., 119 Ala. 484. But see Union Pac., etc., R. Co. *v.* Perkins, 7 Colo. App. 184; Erdman *v.* Hardesty, 14 Colo. App. 395; U. S. National Bank *v.* Venner, 172 Mass. 449; Stuyvesant *v.* Weil, 167 N. Y. 421; Farrington *v.* Muchmore, 52 N. Y. App. Div. 247, as to misnomer of plaintiff in annexed copy of summons, and *distinguishing* the practice in case of misnomer of defendant.
- Different Person.** — Service of process directed against one by an entirely different name from that of the person served is held to be no service upon the latter, and his name cannot be substituted by amendment. Neal-Millard Co. *v.* Owens, 115 Ga. 959.
- 665.** 1. Stuyvesant *v.* Weil, 167 N. Y. 421, under Code Civ. Pro. N. Y., §§ 721, 723. *Contra*, Stromberg *v.* Carnese, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 289, in which case the name of the defendant was fictitious.
- 2.** Farrington *v.* Muchmore, 52 N. Y. App. Div. 247.
- 3.** Mack *v.* American Express Co., (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 215.
- 666.** 7. Substitution of an Entirely Different Defendant is not allowed. William H. Glover Co. *v.* Rollins, 87 Me. 434; Maitland *v.* Worthington, 59 N. J. L. 114.
- 8. Something to Amend By.** — Lowenstein *v.* Gaines, 64 Ark. 499, like Dean *v.* Swift, 11 Vt. 331, set out in this note in the original article.
- 668.** 3. Hare *v.* Dean, 90 Me. 308.
- 5. After Verdict.** — Luddington *v.* Goodnow, 168 Mass. 223, in support of the propriety of an amendment.
- 669.** 3. Gilbert *v.* South Carolina Interstate, etc., Exposition Co., 113 Fed. Rep. 523.
- 4. Contra.** — Sharman *v.* Huot, 20 Mont. 555, holding that a summons without any signature is void under a statute requiring it to be signed.

672. 2. Of Executions — To Conform to Judgment. — See note 4. See also EXECUTIONS AGAINST PROPERTY.

674. Want of Seal. — See note 8.

675. V. IN ATTACHMENT PROCEEDINGS — 1. In General. — See note 6. See also ATTACHMENT.

676. 2. Of the Declaration or Complaint — For the Same Cause of Action. — See note 1.

677. Demurrable Complaint. — See note 1.

New Cause of Action. — See note 2.

678. Change of Parties. — See note 7.

679. Misnomer of the Parties. — See note 1.

680. 3. Of Affidavits — In the Absence of Express Statute. — See note 3. See also AFFIDAVITS.

681. Under General Statute of Amendments. — See note 1.

672. 4. Hollis v. Sales, 103 Ga. 75; Smith v. Bell, 107 Ga. 800, inserting the name of the plaintiff in the judgment upon which execution issued.

Insertion of Costs After Return Satisfied. — After an execution for certain amounts as principal and costs has been returned fully satisfied, it cannot be amended by the clerk by inserting additional costs, as witness fees. *Dickerson v. Downs, 108 Ga. 782.*

674. 8. Davelaar v. Blue Mound Invest. Co., 110 Wis. 470, as to amendment where improper seal was affixed.

Contra. — *Weaver v. Peasley, 163 Ill. 251,* holding the statute in that state requiring process to be sealed with the seal of court to be mandatory; that an execution not under seal is void and cannot be amended after sale.

See also EXECUTIONS AGAINST PROPERTY.

675. 6. Newell v. Whitwell, 16 Mont. 243; Gibbs v. Petree, 7 Tex. Civ. App. 526.

Effect upon Subsequent Attachment. — But a substantial amendment cannot affect the lien of a subsequent attachment levied prior to the time of the amendment. *Heidel v. Benedict, 61 Minn. 170; Maguire v. Bolen, 94 Wis. 48.*

676. 1. Meyer v. Brooks, 29 Ore. 203. See also *Nevada Co. v. Farnsworth, 89 Fed. Rep. 164.*

Rule Restated. — *Driscoll v. Holt, 170 Mass. 262.*

677. 1. In Moore v. Harrod, 101 Ky. 248, it was held that it was error to refuse to allow the amendment of a petition and affidavit on the trial when the court had previously overruled a motion to discharge the attachment.

2. If the Plaintiff Elects to Stand upon the New Cause of action the first cause is in effect dismissed, and that being the basis of the attachment, the attachment falls. *Holway v. American Exch. Nat. Bank, (Neb. 1902) 89 N. W. Rep. 382.*

678. 7. Entire Change of Parties. — So in *Fargo v. Cutshaw, 12 Ind. App. 392,* it was held that the leave should have been granted to amend the complaint in respect of the parties plaintiff, but that such amendment introduced a new plaintiff and dissolved the attachment in the action. There was no error in refusing leave to amend the attachment proceedings.

679. 1. Barton v. South Jordan Co-operative Mercantile, etc., Inst., 10 Utah 346, where the lien of the attachment was preserved.

680. 3. Fargo v. Cutshaw, 12 Ind. App. 392.

Georgia. — Act Ga. 1889, permitting the amendment of all affidavits which are the foundation of legal proceedings, applies to affidavits in attachment. *Brumby v. Rickoff, 94 Ga. 429.*

In Maryland. — *Blair v. Winston, 84 Md. 356,* like *Halley v. Jackson, 48 Md. 254,* cited in this note in the original article.

Jurat. — In *Arkansas City Lumber Co. v. Scott, 5 Kan. App. 636,* it was held to be error to refuse to allow an amendment of an affidavit for attachment to correct a mistake in postdating which made it appear to have been sworn to after the issue of the writ, the defect being one of form and the evidence showing the facts to be in accordance with the proposed amendment.

681. 1. In Montana defects in en-

- 682.** By Express Statute. — See note 1.
683. 4. Of Bonds. — See note 1.
684. See note 1.
685. 5. Of the Writ — In General. — See notes 3, 4, 5.
686. Misnomer. — See note 5.
687. Ad Damnum. — See note 1.

titling, and in failing to state the nature of the contract sued on, whether express or implied, may be cured by amendment. *S. C. Herbst Importing Co. v. Hogan*, 16 Mont. 384.

In Oklahoma. — A mere defect not rendering the attachment void may be amended and such amendment will take effect as to the date of the commencement of the suit. *Coyle Mercantile Co. v. Nix*, 7 Okla. 267. See also *Jaffray v. Wolf*, 4 Okla. 303, where it was held that the plaintiff should have been permitted to amend his affidavit.

United States. — See *Booth v. Denike*, 65 Fed. Rep. 43, permitting an amendment of an affidavit for garnishment under the general power conferred by Rev. Stat. U. S., § 954, though under the state practice such an amendment is not allowable.

682. 1. Alabama. — A defective affidavit may be amended in form or substance. *Simpson v. East*, 124 Ala. 293; *Dittman Boot, etc., Co. v. Mixon*, 120 Ala. 206; *Savage v. Atkins*, 124 Ala. 378, supplying signature of affiant; *McKissack v. Witz*, 120 Ala. 412, addition of a new defendant; *Sloan v. Hudson*, 119 Ala. 27, holding that the amendment may be made on appeal from a justice of the peace, the trial being *de novo*.

Arkansas. — *Winter v. Kirby*, 68 Ark. 471.

Colorado. — The affidavit cannot be amended by supplying jurisdictional allegations. *Mentzer v. Ellison*, 7 Colo. App. 315.

Kentucky. — *Harbour-Pitt Shoe Co. v. Dixon*, 60 S. W. Rep. 186, 22 Ky. L. Rep. 1169, holding, however, under the express terms of the statute, that the lien of an attachment filed before the amendment of an affidavit supporting another attachment is superior to the lien of the latter. See also *Spreen v. Delsignore*, 94 Fed. Rep. 71, under the statute in Kentucky.

Missouri. — *Kirksville Sav. Bank v. Spangler*, 59 Mo. App. 172, amendment to show agency of affiant.

Montana. — *Newell v. Whitwell*, 16 Mont. 243.

West Virginia. — *Lewis v. Bragg*, 47 W. Va. 707.

In Goodman v. Henry, 42 W. Va. 526, the court was equally divided upon the question whether under the statute permitting the filing of a supplemental affidavit setting up other material grounds of attachment, such affidavit could be filed to the prejudice of an intervening lien, and by such equal division the judgment was affirmed over the assignment of error based on a refusal to permit the filing of a supplemental affidavit.

683. 1. In California the undertaking upon attachment stands upon the same ground as the affidavit, and cannot be amended under the general statute relating to amendments, but is controlled by the attachment statute, which provides that when an attachment is irregularly issued it must be discharged upon application. *Tibbet v. Sue*, 122 Cal. 206.

684. 1. Alabama. — An amendment may be made by adding a new defendant. *McKissack v. Witz*, 120 Ala. 412.

685. 3. Adding a New Defendant is permissible under the statute in *Alabama*. *McKissack v. Witz*, 120 Ala. 412.

4. Recital of Grounds. — *Herzberg v. Boiesen*, (N. Y. City Ct. Spec. T.) 5 N. Y. Annot. Cas. 35, holding that where two grounds are recited in the alternative an amendment may be made so that they will be recited conjunctively.

5. Recital of Grounds. — *King v. King*, 68 N. Y. App. Div. 189, 59 N. Y. App. Div. 128.

686. 5. Norris v. Anderson, 181 Mass. 308.

687. 1. Louisville Banking Co. v. Etheridge Mfg. Co., (Ky. 1897) 43 S. W. Rep. 169, holding that an attachment by garnishment which failed to specify the amount of the creditor's claim, which was shown, however, by his petition and affidavit, might be amended and his lien on the fund preserved as against subsequent attach-

688. VI. IN CRIMINAL PROCEEDINGS — 1. Of Indictments — a. AT COMMON LAW — (1) *In Substance*. — See note 2.

689. Recommitting for Amendment. — See note 1.

691. (4) What Constitutes Substance — Date of Offense. — See note 1.

692. (5) What Constitutes Form — In General. — See note 2.

Informal Conclusion. — See note 4.

[*Indorsement.* — The indorsement on an indictment, "a true bill," is formal, and a defect therein is amendable. See note 7a.]

693. b. BY STATUTE — (2) Names, Dates, Descriptions, Etc. — See note 7.

696. 2. Of Informations — Distinguished from Indictments. — See notes 4, 5.

697. Amendments Discretionary. — See notes 1, 2.

ments levied before the amendment, the omission being a mere clerical error of the clerk for which the first attaching creditor was not responsible.

688. 2. Contra. — *State v. Cody*, 119 N. Car. 908; *State v. Faile*, 43 S. Car. 52.

Record Must Show Consent. — Amendments not within the terms of the consent as shown by the record are not authorized, and the court will look to the judgment entry, and not to the bill of exceptions, to ascertain what were the terms of the consent. *Stone v. State*, 105 Ala. 60.

690. 1. People v. Rodley, 131 Cal. 240.

691. 1. Compare Ketline v. State, 58 N. J. L. 462.

Mere Clerical Error. — In *State v. May*, 45 S. Car. 509, it was held that under the statute providing that a defect in form may be amended by the court provided such amendment does not change the nature of the offense, etc., where the date of the offense is left incomplete it may be filled in by amendment.

692. 2. Murphy v. State, 36 Tex. Crim. 24, date of organization of grand jury.

4. State v. Minford, 64 N. J. L. 518, holding that an informal conclusion is amendable.

7a. State v. Williams, 47 La. Ann. 1609.

693. 7. Colorado. — *Harris v. People*, 21 Colo. 95, upholding the insertion of the true name of the defendant though he had not pleaded in abatement.

Louisiana. — Amendment as to name

of owner of property in indictment for burglary. *State v. Satterwhite*, 52 La. Ann. 499. Description of property stolen may be amended. *State v. Jacobs*, 50 La. Ann. 447; *State v. Perkins*, 49 La. Ann. 310, holding that therefore objection to such description comes too late for the first time on appeal. The date of the offense, not being of the essence of the crime charged, may be amended. *State v. Hardaway*, 50 La. Ann. 1345; *State v. Hamilton*, 48 La. Ann. 1566. But where the person injured is a different person in fact from the one named, and the amendment sought is not merely to correct the description, the variance is fatal to the indictment and cannot be cured by amendment. *State v. Taylor*, 49 La. Ann. 319.

Michigan. — *People v. Brown*, 110 Mich. 168.

Mississippi. — Misdescription of the defendant may be corrected. *Orr v. State*, (Miss. 1902) 32 So. Rep. 998.

New Jersey. — Misnomer of the accused may be corrected by amendment. *Hubbard v. State*, 62 N. J. L. 628.

Texas. — *Colter v. State*, 41 Tex. Crim. 78; *Sinclair v. State*, 34 Tex. Crim. 453, as to amendment of name of accused.

696. 4. By Successor in Office. — An information of the state's attorney can be amended by his successor in office, both in form and in substance. *State v. Meacham*, 67 Vt. 707.

5. Daxanbeklar v. People, 93 Ill. App. 553, following *Long v. People*, 135 Ill. 435, and *Truitt v. People*, 88 Ill. 518.

697. 1. State v. Moore, 2 Penn.

698. By Statute. — See note 2.

700. 3. Complaints, Warrants, Etc. — See notes 2, 3.

(Del.) 299; *State v. Hubbard*, 71 Vt. 405.

Immaterial Amendment. — Where the legal import of the information is the same with and without the amendment, the defendant is not prejudiced by the amendment and cannot complain. *State v. McKee*, 17 Utah 370.

697. 2. Where No Offense Charged. — Where the information fails to charge a crime, and the complaint before the magistrate upon which the information was based is likewise defective, it is proper to refuse to allow an amended information to be filed. *State v. Denison*, 60 Neb. 157.

698. 2. Kansas. — *State v. Scott*, 1 Kan. App. 748; *State v. Coggins*, 10 Kan. App. 455; *State v. Engborg*, 63 Kan. 853, wherein the word "unlawfully" was inserted in an information for maintaining a nuisance contrary to the provisions of the prohibitory liquor law; *State v. McDonald*, 57 Kan. 537; *State v. Pipes*, 65 Kan. 543, holding actual amendment not to be necessary where the court makes an order substituting the correct name.

Date of Offense. — Where the information alleges the date of the offense as after the date of the filing of the information, but at a date subsequent to that so alleged the information is amended in other respects by leave of court and is then reverified and refiled, though the date of the offense is still subsequent to the date of the original information, objection on that account is not fairly presented, because the amended information was filed subsequently to the date as alleged. *State v. Oliver*, 55 Kan. 711.

Louisiana. — *State v. Bright*, 105 La. 341, allowing an amendment as to ownership of property stolen, to cure variance, and holding that the defendant could not complain of surprise where he did not ask for delay and where the witness through whom he said he expected to disprove the allegation of ownership was on the stand after the amendment, but the defendant did not examine him on that point.

The statute does not contemplate radical and material changes as to the person or things pertaining to the substance of the charge. The offense cannot be changed so as to affect the pun-

ishment. *State v. Cavanaugh*, 52 La. Ann. 1251.

Michigan. — In *People v. Bennett*, 122 Mich. 281, a prosecution for uttering a forged instrument, the instrument as described in the information appeared to be signed with a name in English, but the name corresponding to this on the instrument produced was written in German. It seems that under Comp. Laws Mich. (1897), § 11,922, the information may be amended so as to set out that the name was written in German and to give the English equivalent.

After Verdict. — It is competent for the court to permit an information to be amended, upon a motion to set aside the verdict, by permitting the clerk to sign the jurat where the proof shows that his failure to do so earlier was a clerical omission. *People v. Roat*, 117 Mich. 578.

Missouri. — The right to amend is not restricted to such defects as would be cured by the statute of jeofails. *State v. Broeder*, 90 Mo. App. 156.

Notice of an Application to amend by supplying the verification of an information should be given to the defendant. *State v. Bragg*, 63 Mo. App. 22.

After Change of Venue an amended or new information must be filed in the original county. *State v. Bartlett*, (Mo. 1902) 71 S. W. Rep. 148.

Montana. — An amendment as to the name of the person robbed is permissible in an information for robbery, under a statute permitting an amendment to cure a variance, etc. *State v. Oliver*, 20 Mont. 318.

Texas — **Formal Parts of an Information** may be amended. *Wilkerson v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 805.

Wisconsin — **Ownership of Property.** — Under a statute permitting an amendment to cure a variance which is not material to the merits, it is proper, in a prosecution for the statutory offense of larceny of timber or trees from land, to allow an amendment as to the name of the owner of the land. *Golonbieski v. State*, 101 Wis. 333.

700. 2. *State v. Brown*, 72 Vt. 410.

3. Alabama. — In a prosecution upon an affidavit for arson, the affidavit

may be amended in the County Court by adding a charge that the property belonged to a different person, and on appeal to the Circuit Court the solicitor may follow the amended affidavit in formulating the complaint in that court. *Simpson v. State*, 111 Ala. 6.

Illinois. — In a prosecution for a violation of a city ordinance, the complaint may be amended on appeal to the Circuit Court from a conviction before a justice, pending a motion to dismiss for a defect in respect to which the amendment is made. *McDermott v. Lewistown*, 92 Ill. App. 474.

Iowa. — *State v. Reilly*, 108 Iowa 735, holding that on appeal from a justice of the peace the amendment may be made by substituting a new information.

Mississippi. — A defective charge upon which one is tried before a magistrate may be amended in the Circuit Court. *Brown v. State*, (Miss. 1902) 32 So. Rep. 952, and need not be resworn. *Coulter v. State*, 75 Miss. 356.

North Carolina. — In *State v. Taylor*, 118 N. Car. 1262, it was held that an amendment by striking out the offense charged in a warrant and inserting

another offense is unauthorized; that the prosecutor has no right to appeal from a judgment of a justice refusing to permit an amendment and adjudging the prosecution frivolous, except, it may be, as to costs.

South Carolina. — The law in regard to informations under oath as the basis for a warrant allows amendment before trial of such information, and such amendment need not be sworn to anew, the prosecutor being present when the amendment is made. *State v. Nash*, 51 S. Car. 319.

Texas. — Amendment of a complaint may be allowed by erasing the initials before the name of the person alleged to have been injured and substituting therefor other initials, so as to make the name conform to that of the affiant who signed and swore to the complaint. *Edgerton v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 678.

Wisconsin. — A complaint may be amended by correcting the name of the person alleged to be the owner of the stolen property, under the statute, and the mere fact that the warrant is not in form amended is immaterial. *Fetkenhauer v. State*, 112 Wis. 491.

AMOUNT IN CONTROVERSY.

703. I [DEFINITION — In Cases of Original Jurisdiction. — The amount in controversy in cases of original, as opposed to appellate, jurisdiction may be defined as that amount or value of which the court, in assuming jurisdiction, must undertake to dispose, by means of a judgment or decree thereafter to be rendered. See note *a*.]

703. a. *Norfolk, etc., R. Co. v. Clark*, 92 Va. 118, wherein the definition given by Field, J., in *Lee v. Watson*, 1 Wall. (U. S.) 337, and quoted with approval in *Harman v. Lynchburg*, 33 Gratt. (Va.) 38, was adopted as applicable to "amount in controversy," as follows: "By matter in dispute is meant the subject of litigation — the matter for which the suit is brought, and upon which issue is joined, and in relation to which jurors are called and witnesses examined." See also *Buscher v. Lafayette*, 8 Ind. App. 590; *Germania Sav. Bank v. Muller*, 52 La. Ann. 553; *Wegmann v. Wegmann*, 52 La. Ann. 947; *State v. Judges*, 48 La. Ann. 672; *Watkins Banking Co. v. Louisiana Lumber Co.*, 47 La. Ann. 581; *Ormond v. Sage*, 69 Minn. 523; *Charlton v. Scoville*, 144 N. Y. 691; *Phelps, etc., Windmill Co. v. Parker*, (Tex. Civ. App. 1895) 30 S. W. Rep. 365; *Riggs v. Clark*, (C. C. A.) 71 Fed. Rep. 560.

Various Phrases are used in the statutes prescribing the pecuniary limits of jurisdiction, nearly all of which are construed and treated as synonymous with "amount in controversy," as above defined, as follows:

Amount Involved. — *Douglas v. Kansas City*, 147 Mo. 428; *State v. Judges*, 48 La. Ann. 672; *Decker v. Williams*, 73 Fed. Rep. 308.

Amount Demanded. — *Kuhn v. Eggers*, 5 Pa. Dist. 156; *Zimmerman v. Snyder*, 9 Pa. Super. Ct. 201.

Amount in Dispute. — *Building, etc., Assoc. v. Cunningham*, 92 Tex. 155; *Blackburn v. Portland Gold Min. Co.*, 175 U. S. 571; *Von Schroeder v. Brittan*, 93 Fed. Rep. 9.

Amount in Litigation. — The amount in controversy is the amount in litigation, not that which may have been the subject of controversy or dispute *in pais*. *Western Union Tel. Co. v. Durham*, 17 Tex. Civ. App. 310.

Amount Which Plaintiff May Recover. — *In Actions Not Involving Specific Property*, the amount in controversy is the amount which the plaintiff may recover under his pleadings, though he makes a claim or demand for more. *Elgin v. Mathis*, 9 Ind. App. 277; *Decker v. Graves*, 10 Ind. App. 25; *Central City v. Treat*, 101 Iowa 109; *Redfield v. Stocker*, 91 Iowa 383; *Harmon v. Callahan*, (Tex. Civ. App. 1896) 35 S. W. Rep. 705; *Fields v. Ft. Worth, etc., R. Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 255; *Doty v. Krutz*, 13 Wash. 169; *Moore v. Harper*, 42 W. Va. 39; *Simmons v. Mutual Reserve Fund L. Assoc.*, 114 Fed. Rep. 785.

In Actions Involving Specific Property, as to enforce a specific lien thereon, the test of jurisdiction is the value of the property to be disposed of, regardless of the amount of the lien. *Schwartz v. Frees*, (Tex. Civ. App. 1895) 31 S. W. Rep. 214. See also *infra*, X. *Value Distinguished from Amount*.

Where, Pendente Lite, the Property Becomes Unidentifiable so that the judgment cannot dispose of it, the amount in controversy is reduced to the amount of the lien claim. *Chapin v. Kenoyer*, 12 Wash. 536.

For an interesting summary of the rules for determining the amount in controversy in various actions, see *Withers v. Hopkins Place Sav. Bank*, 104 Ga. 89.

703. [For the Purpose of Appeal the amount in controversy seems to be the amount or value of which the appellant will be deprived or for which he will be liable by virtue of the judgment, or portion thereof, complained of. See note *b*.]

II. AMOUNT CLAIMED — 1. In General. — See note 1.

703. b. *McFadden v. Rhodes*, 19 Ind. App. 487; *Dunning v. Lacey*, 96 Ky. 611; *Vicksburg, etc., R. Co. v. Scott*, 47 La. Ann. 706; *Armstrong v. Vicksburg, etc., R. Co.*, 46 La. Ann. 1448; *Bohannon v. Roensch*, 13 Tex. Civ. App. 218; *Tufts v. Hodges*, 8 Tex. Civ. App. 240; *Burkhardt v. Elgee*, 93 Wis. 29; *Texas, etc., R. Co. v. Gentry*, 163 U. S. 363; *Gorman v. Havird*, 141 U. S. 206. And see *infra*, XII. *Appealable Amount*.

1. *Troy v. Hallgarth*, 35 Oregon 162, citing *obiter* 1 ENCYC. OF PL. AND PR. 703. See also the following cases:

Alabama. — *Sharpe v. Barney*, 114 Ala. 361; *Crossthwaite v. Caldwell*, 106 Ala. 295.

California. — *Rodley v. Curry*, 120 Cal. 541; *Lehnhardt v. Jennings*, 119 Cal. 192; *Henigan v. Ervin*, 110 Cal. 37; *Fairbanks v. Lampkin*, 99 Cal. 429.

Georgia. — *Griffith v. Elder*, 110 Ga. 453; *Dyar v. Scott*, 99 Ga. 96; *Ashworth v. Harper*, 95 Ga. 660.

Iowa. — *Thurston v. Lamb*, 90 Iowa 363.

Kansas. — *St. Louis, etc., R. Co. v. Brown*, 10 Kan. App. 401.

Louisiana. — *State v. Judges*, 47 La. Ann. 950; *Moore v. Ringuet*, 45 La. Ann. 1115.

Minnesota. — *Parker v. Bradford*, 68 Minn. 437; *Crawford v. Hurd Refrigerator Co.*, 57 Minn. 187.

Missouri. — *Marx, etc., Clothing Co. v. Watson*, 168 Mo. 133; *State v. Rombauer*, 130 Mo. 288.

Nebraska. — *Moise v. Powell*, 40 Neb. 671.

North Carolina. — *Sloan v. Carolina Cent. R. Co.*, 126 N. Car. 487; *Horner School v. Wescott*, 124 N. Car. 518.

Pennsylvania. — *Kuhn v. Eggers*, 5 Pa. Dist. 156.

South Carolina. — *Haygood v. Boney*, 43 S. Car. 63; *Catawba Mills v. Hood*, 42 S. Car. 203.

Texas. — *Harrell v. Storrie*, (Tex. Civ. App. 1898) 47 S. W. Rep. 838; *Lake Nav. Co. v. Austin Electrical Supply Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 832; *Johnson v. Borden*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1131;

Kelly v. Western Union Tel. Co., 17 Tex. Civ. App. 344.

Utah. — *M'Cormick Harvesting Mach. Co. v. Marchant*, 11 Utah 68.

Vermont. — *Bickford v. Travelers Ins. Co.*, 67 Vt. 418.

West Virginia. — *Richmond v. Henderson*, 48 W. Va. 389; *Faulconer v. Stinson*, 44 W. Va. 546; *Arnold v. Lewis County Ct.*, 38 W. Va. 142.

Wisconsin. — *Winchell v. Waukesha*, 110 Wis. 101.

United States. — *Waterfield v. Rice*, (C. C. A.) 111 Fed. Rep. 625; *Washington County v. Williams*, (C. C. A.) 111 Fed. Rep. 801; *Interstate Bldg., etc., Assoc. v. Edgefield Hotel Co.*, 109 Fed. Rep. 692; *Pine v. New York*, 103 Fed. Rep. 337; *Reese v. Zinn*, 103 Fed. Rep. 97; *Turner v. Southern Home Bldg., etc., Assoc.*, (C. C. A.) 101 Fed. Rep. 308; *Ung Lung Chung v. Holmes*, 98 Fed. Rep. 323; *Jones v. McCormick Harvesting Mach. Co.*, (C. C. A.) 82 Fed. Rep. 295; *Insurance Co. of North America v. Svendsen*, 74 Fed. Rep. 346; *Riggs v. Clark*, (C. C. A.) 71 Fed. Rep. 560; *Butchers, etc., Stock-Yards Co. v. Louisville, etc., R. Co.*, (C. C. A.) 67 Fed. Rep. 35; *Smith v. Bivens*, 56 Fed. Rep. 352.

The Amount Need Not Be in the Declaration. It is sufficient that it appears from the pleadings as a whole. *Hail v. Tunstall*, 21 Tex. Civ. App. 593; *McAffrey v. Richards*, (Tenn. Ch. 1900) 59 S. W. Rep. 1064. And see *infra*, V. 2. *Amount Must Appear*.

Erroneous Claim. — *Rodley v. Curry*, 120 Cal. 541; *Kunkel v. Brown*, (C. C. A.) 99 Fed. Rep. 593.

Amendments — Jurisdiction as to Amount May Be Shown by Amendment. — *McPhail v. Johnson*, 115 N. Car. 298, wherein a summons which failed to state any amount was allowed to be amended so as to show the amount claimed; *Whalen v. Gordon*, (C. C. A.) 95 Fed. Rep. 305, wherein a plaintiff who had stated a portion of his claim improperly, thus reducing the amount recoverable under his pleadings to less than the jurisdictional amount, was allowed to amend so as to state such portion properly, bringing

704. Counterclaims and Set-offs. — See note 1.

[**Jurisdiction Unaffected by Counterclaim or Set-off.** — A counterclaim or set-off has no effect on the original jurisdiction acquired by virtue of the plaintiff's claim. See note 1*a*.]

the amount within the court's jurisdiction; *Home Ins. Co. v. Nobles*, 63 Fed. Rep. 641, wherein a petition claiming damages, but not stating the amount thereof, was allowed to be amended so as to state the amount.

Jurisdiction as to Amount Cannot Be Conferred by Amendment. — Where the amount claimed is insufficient to confer jurisdiction, the defect cannot be cured by amendment. *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129; *McPhail v. Johnson*, 115 N. Car. 298; *Sanders v. Pierce*, 68 Vt. 468.

Contra. — That the plaintiff may amend his *ad damnum*, and thus confer jurisdiction, see *San Antonio, etc., R. Co. v. Barnett*, (Tex. Civ. App. 1901) 66 S. W. Rep. 474; *Watson v. Mirike*, (Tex. Civ. App. 1901) 61 S. W. Rep. 538. See also *Louisville, etc., R. Co. v. Steele*, 6 Ind. App. 183.

Amendments on Appeal. — See *infra*,

XII. 3. *In Intermediate Appeals*, note 1.

Amount Claimed Determinative of Jurisdiction. — The amount claimed will prevail over the amount shown by the bill of particulars. *Decker v. Graves*, 10 Ind. App. 25; *Elgin v. Mathis*, 9 Ind. App. 277.

The amount claimed will prevail over the face value of the instrument sued on or the amount appearing to be due and recoverable on such instrument. *Byers v. Bellan-Price Invest. Co.*, 10 Colo. App. 74; *Griffeth v. Elder*, 110 Ga. 453; *Hull v. Webb*, 78 Ill. App. 617; *Catawba Mills v. Hood*, 42 S. Car. 203; *Page v. Warner*, 71 Vt. 180; *Chase v. Bernier*, 73 Vt. 307.

704. 1. Thurston v. Lamb, 90 Iowa 363; *Rivers v. Blom*, 78 Mo. App. 142; *Haygood v. Boney*, 43 S. Car. 63; *Walcott v. McNew*, (Tex. Civ. App. 1901) 62 S. W. Rep. 815; *Texas, etc., R. Co. v. Hayes*, 4 Tex. Civ. App. 88.

1*a*. If the Counterclaim or Set-off Is in Excess of the Court's Jurisdiction, it will not oust the jurisdiction already acquired, but will itself be rejected. *Ramer v. Smith*, 4 Colo. App. 434; *Rivers v. Blom*, 78 Mo. App. 142; *Gimbal v. Gomprecht*, 89 Tex. 497; *Pennybacker v. Hazlewood*, (Tex. Civ. App. 1901) 61 S. W. Rep. 153; *Rylie v. Elam*, (Tex. Civ. App. 1900) 58 S. W.

Rep. 51; *Pioneer Sav., etc., Co. v. Wilson*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1095; *Cain v. Cullbreath*, (Tex. Civ. App. 1896) 35 S. W. Rep. 809; *Pickett v. Edwards*, (Tex. Civ. App. 1894) 25 S. W. Rep. 32; *Martin v. Eastman*, 109 Wis. 286; *Pickham v. Wheeler-Bliss Mfg. Co.*, (C. C. A.) 77 Fed. Rep. 663, 69 Fed. Rep. 419; *Bennett v. Forrest*, 69 Fed. Rep. 421. See also *Lynch v. Free*, 64 Minn. 277, wherein the effect of a counterclaim in excess of the court's jurisdiction was expressly left undecided.

If a Counterclaim or Set off Is Within the Court's Jurisdiction, it cannot be added to the plaintiff's claim for the purpose of ousting jurisdiction; but the claim and counterclaim or set-off will be considered separately as two cases triable together. *Rhodes Haverty Furniture Co. v. Henry*, (Tex. Civ. App. 1902) 67 S. W. Rep. 340.

A Counterclaim Below the Minimum Jurisdictional Limit may be litigated in an action wherein jurisdiction has been acquired by reason of the amount of the plaintiff's claim. *Freeman v. Seitz*, 126 Cal. 291; *Garrett v. Robinson*, 93 Tex. 406.

But no judgment can be rendered for the defendant on a counterclaim below the jurisdictional limit, except as a credit on the plaintiff's claim; and hence, where the plaintiff fails to recover, the court has no jurisdiction to render an affirmative judgment on a counterclaim below its jurisdiction. *Freeman v. Seitz*, 126 Cal. 291.

Waiver or Remission of Excess. — A counterclaim or set-off may be brought within the court's jurisdiction by waiver or remission of the excess above the jurisdictional limit. *General Electric Co. v. Williams*, 123 N. Car. 51; *Haygood v. Boney*, 43 S. Car. 63; *Bennett v. Forrest*, 69 Fed. Rep. 421. And see *infra*, III. *Amount Remitted*.

Crediting Counterclaim with Claim. — A counterclaim in excess of the jurisdictional amount cannot be brought within the court's jurisdiction by crediting it with the plaintiff's claim. *Gimbal v. Gomprecht*, 89 Tex. 497; *Clark v. Smith*, (Tex. Civ. App. 1902) 68 S. W. Rep. 532; *Pennybacker v.*

704. 2. When Claim Is Unliquidated. — See note 2.

705. 3. In Actions Ex Delicto. — See note 1.

Hazlewood, (Tex. Civ. App. 1901) 61 S. W. Rep. 153; *Cain v. Culbreath*, (Tex. Civ. App. 1896) 35 S. W. Rep. 809.

Jurisdiction Conferred by Counterclaim. — A plea in reconvention of a sufficient amount confers jurisdiction where the plaintiff's claim is insufficient to do so. *Phelps, etc., v. Windmill Co. v. Parker*, (Tex. Civ. App. 1895) 30 S. W. Rep. 365. Compare *Dewitt County v. Wischkemper*, (Tex. 1902) 67 S. W. Rep. 882, wherein it was held that where the plaintiff's bill in an action involving specific property failed to show the value of the property, a plea in reconvention claiming damages in an amount within the court's jurisdiction would not confer jurisdiction.

A Counterclaim Necessarily Pleaded under a statutory requirement is a part of the amount in controversy, and may be added to the amount claimed for the purpose of conferring jurisdiction on a federal court. *Lee v. Continental Ins. Co.*, 74 Fed. Rep. 424.

On Appeal. — See *infra*, XII. 2. b. *Counterclaim Filed*.

704. 2. Colorado. — *Colorado Fuel, etc., Co. v. Four Mile R. Co.*, (Colo. 1901) 66 Pac. Rep. 902.

Connecticut. — *Star Cash, etc., Car Co. v. Starr*, 69 Conn. 440.

Louisiana. — *State v. Judges*, 47 La. Ann. 950; *Vincent v. Phillips*, 47 La. Ann. 1216, 1238.

Maine. — *Smith v. Hunt*, 91 Me. 572.

Minnesota. — *Parker v. Bradford*, 68 Minn. 437.

Nebraska. — *Adams v. Nebraska Sav., etc., Bank*, 56 Neb. 121.

Vermont. — *Chase v. Bernier*, 73 Vt. 307; *A. H. Berry Shoe Co. v. Dechenes*, 68 Vt. 387.

United States. — *Green County Bank v. Teasdale*, 112 Fed. Rep. 801; *Von Schroeder v. Brittan*, 93 Fed. Rep. 9; *Levinski v. Middlesex Banking Co.*, (C. C. A.) 92 Fed. Rep. 449; *Hayward v. Nordberg Mfg. Co.*, (C. C. A.) 85 Fed. Rep. 4; *Holden v. Utah, etc., Machinery Co.*, 82 Fed. Rep. 209; *American Wringer Co. v. Ionia*, 76 Fed. Rep. 6; *Bank of Araphoe v. Bradley*, (C. C. A.) 72 Fed. Rep. 867; *Texas, etc., R. Co. v. Kuteman*, (C. C. A.) 54 Fed. Rep. 547.

Demand Prima Facie Test. — The demand or *ad damnum* is only *prima facie* indicative of the real amount, and will

not be regarded where it affirmatively appears that the amount is different. *Sams Automatic Car-Coupler Co. v. League*, 25 Colo. 129; *Redfield v. Stocker*, 91 Iowa 383; *Evans v. Cleaver*, (Ky. 1895) 29 S. W. Rep. 29; *Doty v. Krutz*, 13 Wash. 169; *Burkhardt v. Elgee*, 93 Wis. 29; *Bergman v. Inman*, 91 Fed. Rep. 293; *Hayward v. Nordberg Mfg. Co.*, (C. C. A.) 85 Fed. Rep. 4. And see *infra*, V. *Real Amount*.

705. 1. Arkansas. — *Thompson v. Willard*, 66 Ark. 346.

Indiana. — *Conner v. Citizens' St. R. Co.*, (Ind. App. 1895) 42 N. E. Rep. 247.

Iowa. — *Thompson v. Jackson*, 93 Iowa 376; *Rand v. Binder*, (Iowa 1898) 75 N. W. Rep. 505.

Nebraska. — *Hastings v. Mills*, 50 Neb. 842.

Oregon. — *Troy v. Hallgarth*, 35 Oregon 162.

Pennsylvania. — *Townsend v. Whalen*, 5 Pa. Dist. 656.

Texas. — *Strickland v. Sloan*, (Tex. Civ. App. 1899) 50 S. W. Rep. 622; *Dwyer v. Bassett*, (Tex. Civ. App. 1895) 29 S. W. Rep. 815; *Waugh v. Dabney*, 12 Tex. Civ. App. 290; *Baker v. Guinn*, 4 Tex. Civ. App. 539.

West Virginia. — *Hale v. Weston*, 40 W. Va. 313.

United States. — *Scott v. Donald*, 165 U. S. 107; *Wiley v. Sinkler*, 179 U. S. 58; *Greene County Bank v. J. H. Teasdale Commission Co.*, 112 Fed. Rep. 801; *Horst v. Merkley*, 59 Fed. Rep. 502.

The Reason that the ad Damnum Controls in actions *ex delicto*, or in any action for unliquidated damages, is that there is no other test or measure which can be applied. Thus, in *Wiley v. Sinkler*, 179 U. S. 58, the damages claimed for the rejection of the plaintiff's vote at a Congressional election were said to be so peculiarly appropriate for the determination of a jury that the *ad damnum* would be held to be conclusive on the question of jurisdiction. See also *Thompson v. Willard*, 66 Ark. 346; *A. H. Berry Shoe Co. v. Dechenes*, 68 Vt. 387; *Von Schroeder v. Brittan*, 93 Fed. Rep. 9.

The Real Value or Amount will control, where it can be ascertained without evidence, even though it be different from that indicated by the *ad*

706. 4. In Suits on Bonds. — See note 1.

707. III. AMOUNT REMITTED — 1. Jurisdiction Conferred. — See note 1.

damnum. Hannon *v.* Bramley, 65 Conn. 193; Thompson *v.* Jackson, 93 Iowa 376; Houston Ice, etc., Co. *v.* North Galveston Imp. Co., (Tex. Civ. App. 1902) 67 S. W. Rep. 1079. And see *infra*, IV. *Fictitious Amount*; V. *Real Amount*.

706. 1. Volcano Stables, etc., Co. *v.* Hayashi, 13 Hawaii 695, citing 1 ENCYC. OF PL. AND PR. 706; Lee *v.* Russell, (Ky. 1901) 60 S. W. Rep. 376; Montgomery *v.* Martin, 104 Mich. 390; Hail *v.* Tunstall, 21 Tex. Civ. App. 593.

Replevin — Value as Claimed. — In an action on a replevin bond, the value of the property as indicated by the bond, not the penalty, is the amount in controversy. Hail *v.* Tunstall, 21 Tex. Civ. App. 593.

Suit on Forthcoming Bond. — Where property is released to an intervener on a forthcoming bond, in a suit on such bond the amount in controversy is the amount of the plaintiff's claim against the property, and the value of the property cannot be considered. State *v.* Court Appeals, 47 La. Ann. 740. See also Biddle *v.* Paine, 74 Miss. 494, wherein it was held that where property distrained for rent was released to the tenant on a forthcoming bond, in a suit thereafter instituted on the bond the amount in controversy was the amount of the rent chargeable upon the property, and not the value of the property.

Real Debt, Not Claim nor Penalty. — In an action on a penal bond the amount in controversy is neither the demand nor the amount of the bond, but the amount equitably due by reason of the breach. Cabot *v.* McMaster, 61 Fed. Rep. 129.

707. 1. Volcano Stables, etc., Co. *v.* Hayashi, 13 Hawaii 695; Ward *v.* Evans, 49 W. Va. 184; Richmond *v.* Henderson, 48 W. Va. 389, in which cases 1 ENCYC. OF PL. AND PR. 707 was quoted and cited with approval. See also the following cases in which it was held that jurisdiction may be conferred by suing for less than the real amount:

Arkansas. — Hunton *v.* Luce, 60 Ark. 146.

Colorado. — Byers *v.* Bellan-Price Invest. Co., 10 Colo. App. 74.

Connecticut. — Starr Cash, etc., Car Co. *v.* Starr, 69 Conn. 440.

Georgia. — Dowdle *v.* Stein, 103 Ga. 94, which being decided under 2 Code Ga., § 4195, applicable to county courts, was distinguished by the court from Peeples *v.* Strickland, 101 Ga. 829, on the ground that the latter case was begun in a justice's court, and that there was "no law authorizing a plaintiff to remit or release a part of his claim so as to give jurisdiction to a justice's court."

Illinois. — Hull *v.* Webb, 78 Ill. App. 617, decided under Starr & Curt. Annot. Stat. Ill. (1896), c. 79, par. 16, subdiv. 6, applicable to justices' courts.

Minnesota. — Parker *v.* Bradford, 68 Minn. 437.

New Jersey. — Lochanowski *v.* McKeone, 60 N. J. L. 118, decided under Gen. Stat. N. J., p. 1254, par. 217.

North Carolina. — Cromer *v.* Marsha, 122 N. Car. 563; Heyser *v.* Gunter, 118 N. Car. 964.

Pennsylvania. — The plaintiff may reduce his claim to the jurisdictional limit by crediting it with matters growing out of the same transaction, but not by credits arising from a separate and distinct transaction. Zimmerman *v.* Snyder, 9 Pa. Super. Ct. 201; Wanner *v.* Zimmerman, 5 Pa. Dist. 29.

South Carolina. — Catawba Mills *v.* Hood, 42 S. Car. 203.

Texas. — Western Union Tel. Co. *v.* Durham, 17 Tex. Civ. App. 310.

West Virginia. — Wells *v.* Michigan Mut. L. Ins. Co., 41 W. Va. 131.

Contra in Georgia in Justice's Court. — Ashworth *v.* Harper, 95 Ga. 660, wherein it was held that where the plaintiff's suit is originally for an amount in excess of the justice's jurisdiction, an abandonment *pendente lite* of a portion of such claim will not confer jurisdiction. See also the Georgia cases cited *supra*, this note.

Remittitur Pendente Lite. — An Abandonment of Claim for Damages in replevin which brings the amount, originally excessive, within the jurisdictional limit will confer jurisdiction. Bensch *v.* Farnsworth, 9 Ind. App. 547.

A Release of a Portion of Replevied Property may likewise confer jurisdiction. Nigh *v.* Dovel, 84 Ill. App. 228.

The Amount Demanded in the com-

709. 2. Jurisdiction Unaffected. — See note 1.

plaint may be voluntarily reduced *pendente lite* so as to confer jurisdiction. *McPhail v. Johnson*, 115 N. Car. 298.

The Amount Remitted cannot thereafter be recovered. *Catawba Mills v. Hood*, 42 S. Car. 203; *Richmond v. Henderson*, 48 W. Va. 389. See also *infra*, VIII, 3. *Several Claims in One Suit*, par. *Divided Claims or Debt*.

An Action for Less than the Full Amount will be construed as a waiver of the amount not sued for. *Byers v. Bellan-Price Invest. Co.*, 10 Colo. App. 74; *Dowdle v. Stein*, 103 Ga. 94; *Volcano Stables, etc., Co. v. Hayashi*, 13 Hawaii 695; *Catawba Mills v. Hood*, 42 S. Car. 203.

A Remittitur of Damages After Judgment for restitution will not render the judgment valid where the sum of the value of the property and the damages claimed were in excess of the court's jurisdiction. *Ferguson v. Byers*, (Oregon 1902) 67 Pac. Rep. 1115.

Credits or Set-offs. — By statute in *Wisconsin* (Stat. Wis., § 3572, subdiv. 4), a justice has jurisdiction of actions on an account of five hundred dollars, or less, provided such account shall be reduced to the usual jurisdictional amount in justices' courts by credits allowed, or by set-offs introduced by the opposite party. *Prairie Grove Cheese Mfg. Co. v. Luder*, (Wis. 1902) 89 N. W. Rep. 138.

Payments set up by the defendant will confer jurisdiction of an excessive claim where the court must consider conflicting evidence or disputed questions of law in order to ascertain the amount actually in controversy. *Stillwell-Bierce, etc., Co. v. Williamston Oil, etc., Co.*, 30 Fed. Rep. 68.

Waiver of Interest. — *Zimmerman v. Snyder*, 9 Pa. Super. Ct. 201.

Where a petition claiming interest from a certain date, the total amount thus claimed being within the jurisdictional limit, was amended at a time when the additional interest accrued raised the total amount above the maximum limit, it was held that the excess of interest might be waived and jurisdiction be thus restored. *San Antonio, etc., R. Co. v. Barnett*, (Tex. Civ. App. 1901) 66 S. W. Rep. 474.

Waiver of Amount of Recovery. — *Adams v. Nebraska Sav., etc., Bank*, 56 Neb. 121 [decided under Code Civ. Pro. Neb., §§ 910, 1003]; *Globe v.*

Rauch, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 48, 26 Civ. Pro. (N. Y.) 359; *M'Cormick Harvesting Mach. Co. v. Marchant*, 11 Utah 68.

Arizona Statute. — Rev. Stat. Ariz. (1887), § 822 (Rev. Stat. 1901, § 1455), expressly authorizes a remittitur of the excess of a judgment above the court's jurisdiction, in order to confer jurisdiction and thus to render the judgment valid. *Simms v. Simms*, 175 U. S. 162.

Waiver of Penalty. — A penalty for failure to pay a city tax may be waived by the city in order to confer jurisdiction in an action for the tax. *Chester v. McGeoghegan*, 41 W. N. C. (Pa.) 423.

709. 1. *Dwyer v. Bassett*, (Tex. Civ. App. 1895) 29 S. W. Rep. 815; *Tennent-Stribling Shoe Co. v. Roper*, (C. C. A.) 94 Fed. Rep. 739; *Levinski v. Middlesex Banking Co.*, (C. C. A.) 92 Fed. Rep. 449; *Hayward v. Nordberg Mfg. Co.*, (C. C. A.) 85 Fed. Rep. 4.

In an Appellate Court the rule is the same. *Chicago, etc., R. Co. v. Davis*, 159 Ill. 53; *Gilmore v. Courtney*, 158 Ill. 432; *Kingsbury v. Franz*, 40 Neb. 400; *Schneider v. Luckie*, (Tex. Civ. App. 1898) 47 S. W. Rep. 685.

Reduction to Defeat Appeal. — A remittitur or reduction before verdict or judgment will not defeat an appeal. *Bell v. Davis*, 93 Ga. 233; *New Orleans, etc., R. Co. v. McNeely*, 47 La. Ann. 1298; *Sample v. Shidel*, 20 Pa. Co. Ct. 357. Likewise a remittitur after verdict and before judgment will not defeat appeal. *Washington Mfg., etc., Co. v. Barnett*, (Ky. 1897) 42 S. W. Rep. 1120. But see *infra*, III, 3. *Jurisdiction Ousted*, note *Amount Remitted Pendente Lite Prevents Appeal*.

Matters of Defense successfully interposed or admitted will not oust the court of jurisdiction though the amount in controversy be thereby reduced below jurisdictional limit. *Jacobs v. Postal Tel.-Cable Co.*, 76 Miss. 278, wherein a portion of the plaintiff's claim was excluded; *Kelly v. Western Union Tel. Co.*, 17 Tex. Civ. App. 344, wherein the statute of limitations was interposed against one of the plaintiff's causes of action; *Turner v. Southern Home Bldg., etc., Assoc.*, (C. C. A.) 101 Fed. Rep. 308, wherein a credit was allowed on the plaintiff's claim; *Building, etc., Assoc. v. Price*, 169 U.

710. 3. Jurisdiction Ousted. — See note 1.**IV. FICTITIOUS AMOUNT.** — See note 3.

S. 45, wherein the defense of usury was set up.

Demurrer Sustained. — *Sloan v. Carolina Cent. R. Co.*, 126 N. Car. 487; *Waterfield v. Rice*, (C. C. A.) 111 Fed. Rep. 625. *Contra*, *Hill v. Strauss*, (Tex. Civ. App. 1900) 56 S. W. Rep. 540; *Keller v. Huffman*, (Tex. Civ. App. 1894) 26 S. W. Rep. 863; *Doherty v. Galveston*, 19 Tex. Civ. App. 708. And see *infra*, III. 3. *Jurisdiction Ousted*, note *Statute of Limitations*.

Waiver of Damages After Default by the defendant in an injunction suit will not affect the court's jurisdiction though the amount in controversy be thereby reduced below the jurisdictional limit. *Starr Cash, etc., Car Co. v. Starr*, 69 Conn. 440.

Amount Remitted on Appeal. — See *infra*, XII. 3. *In Intermediate Appeals*, note *Amendments on Appeal*.

710. 1. Statute of Limitations. — Where the bar of limitations appears on the face of the bill or complaint, and sufficient items, thus barred, are stricken out to reduce the claim below the jurisdictional limit, and the plaintiff does not amend, the case will be dismissed. *Hill v. Strauss*, (Tex. Civ. App. 1900) 56 S. W. Rep. 540; *Keller v. Huffman*, (Tex. Civ. App. 1894) 26 S. W. Rep. 863; *Doherty v. Galveston*, 19 Tex. Civ. App. 708. *Contra*, *Waterfield v. Rice*, (C. C. A.) 111 Fed. Rep. 625. See also *supra*, III. 2. *Jurisdiction Unaffected*, note *Demurrer Sustained*.

Amount Remitted Pendente Lite Prevents Appeal. — *Young v. Stuart*, 104 Iowa 597; *Fillmore v. Hintz*, 90 Iowa 758; *Rust v. Olson*, 113 Iowa 571; *Rand v. Binder*, (Iowa 1898) 75 N. W. Rep. 505; *Illinois Cent. R. Co. v. Landram*, (Ky. 1902) 66 S. W. Rep. 599; *State v. Judges*, 107 La. 784; *Dodge v. Corliss*, (Wash. 1902) 68 Pac. Rep. 869.

In Iowa a remittitur to prevent an appeal from the Superior and District Courts is prohibited by Code Iowa, § 4178; but it is held that a remittitur may be made at any time before judgment, and an appeal be thus prevented. *Rust v. Olson*, 113 Iowa 571; *Knox v. Nicoli*, 97 Iowa 687; *Young v. Stuart*, 104 Iowa 597; *Sharp v. Nelson*, 93 Iowa 466.

Acceptance of a Referee's Report allowing less than the amount claimed by the

plaintiff will prevent an appeal by the defendant, where the amount so allowed is less than the minimum appealable amount. *Weaver v. Cone*, 189 Pa. St. 298.

Where a Judgment Is for an Amount in Excess of the minimum appealable amount, an appeal may be prevented by remitting an amount which will bring the judgment below the limit. *Louisville, etc., R. Co. v. Steele*, 6 Ind. App. 183; *Edwards v. Howard*, (Ky. 1899) 49 S. W. Rep. 964; *Simms v. Simms*, 175 U. S. 162; *Northwestern L. Ins. Co. v. Martin*, 154 U. S. 640; *Texas, etc., R. Co. v. Saunders*, 151 U. S. 105; *Texas, etc., R. Co. v. Horn*, 151 U. S. 110.

Remittitur in Discretion of Court. — In *Simms v. Simms*, 175 U. S. 162, it was held that the right to remit a portion of a judgment is subject to the discretion of the trial court.

A Voluntary Settlement by the Defendant of a part of a judgment against him, whereby the amount thereof is reduced below the appealable amount, prevents an appeal by him. *Thorp v. Bonfield*, 177 U. S. 15.

Admission of Part of the Plaintiff's Claim eliminates such part from consideration in determining the appellate amount. *State v. Judges*, 48 La. Ann. 672; *Hedrick v. Mutual Guarantee Bldg., etc., Assoc.*, (W. Va. 1902) 41 S. E. Rep. 118; *Blonde v. Menominee Bay Shore Lumber Co.*, 103 Wis. 284.

3. *Chicago, etc., R. Co. v. Weaver*, 112 Iowa 103, citing with approval and adopting 1 ENCYC. OF PL. AND PR. 710. See also *Lehnhardt v. Jennings*, 119 Cal. 192; *Darrell v. Biscoe*, 94 Md. 684; *James v. Hiatt*, 80 Mo. App. 43; *Waite v. Santa Cruz*, 184 U. S. 302; *Bedford Quarries Co. v. Welch*, 100 Fed. Rep. 513; *Hayward v. Nordberg Mfg. Co.*, (C. C. A.) 85 Fed. Rep. 4; *Holden v. Utah, etc., Machinery Co.*, 82 Fed. Rep. 209; *Stillwell-Bierce, etc., Co. v. Williamston Oil, etc., Co.*, 80 Fed. Rep. 68.

On Appeal the rule is the same. Jurisdiction cannot be conferred by merely colorable or fictitious claims or offsets. *Chicago, etc., R. Co. v. Weaver*, 112 Iowa 101; *Wolf v. Stewart*, 48 La. Ann. 1431; *State v. Judges*, 47 La. Ann. 950; *Manchester Paper-Mills Co. v. Heith*, (Va. 1893) 18 S. E.

711. Question Discretionary. — See note 1.**712.** V. REAL AMOUNT — 1. In General. — See note 1.

Rep. 189; Northern Pac. R. Co. v. Booth, 152 U. S. 671.

Claims Fictitiously Assigned. — Where nominal assignments of claims are made to the same party in order that he may aggregate them on appeal, the court will not assume jurisdiction. *Filler v. Tyler*, 91 Va. 458.

Excessive Damage Claims. — An appeal will not be entertained where it appears from the evidence presented at the trial that the plaintiff, thereafter appellant, could not really have expected to recover the damages claimed. *Lea v. Orleans*, 46 La. Ann. 1444.

Where an Honest Mistake Has Been Made its correctness will not oust jurisdiction though the amount in controversy be thereby reduced below the jurisdictional limit. *Rodley v. Curry*, 120 Cal. 541. See also *Kunkel v. Brown*, (C. C. A.) 99 Fed. Rep. 593, wherein the court retained jurisdiction, though it appeared that the allegation of the amount involved as sufficient to confer jurisdiction was a mistake, and that the real amount was below the jurisdictional limit.

Necessity for Plea to Jurisdiction. — Where the claim on its face is sufficient, the issues of its *bona fides* must be raised by plea to the jurisdiction. *Allison v. Haney*, (Tex. Civ. App. 1901) 62 S. W. Rep. 933; *Strickland v. Sloan*, (Tex. Civ. App. 1899) 50 S. W. Rep. 622; *Baker v. Guinn*, 4 Tex. Civ. App. 539.

711. 1. Chicago, etc., R. Co. v. Weaver, 112 Iowa 101; *State v. Judges*, 47 La. Ann. 950; *Eaton v. Tod*, (Tex. Civ. App. 1902) 68 S. W. Rep. 546; *Bickford v. Travelers Ins. Co.*, 67 Vt. 418; *Hayward v. Nordberg Mfg. Co.*, (C. C. A.) 85 Fed. Rep. 4.

No Presumption of Bad Faith. — It must manifestly appear that the amount claimed is fictitious before the court will be justified in dismissing. *State v. Judges*, 47 La. Ann. 950; *Ball v. Hines*, (Tex. Civ. App. 1901) 61 S. W. Rep. 332; *Bickford v. Travelers Ins. Co.*, 67 Vt. 418; *Filler v. Tyler*, 91 Va. 458.

The Plaintiff's Testimony that less is due to him than was claimed in his pleadings is insufficient to show that the amount claimed is fictitious. *Johnson v. Borden*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1131.

The Sustaining of a Demurrer to a Portion of the Claim is not sufficient to show fraud on jurisdiction. *Sloan v. Carolina Cent. R. Co.*, 126 N. Car. 487.

Question for Jury. — In *Heierman v. Robinson*, (Tex. Civ. App. 1901) 63 S. W. Rep. 657, it was held that the question whether there was an attempt to give jurisdiction by fraud should be submitted to the jury, where the fraud does not manifestly appear.

712. 1. *California.* — *California Cured Fruit Assoc. v. Ainsworth*, 134 Cal. 461; *Lehnhardt v. Jennings*, 119 Cal. 192.

Colorado. — *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129.

Connecticut. — *Cantoni v. Betts*, 70 Conn. 386; *Hannon v. Bramley*, 65 Conn. 193.

District of Columbia. — *Mansfield v. Winter*, 10 App. Cas. (D. C.) 549.

Georgia. — *Griffin v. Bradley*, 110 Ga. 327.

Indiana. — *McFadden v. Rhodes*, 19 Ind. App. 487; *Biddle v. Pierce*, 141 Ind. 148.

Iowa. — *Chicago, etc., R. Co. v. Weaver*, 112 Iowa 101; *Central City v. Treat*, 101 Iowa 109; *Thompson v. Jackson*, 93 Iowa 376; *Redfield v. Stocker*, 91 Iowa 383; *Fillmore v. Hintz*, 90 Iowa 758.

Kansas. — *Gabby v. Primley*, (Kan. App. 1898) 52 Pac. Rep. 907; *Stinson v. Cook*, 53 Kan. 179; *Berger v. Rife*, 7 Kan. App. 639; *Heraughty v. Grant*, 6 Kan. App. 923, 50 Pac. Rep. 506.

Kentucky. — *Murrell v. Humphries*, (Ky. 1895) 30 S. W. Rep. 606; *Evans v. Cleaver*, (Ky. 1895) 29 S. W. Rep. 29; *Cully v. Louisville, etc., R. Co.*, 101 Ky. 319.

Louisiana. — *State v. Fernandez*, 49 La. Ann. 249; *State v. Judge*, 47 La. Ann. 1022; *State v. Judges*, 47 La. Ann. 950; *Lea v. Orleans*, 46 La. Ann. 1444; *Solari v. Barras*, 45 La. Ann. 1128.

Maryland. — *Darrell v. Biscoe*, 94 Md. 684.

Missouri. — *May v. Jarvis-Conklin Mortg. Trust Co.*, 138 Mo. 275; *State v. Rombauer*, 130 Mo. 288; *James v. Hiatt*, 80 Mo. App. 43; *Kirchgraber v. Lloyd*, 59 Mo. App. 59; *Drummond Tobacco Co. v. Addison Tinsley Tobacco Co.*, 52 Mo. App. 10.

713. See note 1.

New York. — Thacher v. Hope Cemetery Assoc., 146 N. Y. 381.

North Carolina. — Gillam v. Virginia L. Ins. Co., 121 N. Car. 369.

Pennsylvania. — Zimmerman v. Snyder, 9 Pa. Super. Ct. 201; Kuhn v. Eggers, 5 Pa. Dist. 156.

Texas. — Building, etc., Assoc. v. Cunningham, 92 Tex. 155; Eaton v. Tod, (Tex. Civ. App. 1902) 68 S. W. Rep. 546; Allison v. Haney, (Tex. Civ. App. 1901) 52 S. W. Rep. 933; Strickland v. Sloan, (Tex. Civ. App. 1899) 50 S. W. Rep. 622; Harmon v. Callahan, (Tex. Civ. App. 1896) 35 S. W. Rep. 705; Cox v. Wright, (Tex. Civ. App. 1894) 27 S. W. Rep. 294; Texas, etc., R. Co. v. Hayes, 4 Tex. Civ. App. 88; Baker v. Guinn, 4 Tex. Civ. App. 539.

Vermont. — Bickford v. Travelers Ins. Co., 67 Vt. 418; Crosby v. Enterprise Cheese Co., 67 Vt. 638.

Washington. — Doty v. Krutz, 13 Wash. 169.

Wisconsin. — Burkhardt v. Elgee, 93 Wis. 29.

United States. — Put-in-Bay Waterworks, etc., R. Co. v. Ryan, 181 U. S. 409; North American Transp., etc., Co. v. Morrison, 178 U. S. 262; Vance v. W. A. Vandercook Co., 170 U. S. 468; Wetmore v. Rymer, 169 U. S. 115; Colvin v. Jacksonville, 158 U. S. 450; Northern Pac. R. Co. v. Booth, 152 U. S. 671; Battle v. Atkinson, 115 Fed. Rep. 384; Western Union Tel. Co. v. White, 102 Fed. Rep. 705; Bedford Quarries Co. v. Welch, 100 Fed. Rep. 513; Von Schroeder v. Brittan, 93 Fed. Rep. 9; Robinson v. West Virginia Loan Co., 90 Fed. Rep. 770; Less v. English, (C. C. A.) 85 Fed. Rep. 471; Hayward v. Nordberg Mfg. Co., (C. C. A.) 85 Fed. Rep. 4; Holden v. Utah, etc., Machinery Co., 82 Fed. Rep. 209; Stillwell-Bierce, etc., Co. v. Williamson Oil, etc., Co., 80 Fed. Rep. 68; Baltimore v. Postal Tel. Cable Co., 62 Fed. Rep. 500; U. S. Express Co. v. Poe, 61 Fed. Rep. 475; Cabot v. McMaster, 61 Fed. Rep. 129; Horst v. Merkley, 59 Fed. Rep. 502.

Plea to Jurisdiction. — The question of real amount may be put in issue by plea to the jurisdiction, though the apparent amount, as shown by the pleadings or record, is within the jurisdictional limit. Allison v. Haney, (Tex. Civ. App. 1901) 62 S. W. Rep. 933; Baker v. Guinn, 4 Tex. Civ. App. 539; Strickland v. Sloan, (Tex. Civ. App.

1899) 50 S. W. Rep. 622; Von Schroeder v. Brittan, 93 Fed. Rep. 9.

Judicial Notice. — The court will act upon its knowledge of the real amount in controversy acquired on a former trial, though in the second trial the amount is apparently within the jurisdictional limit. Cantoni v. Betts, 70 Conn. 386.

In Ancillary and Incidental Proceedings the amount in controversy in the principal action controls, provided the incidental demand does not exceed the maximum limit of the court's jurisdiction. De Lesdernier v. De Lesdernier, 45 La. Ann. 1364; Taylor v. Almanda, 50 La. Ann. 351; Harper v. Behagg, 14 Ind. App. 427; Grambling v. Dickey, 118 N. Car. 986.

Where the court has jurisdiction of the principal sum, it may settle the claims of all parties to such sum though such claims are too small to be the subjects of independent actions in such court. Barfield v. Gleason, (Ky. 1901) 63 S. W. Rep. 964, 23 Ky. L. Rep. 128; Robinson v. Chamberlin, (Tex. Civ. App. 1902) 68 S. W. Rep. 209; Parlin, etc., Co. v. Moore, (Tex. Civ. App. 1902) 66 S. W. Rep. 798; Bidwell v. Huff, 103 Fed. Rep. 362; National Bank of Commerce v. Allen, (C. C. A.) 90 Fed. Rep. 545.

A Counterclaim below the minimum limit of the court's jurisdiction may be litigated in an action wherein jurisdiction has been acquired by reason of the amount of the plaintiff's claim. Freeman v. Seitz, 126 Cal. 291; Garrett v. Robinson, 93 Tex. 406.

In Trespass to Try Title the Defendant May Implead His Warrantor though the latter's liability is less than the minimum jurisdictional limit. Brown v. Pontchartrain Land Co., 49 La. Ann. 1779; Meade v. Jones, 13 Tex. Civ. App. 320; Meade v. Warring, (Tex. Civ. App. 1896) 35 S. W. Rep. 308. And see *infra*, X. *Value Distinguished from Amount — Property Rights Involved*, note *In Attachment*.

Bill of Discovery in Aid of Action at Law. — The amount involved by a bill of discovery in aid of an action at law is the amount in controversy in such action. Hurricane Telephone Co. v. Mohler, (W. Va. 1902) 41 S. E. Rep. 421.

713. 1. Heraughty v. Grant, 6 Kan. App. 923, 50 Pac. Rep. 506; State v. Judge, 47 La. Ann. 1022; State v.

714. See note 1.

715. See note 1.

The Real Value. — See note 2.

Exemplary Damages. — See note 3.

Judges, 47 La. Ann. 950; Kirchgraber v. Lloyd, 59 Mo. App. 59; Cox v. Wright, (Tex. Civ. App. 1894) 27 S. W. Rep. 294; Texas, etc., R. Co. v. Hayes, 4 Tex. Civ. App. 88; Burkhardt v. Elgee, 93 Wis. 29; Put-in-Bay Waterworks, etc., R. Co. v. Ryan, 181 U. S. 409; Wetmore v. Rymer, 169 U. S. 115; Colvin v. Jacksonville, 158 U. S. 456; Horst v. Merkley, 59 Fed. Rep. 502.

In Cases Involving Specific Property the value of which must be determined by evidence this rule is especially applicable. Cox v. Wright, (Tex. Civ. App. 1894) 27 S. W. Rep. 294. And see *infra*, X. *Value Distinguished from Amount.*

Federal Courts. — In Wetmore v. Rymer, 169 U. S. 115, it was held that in the federal courts a case may not be dismissed as involving less than the jurisdictional amount unless the facts when made to appear on the record lead to that conclusion as a legal certainty.

714. 1. California. — California Cured Fruit Assoc. v. Ainsworth, 134 Cal. 461; Lehnhardt v. Jennings, 119 Cal. 192.

Colorado. — Sams Automatic Car-Coupler Co. v. League, 25 Colo. 129.

Connecticut. — Hannon v. Bramley, 65 Conn. 193.

District of Columbia. — Mansfield v. Winter, 10 App. Cas. (D. C.) 549.

Georgia. — Griffin v. Bradley, 110 Ga. 327.

Indiana. — McFadden v. Rhodes, 19 Ind. App. 487.

Iowa. — Chicago, etc., R. Co. v. Weaver, 112 Iowa 101; Central City v. Treat, 101 Iowa 109; Thompson v. Jackson, 93 Iowa 376; Redfield v. Stocker, 91 Iowa 383; Fillmore v. Hintz, 90 Iowa 758.

Kansas. — Gabby v. Primley, (Kan. App. 1898) 52 Pac. Rep. 907; Stinson v. Cook, 53 Kan. 179; Berger v. Rife, 7 Kan. App. 639.

Kentucky. — Evans v. Cleaver, (Ky. 1895) 29 S. W. Rep. 29; Cully v. Louisville, etc., R. Co., 101 Ky. 319.

Louisiana. — State v. Fernandez, 49 La. Ann. 249; State v. Judges, 47 La. Ann. 950; State v. Judge, 47 La. Ann.

1022; Lea v. Orleans, 46 La. Ann. 1444; Solari v. Barras, 45 La. Ann. 1128.

Missouri. — May v. Jarvis-Conklin Mortg. Trust Co., 138 Mo. 275; State v. Rombauer, 130 Mo. 288; Kirchgraber v. Lloyd, 59 Mo. App. 59; Drummond Tobacco Co. v. Addison Tinsley Tobacco Co., 52 Mo. App. 10.

New York. — Thacher v. Hope Cemetery Assoc., 146 N. Y. 381.

North Carolina. — Gillam v. Virginia L. Ins. Co., 121 N. Car. 369.

Pennsylvania. — Zimmerman v. Snyder, 9 Pa. Super. Ct. 201; Kuhn v. Eggers, 5 Pa. Dist. 156.

Texas. — Harmon v. Callahan, (Tex. Civ. App. 1896) 35 S. W. Rep. 705; Building, etc., Assoc. v. Cunningham, 92 Tex. 155.

Washington. — Doty v. Krutz, 13 Wash. 169.

Wisconsin. — Burkhardt v. Elgee, 93 Wis. 29.

United States. — North American Transp., etc., Co. v. Morrison, 178 U. S. 262; Vance v. W. A. Vendercook Co., 170 U. S. 468; Battle v. Atkinson, 115 Fed. Rep. 384; Western Union Tel. Co. v. White, 102 Fed. Rep. 705; Robinson v. West Virginia Loan Co., 90 Fed. Rep. 770; Less v. English, (C. C. A.) 85 Fed. Rep. 471; Hayward v. Nordberg Mfg. Co., (C. C. A.) 85 Fed. Rep. 4; Baltimore v. Postal Tel. Cable Co., 62 Fed. Rep. 500; Cabot v. McMaster, 61 Fed. Rep. 129; Horst v. Merkley, 59 Fed. Rep. 502.

715. 1. Byers v. Bellan-Price Invest. Co., 10 Colo. App. 74; Griffith v. Elder, 110 Ga. 453; Hull v. Webb, 78 Ill. App. 617; Biddle v. Pierce, 141 Ind. 148; Murrell v. Humphries, (Ky. 1895) 30 S. W. Rep. 606; Catawba Mills v. Hood, 42 S. Car. 203; Chase v. Bernier, 73 Vt. 307; Page v. Warner, 71 Vt. 180; Crosby v. Enterprise Cheese Co., 67 Vt. 638. But see *infra*, VIII. 3. *Several Claims in One Suit*, par. *Divided Claims or Debt*

2. The Value as Claimed, however, is *prima facie* the real value. Lake Nav. Co. v. Austin Electrical Supply Co., (Tex. Civ. App. 1895) 30 S. W. Rep. 832. See also *infra*, X. *Value Distinguished from Amount.*

3. Thompson v. Jackson, 93 Iowa

715. Attorney's Fees. — See note 4.

[Costs cannot be added to the amount of a judgment rendered or claim rejected for the purpose of entitling an unsuccessful litigant to an appeal, even though there is no statute excluding costs from the appealable amount. See note 4a.]

376; *Rand v. Binder*, (Iowa 1898) 75 N. W. Rep. 505; *Dwyer v. Bassett*, (Tex. Civ. App. 1895) 29 S. W. Rep. 815; *Strickland v. Sloan*, (Tex. Civ. App. 1899) 50 S. W. Rep. 622; *Waugh v. Dabney*, 12 Tex. Civ. App. 290; *Baker v. Guinn*, 4 Tex. Civ. App. 539.

Exemplary Damages Not Properly Pleaded are not calculable in determining the amount in controversy. *Thompson v. Jackson*, 93 Iowa 376; *Peterson v. Thomas*, (Tex. Civ. App. 1893) 24 S. W. Rep. 1124; *Hudson v. Norwood*, 13 Tex. Civ. App. 662; *Ma-gruder v. Ames*, 180 U. S. 496.

715. 4. *De Jarnatt v. Marquez*, 127 Cal. 558; *Peeples v. Strickland*, 101 Ga. 820; *Ashworth v. Harper*, 95 Ga. 660; *Almand v. Almand*, 95 Ga. 204; *Foster's Succession*, 51 La. Ann. 1670; *Rainey v. Laudaudale*, (Tex. Civ. App. 1895) 30 S. W. Rep. 1084; *Rogers v. Riley*, 80 Fed. Rep. 759.

Void Stipulation. — It has been held that attorney's fees expressly stipulated for in a note are calculable as a part of the note, even though the stipulation is void under a statute. *Rimes v. Williams*, 99 Ga. 281; *Warder, etc., Co. v. Raymond*, 7 S. Dak. 451. But see *contra*, *Exchange Bank v. Apalachian Land, etc., Co.*, 128 N. Car. 193.

Where Contingency Is in Abeyance. — In a suit to cancel notes, instituted before their maturity, attorney's fees, though expressly stipulated for, are not calculable as a part of the amount in controversy, the contingency upon which such fees depend being still in abeyance. *Hildebrand v. Walter A. Wood Mowing, etc., Mach. Co.*, 8 Tex. Civ. App. 132.

Attorney's Fees Which Are Not Demanded, though expressly stipulated for, are not calculable. *Davis v. Jones*, 109 Ala. 418; *Morgan v. Kiser*, 105 Ga. 104; *Pickett v. Smith*, 95 Ga. 757. And see *supra*, III. 1. *Jurisdiction Conferred*.

On Appeal. — *Attorney's Fees Allowed under General Practice Rules*, and not by virtue of a previous stipulation between the parties, are separate and distinct from the amount in controversy,

and cannot be included therein in order to confer appellate jurisdiction. *Wiggins v. Com.*, (Ky. 1901) 63 S. W. Rep. 31, 23 Ky. L. Rep. 475; *State v. Judges*, 106 La. 241; *Levitt v. Carr*, 22 Wash. 361; *Durand v. Simpson Logging Co.*, 21 Wash. 21.

Fees Allowed by Statute. — Where a statute allows attorney's fees to be assessed as damages by the jury, in certain specified actions, fees thus assessed constitute a part of the amount in controversy on appeal by the defendant. *Clark v. Ford*, 7 Kan. App. 332. *Contra*, where the fees are taxed as costs, *Eagle Gold Min. Co. v. Bryarly*, 28 Colo. 262. See also *Gulf, etc., R. Co. v. Rowley*, (Tex. Civ. App. 1893) 22 S. W. Rep. 182; *Gulf, etc., R. Co. v. Farmer*, 3 Tex. Civ. App. 458, in which cases the attorney's fees seem to have been regarded as costs, and hence jurisdiction was denied.

Independent Appeal. — Though attorney's fees not previously stipulated for are not calculable to secure appeal in the main action, where such fees are of sufficient amount they may be made the subject of an independent appeal. *State v. Judges*, 106 La. 241; *Simms v. Simms*, 175 U. S. 162.

4a. *Erile v. Placer County*, (Cal. 1896) 44 Pac. Rep. 229; *Randall v. Duff*, (Cal. 1895) 40 Pac. Rep. 386; *Henigan v. Ervin*, 110 Cal. 37; *Perry v. Quackenbush*, 105 Cal. 299; *Eagle Gold Min. Co. v. Bryarly*, 28 Colo. 262; *Lockett v. Clifton*, (Ky. 1902) 67 S. W. Rep. 831; *Boske v. Security Trust, etc., Co.*, (Ky. 1900) 56 S. W. Rep. 524; *Shafer v. Chesapeake, etc., R. Co.*, (Va. 1895) 23 S. E. Rep. 221; *Norfolk, etc., R. Co. v. Clark*, 92 Va. 118; *Shahan v. Shahan*, 48 W. Va. 477; *City Bank v. Hunter*, 152 U. S. 512.

Costs Taxed as Part of the Judgment, pursuant to statutory provision, constitute a part of the amount in controversy on appeal by the defendant. *Winn v. Sanborn*, 10 S. Dak. 340.

Where a Statute Excludes Costs from the Appealable Amount no appeal lies from an order taxing costs, even where the costs exceed the minimum appealable amount. *State v. Kellogg*, 97 Wis. 532.

715. Courts Will Investigate. — See note 5.

716. 2. Amount Must Appear. — See note 2.

Costs Included in Judgment Which Is Subject of Action. — Costs included in a judgment which is made the subject of another and independent suit constitute a part of the amount in controversy. *McClelland v. Cragun*, 54 Kan. 599; *Swartz v. English*, 4 Kan. App. 509; *Nashville, etc., R. Co. v. Mattingly*, 101 Ky. 219.

715. 5. California. — *Lehnhardt v. Jennings*, 119 Cal. 192.

Iowa. — *Fillmore v. Hintz*, 90 Iowa 758.

Kentucky. — *Hale v. Grogan*, (Ky. 1899) 50 S. W. Rep. 257.

Louisiana. — *State v. Judge*, 47 La. Ann. 1022; *Lea v. Orleans*, 46 La. Ann. 1444.

Missouri. — *Kuh v. Garvin*, 53 Mo. App. 64; *Drummond Tobacco Co. v. Addison Tinsley Tobacco Co.*, 52 Mo. App. 10.

Texas. — *Smith v. Horton*, 92 Tex. 21.

716. 2. Alabama. — *Gunter v. Mason*, 125 Ala. 644.

Delaware. — *Pepper v. Warren*, 2 Marv. (Del.) 225.

Illinois. — *Gottfred v. Woodruff*, 193 Ill. 401; *Seator v. Fay*, 188 Ill. 507; *McDole v. Shepardson*, 156 Ill. 383.

Indiana. — *Scheiber v. United Telephone Co.*, 23 Ind. App. 702.

Kansas. — *Fraternal Aid Assoc. v. Evans*, 60 Kan. 856, 56 Pac. Rep. 9; *Roberts v. Jordan*, 60 Kan. 859, 57 Pac. Rep. 938; *Packard v. Packard*, 56 Kan. 132; *Crouse v. Brown*, (Kan. 1902) 69 Pac. Rep. 165; *Grant v. Robb*, (Kan. 1902) 67 Pac. Rep. 852; *Barker v. Lanyon Zinc Co.*, (Kan. 1902) 67 Pac. Rep. 629; *Staley v. Chicago, etc., R. Co.*, 63 Kan. 885, 65 Pac. Rep. 643; *Davenport v. School Dist. No. 4*, 62 Kan. 869, 64 Pac. Rep. 596; *Webber v. Genoways*, 9 Kan. App. 670; *Weil v. Pooch*, 9 Kan. App. 883, 57 Pac. Rep. 1057; *Gabby v. Primley*, (Kan. App. 1898) 52 Pac. Rep. 907; *Hicks v. Ferd. Heim Brewing Co.*, 7 Kan. App. 812; *Smith v. Benton*, 7 Kan. App. 62; *Werner v. Barber Asphalt Paving Co.*, 7 Kan. App. 815; *Casner v. Samis*, 6 Kan. App. 920, 51 Pac. Rep. 802; *Sparks v. Sparks*, 6 Kan. App. 750; *Garretson v. Chicago, etc., R. Co.*, 5 Kan. App. 164; *Atchison, etc., R. Co. v. Anderson*, 5 Kan. App. 707; *Chuub v. Steward*, 5 Kan. App. 72; *Simpson v. Duvall*, 4 Kan. App. 588;

Newell v. Daniels, 5 Kan. App. 505; *Pomeroy v. Schwendener*, 2 Kan. App. 305; *Gray v. Haish*, 2 Kan. App. 145; *Webber v. Carey*, 2 Kan. App. 165; *Salina, etc., R. Co. v. Conger*, 2 Kan. App. 287.

Kentucky. — *Taylor v. Moore*, (Ky. 1901) 65 S. W. Rep. 612.

Louisiana. — *Immanuel Presb. Church v. Riedy*, 52 La. Ann. 1353; *Murray v. Kimbro*, 49 La. Ann. 351.

Missouri. — *Gast Bank Note, etc., Co. v. Fennimore Assoc.*, 147 Mo. 557; *Kane v. Kane*, 146 Mo. 505; *Kitchell v. Manchester Road Electric R. Co.*, 146 Mo. 455; *Kansas City v. Zahner*, 138 Mo. 453; *Hilton v. St. Louis*, 129 Mo. 389.

Pennsylvania. — *Matthews v. Rising*, 194 Pa. St. 217; *Staib's Estate*, 188 Pa. St. 238; *Matter of Misselwitz*, 1 Pa. Super. Ct. 221, which last case was decided under Act Pa., June 24, 1895, requiring that the amount involved must appear on the face of the record in order to give jurisdiction to the Superior Court.

Texas. — *Gulf, etc., R. Co. v. Buford*, 85 Tex. 430; *Dewitt County v. Wischkemper*, (Tex. 1902) 67 S. W. Rep. 882; *Lillard v. Freestone County*, 23 Tex. Civ. App. 363; *Scottish-American Mortg. Co. v. Board of Equalization*, (Tex. Civ. App. 1898) 45 S. W. Rep. 757; *Gautier v. McHenry*, 15 Tex. Civ. App. 332.

West Virginia. — *Deaton v. Mitchell*, 45 W. Va. 670.

Wisconsin. — *Crata v. Pettepher*, 112 Wis. 252.

United States. — *Citizens' Bank v. Cannon*, 164 U. S. 319; *Green v. Fisk*, 154 U. S. 668; *South Carolina v. Seymour*, 153 U. S. 353; *El Paso Water Co. v. El Paso*, 152 U. S. 157; *Cochran v. Childs*, (C. C. A.) 111 Fed. Rep. 433; *Cooper v. Preston*, 105 Fed. Rep. 403; *Yellow Aster Min., etc., Co. v. Winchell*, 95 Fed. Rep. 213; *Harvey v. Raleigh, etc., R. Co.*, 89 Fed. Rep. 115; *Home Ins. Co. v. Nobles*, 63 Fed. Rep. 641; *Horst v. Merkley*, 59 Fed. Rep. 502. But see *Glottin v. Oswald*, 65 Fed. Rep. 151, decided under Act Cong. 1881, providing that a trademark case may be begun in the federal courts without averring the amount in controversy.

The Court Will of Its Own Motion con-

sider whether the jurisdictional amount sufficiently appears. *Gunter v. Mason*, 125 Ala. 644; *Winkler v. Miami County*, 6 Kan. App. 519; *Murray v. Kimbro*, 49 La. Ann. 351; *Deaton v. Mitchell*, 45 W. Va. 670; *Henk v. Baumann*, 100 Wis. 28.

The Record of a Court of Limited Jurisdiction must show that the amount was within the jurisdictional limit, or the judgment will be void. *Taylor v. Moore*, (Ky. 1901) 65 S. W. Rep. 612; *Rehmyer v. Sheffer*, 7 Del. Co. Rep. (Pa.) 592, 13 York Leg. Rec. (Pa.) 183.

Amount Unknown to Plaintiff.—The plaintiff is not excused from showing the amount necessary for jurisdiction by an allegation that it is unknown to him. *Kane v. Kane*, 146 Mo. 605.

General Allegations that the amount involved exceeds a certain sum—the minimum jurisdictional limit—when supported by other allegations relating to the subject-matter and the extent of the pleader's rights therein are sufficient to confer jurisdiction. *Hale v. Sweet*, 7 Kan. App. 409; *Newell v. Leathers*, 50 La. Ann. 162; *State v. Frost*, 113 Wis. 623; *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290; *Scott v. Donald*, 165 U. S. 107; *Fishback v. Western Union Tel. Co.*, 161 U. S. 96; *Green v. Valley*, 101 Fed. Rep. 882; *Butchers', etc., Stock-Yards Co. v. Louisville, etc., R. Co.*, (C. C. A.) 67 Fed. Rep. 35.

An Averment of the Legal Conclusion that the amount in controversy exceeds the minimum jurisdictional limit is insufficient. *Fishback v. Western Union Tel. Co.*, 161 U. S. 96. See also **LEGAL CONCLUSIONS**.

Exact Amount Need Not Appear.—A showing that the amount is between two other amounts, both within the jurisdictional limit, is sufficient. *Landis v. Davidson*, (Kan. App. 1898) 53 Pac. Rep. 483.

Evidence and Testimony.—*Where the Record Is Silent*, evidence and testimony will be received to show the amount. *Towle v. Weise*, (Kan. 1902) 68 Pac. Rep. 637; *Newell v. Daniels*, 5 Kan. App. 505; *Reinert v. Rhody*, 52 La. Ann. 2029. *Contra*, *McDole v. Shepardson*, 156 Ill. 383.

Where the Record Affirmatively Shows an Amount, evidence and testimony will not be received to show a different amount. *Spencer v. Nugent*, (Tex. Civ. App. 1902) 68 S. W. Rep. 729.

Affidavits to show the amount on ap-

peal will be received where the record is silent on the subject and the case is one in which proper pleading would not necessarily disclose the amount. *McLaughlin v. Darlington*, 6 Kan. App. 212; *Waters Pierce Oil Co. v. New Iberia*, 47 La. Ann. 863; *Austin Real Estate, etc., Co. v. Bahn*, 87 Tex. 582; *Dorothy v. Richmond*, 107 Wis. 652; *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290.

Where the Amount Involved Is Capable of Definite Calculation, affidavits may be received to show that the court has no jurisdiction, notwithstanding a sufficient amount claimed in the *ad damnum*. *U. S. Express Co. v. Poe*, 61 Fed. Rep. 475.

Where the Amount Is of Necessity Indefinite, such as unliquidated damages, *ex parte* affidavits will not be received to contradict the *ad damnum*. *Holden v. Utah, etc., Machinery Co.*, 82 Fed. Rep. 209.

The Amount Is Not Presumed, but a reasonable doubt as to the value will be resolved in favor of jurisdiction. *Endel v. Norris*, 93 Tex. 540; *Houston Ice, etc., Co. v. North Galveston Imp. Co.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1079.

In *Matthews v. Ripley*, 101 Wis. 100, under a statute giving jurisdiction to justices where the amount, "proven to the satisfaction of the justice," does not exceed a certain sum, it was held on an appeal from a justice that, in the absence of any showing to the contrary, and the record being silent, it would be presumed that the justice had jurisdiction of the amount.

Burden of Proving Jurisdiction.—*Pepper v. Warren*, 2 Marv. (Del.) 225; *Green v. Fisk*, 154 U. S. 668.

Want of Jurisdiction.—*Heman v. Wade*, 141 Mo. 596. See also *Peterson First Nat. Bank v. Bourdelais*, 109 Iowa 497; *Democrat Pub. Co. v. Lewis*, 90 Iowa 304, which cases were decided under a statute [now Code Iowa, §§ 4100, 4110] giving to the Supreme Court appellate jurisdiction in all cases except when the amount "as shown by the pleadings" does not exceed a certain sum.

Court Will Dismiss.—*Delaware*.—*Pepper v. Warren*, 2 Marv. (Del.) 225.

Kansas.—*Crouse v. Brown*, (Kan. 1902) 69 Pac. Rep. 165; *Fraternal Aid Assoc. v. Evans*, 60 Kan. 856, 56 Pac. Rep. 9; *Roberts v. Jordon*, 60 Kan. 859, 57 Pac. Rep. 938; *Weil v. Pooch*,

718. 3. Amount Unaffected by Agreement of Parties. — See note 1.

4. Amount Not Dependent on Collateral Effect of Judgment. — See note 2.

9 Kan. App. 883, 57 Pac. Rep. 1057; *Hicks v. Ferd Helm Brewing Co.*, 7 Kan. App. 812; *Werner v. Barber Asphalt Paving Co.*, 7 Kan. App. 815; *Winkler v. Miami County*, 6 Kan. App. 519; *Casner v. Samis*, 6 Kan. App. 920, 51 Pac. Rep. 802; *Gray v. Haish*, 2 Kan. App. 145; *Pomeroy v. Schwendener*, 2 Kan. App. 305; *Salina, etc., R. Co. v. Conger*, 2 Kan. App. 287.

Louisiana. — *Murray v. Kimbro*, 49 La. Ann. 351.

New York. — *Thacher v. Hope Cemetery Assoc.*, 146 N. Y. 381.

Texas. — *Storrie v. Woessner*, (Tex. Civ. App. 1898) 47 S. W. Rep. 837; *Gregory v. Gulf, etc., R. Co.*, 20 Tex. Civ. App. 272.

Washington. — *Chapin v. Kenoyer*, 12 Wash. 536.

West Virginia. — *Deaton v. Mitchell*, 45 W. Va. 670.

United States. — *South Carolina v. Seymour*, 153 U. S. 353; *Harvey v. Raleigh, etc., R. Co.*, 89 Fed. Rep. 115.

Where It Affirmatively Appears that the Court Has Not Jurisdiction the court will, *a fortiori*, render a judgment of dismissal.

Alabama. — *Gunter v. Mason*, 125 Ala. 644.

Kansas. — *Finnup v. Garfield Tp.*, 7 Kan. App. 815.

Kentucky. — *Hale v. Grogan*, (Ky. 1899) 50 S. W. Rep. 257.

Louisiana. — *Macedonia Baptist Church v. Dickinson*, 52 La. Ann. 704.

South Dakota. — *Issenhuth v. Baum*, 10 S. Dak. 340.

Texas. — *Spencer v. Nugent*, (Tex. Civ. App. 1902) 68 S. W. Rep. 729.

Wisconsin. — *Troy Carriage Co. v. Bonell*, 102 Wis. 424.

See also *Peterson First Nat. Bank v. Bourdelais*, 109 Iowa 497; *Democrat Pub. Co. v. Lewis*, 90 Iowa 304.

An Appeal Will Be Transferred to another court having jurisdiction, if there be one, where the amount involved is such that the court to which the appeal is erroneously taken cannot take jurisdiction.

Indiana. — *Scheiber v. United Telephone Co.*, 23 Ind. App. 702.

Kansas. — *Kansas City v. Frower*, 61 Kan. 859.

Missouri. — *Lile v. Gibson*, 163 Mo

182; *Kansas City v. Metropolitan St. R. Co.*, 162 Mo. 236; *Kitchell v. Manchester Road Electric R. Co.*, 146 Mo. 455; *Overall v. St. Louis Traction Co.*, 88 Mo. App. 175; *Rivers v. Blom*, 78 Mo. App. 142.

Pennsylvania. — *Matthews v. Rising*, 194 Pa. St. 217; *Staib's Estate*, 188 Pa. St. 238; *Matter of Misselwitz*, 1 Pa. Super. Ct. 221.

Amendments. — See *supra*, II. *Amount Claimed*; and *infra*, XII. 3. *In Intermediate Appeals.*

718. 1. Denver v. Marsellis, (Colo. 1901) 66 Pac. Rep. 887; *McClaskey v. Lake View Min., etc., Co.*, 18 Colo. 65; *Wedgewood v. Parr*, 112 Iowa 514; *Hilton v. St. Louis*, 129 Mo. 389; *Matthews v. Rising*, 194 Pa. St. 217; *Land Mortg. Bank v. Voss*, (Tex. Civ. App. 1902) 68 S. W. Rep. 732; *Sanders v. Pierce*, 68 Vt. 468; *Henk v. Baumann*, 100 Wis. 28; *Willis v. Eastern Trust, etc., Co.*, 167 U. S. 76.

Neither Appearance nor Joinder in Appellate Proceedings can confer jurisdiction when the proper amount is not involved. *McClaskey v. Lake View Min., etc., Co.*, 18 Colo. 65; *Moise v. Powell*, 40 Neb. 671; *Willis v. Eastern Trust, etc., Co.*, 167 U. S. 76.

Iowa. — See *Wedgewood v. Parr*, 112 Iowa 514.

Estoppel. — Where the plaintiff in replevin claims that the value of the property is within the court's jurisdiction, and the defendant goes to trial without objection, he cannot thereafter assert that the property is not of the value claimed by the plaintiff. *Parker v. Bradford*, 68 Minn. 437.

Where the defendant, without objection, allows the plaintiff to abandon his claim for double damages for the killing of cattle, and the case is thus reduced to one for actual damages, he cannot claim the right to appeal from a judgment for less than the appealable amount on the ground that the plaintiff had no right to abandon the claim for double damages. *Huber v. Brown*, 17 Wash. 4.

Consolidations of Amount by Agreement of Parties. — See *infra*, VIII. 1. *Several Plaintiffs.*

2. Gorman v. Glenn, (Ky. 1900) 58 S. W. Rep. 776, 22 Ky. L. Rep. 839;

719. VI. AMOUNT MUST BE PECUNIARY. — See note 1.**VII. ACCRUED INTEREST — 1. When Calculable.** — See note 2.

State *v.* Judge, 48 La. Ann. 1027; Hosack *v.* Crill, 197 Pa. St. 370; Cleaver *v.* Duke, (Tex. Civ. App. 1900) 58 S. W. Rep. 145; Huntington *v.* Saunders, 163 U. S. 319; Hollander *v.* Fechheimer, 162 U. S. 326; Baltimore *v.* Postal Tel. Cable Co., 62 Fed. Rep. 500; Lachance *v.* La Société De Prêts, 26 Can. Sup. Ct. 200.

719. 1. Macedonia Baptist Church *v.* Dickinson, 52 La. Ann. 704; Vincent *v.* Phillips, 47 La. Ann. 1216, 1238; Perrine *v.* Slack, 164 U. S. 452.

Habeas Corpus, though a civil proceeding, is not subject to review by courts whose jurisdiction depends on the amount in controversy. Stevens *v.* Moore, 4 Kan. App. 757; *In re* Borrego, 8 N. Mex. 655.

A Money Judgment need not be demanded. It is sufficient if the right or interest involved is capable of pecuniary valuation. State *v.* Frost, 113 Wis. 623.

A Mere Adjudication of Liability may entitle the defendant to an appeal though no money judgment is rendered against him. St. Joe, etc., Min. Co. *v.* Aspen First Nat. Bank, 24 Colo. 537; Mutual Reserve Fund L. Assoc. *v.* Smith, 169 Ill. 264.

2. Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528, holding that interest accruing *pendente lite* and allowed in the judgment is calculable on appeal. See also Ormond *v.* Sage, 69 Minn. 523, wherein it was held that interest accruing after the institution of the suit is merely incidental to the amount in controversy and not calculable as a part thereof, so far at least as concerns the authority of the justice to enter judgment therefor; Lewis *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 35 Misc. (N. Y.) 304, wherein it was held that interest demanded in an action of tort was calculable; M'Cormick Harvesting Mach. Co. *v.* Marchant, 11 Utah 68, wherein it was held that interest accruing *pendente lite* is calculable as a part of the amount in controversy, but that including it in the judgment, which is thereby raised above the court's maximum limit, does not render the judgment void provided the amount in controversy at the beginning of the action was within the court's jurisdiction.

Interest Accrued Before Suit. — *In Actions on Claims Bearing Interest by Virtue of Their Legal Character*, interest accrued prior to suit is, when claimed by the plaintiff, calculable as a part of the amount in controversy the same as if it were principal.

Georgia. — Baxley Banking Co. *v.* Carter, 112 Ga. 529; Almand *v.* Almand, 95 Ga. 204.

Idaho. — Quayle *v.* Glenn, (Idaho 1899) 57 Pac. Rep. 308.

Louisiana. — Bruno *v.* Oviatt, 48 La. Ann. 471.

Minnesota. — Crawford *v.* Hurd Refrigerator Co., 57 Minn. 187.

Nebraska. — Adams *v.* Nebraska Sav., etc., Bank, 56 Neb. 121.

North Carolina. — Exchange Bank *v.* Apalachian Land, etc., Co., 128 N. Car. 193.

Ohio. — Burnap *v.* Sylvania Butter Co., 1 Ohio Dec. 110, 7 Ohio N. P. 217.

Washington. — State *v.* Superior Ct., 9 Wash. 369.

In Actions for Unliquidated Damages interest accrued prior to suits is calculable, when demanded from a stated time, as a part of the amount in controversy, just as if it were principal. St. Louis, etc., R. Co. *v.* Brown, 10 Kan. App. 401; Lewis *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 35 Misc. (N. Y.) 304; Dwyer *v.* Bassett, (Tex. Civ. App. 1895) 29 S. W. Rep. 815; Brown *v.* Webster, 156 U. S. 328.

Must Be Demanded. — It must appear that interest is claimed, otherwise it will not be considered in determining the amount in controversy. Mansfield *v.* Winter, 10 Abb. Cas. (D. C.) 549; Kansas City *v.* Metropolitan St. R. Co., 162 Mo. 236; Houston, etc., R. Co. *v.* Lockhart, (Tex. Civ. App. 1896) 39 S. W. Rep. 320; Northern Pac. R. Co. *v.* Booth, 152 U. S. 671.

Unrecoverable Interest forms no part of the amount in controversy though the plaintiff claims and seeks to recover it. Spencer *v.* Hall, (County Ct.) 30 Misc. (N. Y.) 75.

Interest on the Judgment is not calculable as a part of the amount in controversy on appeal though the defendant is the appellant. Johnson *v.* Tully, (Ariz. 1887) 12 Pac. Rep. 567 [following Merrill *v.* Petty, 16 Wall. (U. S.) 341]; Cincinnati, etc., R. Co. *v.* Grames, 135

720. 2. When Not Calculable — Excluded by Statute. — See note 1.

721. VIII. AGGREGATED AMOUNT — 1. Several Plaintiffs. — See note 1.

Ind. 44. See also *Arnold v. Lewis County Ct.*, 38 W. Va. 142.

720. 1. Gallagher v. McGraw, 132 Cal. 601; *Butler v. Rasdall*, (Ky. 1900) 56 S. W. Rep. 652; *Spiceland v. Shelton*, (Ky. 1899) 53 S. W. Rep. 274; *Hale v. Grogan*, (Ky. 1899) 50 S. W. Rep. 257; *Walter A. Wood Mowing, etc.*, Mach. Co. v. Taylor, 104 Ky. 217; *Clark v. Collins*, (Ky. 1901) 60 S. W. Rep. 369, 22 Ky. L. Rep. 1304; *State v. Fernandez*, 49 La. Ann. 249; *Greene County v. Kortrecht*, (C. C. A.) 81 Fed. Rep. 241.

A Stipulation to Regard Interest as Principal is unavailing to render it a part of the amount in controversy when it is excluded by statute. *Christian v. Superior Ct.*, 122 Cal. 117; *Bradley v. Asher*, 65 Mo. App. 589.

Inclusion of Interest Not Presumed. — The record must show that interest has been included in the claim sued on or the judgment rendered; otherwise it will be considered as a part of the amount in controversy. *Crandall v. Colley*, 178 Mass. 339.

If the Interest Can Be Identified from any part of the record, it will be excluded from the computation of the amount in controversy. *Spiceland v. Shelton*, (Ky. 1899) 53 S. W. Rep. 274; *Hale v. Grogan*, (Ky. 1899) 50 S. W. Rep. 257.

Ohio Statute. — The provision in 93 Ohio Laws 255 limiting the Supreme Court's appellate jurisdiction to judgments involving a sum greater than three hundred dollars, exclusive of interest, excludes only the interest on the judgment, and not that which is included in the judgment. *Toledo v. Buechell*, 64 Ohio St. 389.

Interest as Special Damages. — Statutes excluding interest from computation as a part of jurisdictional amounts usually refer only to interest as such, *e. g.*, interest on interest-bearing instruments, and not to interest allowed as special damages, as in actions for unliquidated damages, conversion, etc. *Schulz v. Tessman*, 92 Tex. 488; *Baker v. Smelser*, 88 Tex. 26; *Dwyer v. Bassett*, (Tex. Civ. App. 1895) 29 S. W. Rep. 815; *Brown v. Webster*, 156 U. S. 328.

Interest as Penalty. — A statute which precludes interest from being taken as

a part of the amount in controversy does not apply to interest which another statute allows as a penalty against the defendant in certain actions for damages. *Gulf, etc., R. Co. v. Gregory*, (Tex. Civ. App. 1900) 59 S. W. Rep. 310.

Interest Coupons constitute separate contracts, and are not excluded by statutes excluding interest. *Home, etc., Invest., etc., Co. v. Ray*, 69 Fed. Rep. 657; *Edwards v. Bates County*, 163 U. S. 269. But interest on the coupons and on the bonds after maturity is interest within the meaning of the statutes. *Greene County v. Kortrecht*, (C. C. A.) 81 Fed. Rep. 241.

Implied Exclusion. — Under Code Civ. Pro. Neb., § 1017, which makes the appellate jurisdiction depend upon the amount claimed in the bill of particulars, interest on the verdict is not calculable. *Moise v. Powell*, 40 Neb. 671.

Under Rev. Stat. Quebec, art. 2311, making an appeal depend on the sum "demanded, and not that recovered," interest cannot be added to the sum demanded in order to obtain an appeal. *Dufresne v. Guévremont*, 26 Can. Sup. Ct. 216.

721. 1. Texas, etc., R. Co. v. Gentry, 163 U. S. 353; *Brown v. Trousdale*, 138 U. S. 389; *Hartford F. Ins. Co. v. Bonner Mercantile Co.*, (C. C. A.) 56 Fed. Rep. 378, in which last case it was held that in proceedings by several parties to set aside an award against them, the amount in controversy is the aggregate amount of the award.

In Appeals. — *On Appeal by Several Plaintiffs* whose interests are common, the amount in controversy is their aggregated interests. *Com. v. Scott*, (Ky. 1901) 65 S. W. Rep. 596; *Baker v. Lee*, 49 La. Ann. 874; *Amato v. Ermann*, 47 La. Ann. 967; *Cheatham v. Aistrop*, 97 Va. 457.

On an Appeal by the Defendant from a joint judgment in favor of several plaintiffs, the amount in controversy is the total amount of the judgment. *Armstrong v. Vicksburg, etc., R. Co.*, 46 La. Ann. 1448; *Hicks v. Roanoke Brick Co.*, 94 Va. 741; *Williams v. Clark*, 93 Va. 690; *Texas, etc., R. Co. v. Gentry*, 163 U. S. 353.

722. 2. Several Defendants. — See note 1.

3. Several Claims in One Suit. — See note 2.

723. Several Items in One Demand. — See note 1.

Consolidation by Agreement. — Where cases of the same character are consolidated by agreement, the aggregate amount involved determines the appellate jurisdiction. *Tuthill Spring Co. v. Smith*, 90 Iowa 331; *Skinner v. Cowley County*, 63 Kan. 557; *Security Co. v. Panhandle Nat. Bank*, 93 Tex. 575.

A Misjoinder for the Purpose of Making up the Jurisdictional Amount will not be permitted. *Auer v. Lombard*, (C. C. A.) 72 Fed. Rep. 209. See also *Fitchett v. Blows*, (C. C. A.) 74 Fed. Rep. 47.

722. 1. Moore v. McSleeper, 102 Cal. 277; *Ricketts v. Hamilton*, (Ky. 1895) 29 S. W. Rep. 736; *Ross v. Enaut*, 46 La. Ann. 1250; *Kuh v. Garvin*, 53 Mo. App. 64; *Jalufka v. Matejek*, 22 Tex. Civ. App. 384; *Cooper v. Preston*, 105 Fed. Rep. 403; *Pacific Live-Stock Co. v. Hanley*, 98 Fed. Rep. 327, wherein numerous cases were cited and reviewed.

2. Brigham-Hopkins Co. v. Gross, 107 Fed. Rep. 769 [citing 1 ENCYC. OF PL. AND PR. 722]; *Friend v. Smith Sons' Gin, etc., Co.*, 59 Ark. 86; *Vinet v. Bres*, 48 La. Ann. 1254; *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28; *Weaver v. Norway Tack Co.*, 80 Fed. Rep. 700; *Coolidge v. Ray*, 75 Fed. Rep. 39; *Fitchett v. Blows*, (C. C. A.) 74 Fed. Rep. 47; *Western Union Tel. Co. v. Poe*, 61 Fed. Rep. 449. See also *Lehman v. Coulton*, 105 La. 431.

Several Penalties. — *Burrell v. Hughes*, 116 N. Car. 430.

Several Counterclaims may be aggregated to determine the court's jurisdiction thereof. *General Electric Co. v. Williams*, 123 N. Car. 51.

723. 1. Several Counts. — *Counts Stating Various Causes of Action.* — Where various causes of action are properly stated in several counts the jurisdiction will depend on the aggregate amount claimed. *Waterman v. Glisson*, 115 Ga. 95; *Wedgewood v. Parr*, 112 Iowa 514; *Gilman v. American Producers' Controlling Co.*, 180 Mass. 319; *Williamsport v. Williamsport Water Co.*, 7 Pa. Dist. 206. Compare *Little Rock, etc., R. Co. v. Smith*, 66 Ark. 278, holding that a justice of the peace may decide in one action several claims *ex delicto*, each being within his jurisdiction, though the

aggregate amount exceeds his jurisdictional limit.

Counts Stating Same Cause of Action. — Where the several counts are resorted to merely to state the same cause of action in various ways, the several amounts demanded cannot be aggregated. *Cardwell v. Stuart*, 164 Mo. 166; *Riffe v. Wabash R. Co.*, 137 Mo. 186; *Fields v. Ft. Worth, etc., R. Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 255; *Richmond v. Henderson*, 48 W. Va. 389.

Where Only One Recovery Is Claimed, the amounts set forth in various counts will not be aggregated. *Houston Ice, etc., Co. v. Edgewood Distilling Co.*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1075.

Claims Acquired by Assignment. — *Brigham-Hopkins Co. v. Gross*, 107 Fed. Rep. 769 [citing 1 ENCYC. OF PL. AND PR. 723]; *Davis v. Mills*, 99 Fed. Rep. 39; *Tennent-Stribling Shoe Co. v. Roper*, (C. C. A.) 94 Fed. Rep. 739; *Bergman v. Inman*, 91 Fed. Rep. 293.

Value of Property and Damages. — In actions for the recovery of property and damages for its detention, the value of the property and the damages claimed may be added in determining the jurisdictional amount. *Thompson v. Willard*, 66 Ark. 346; *Wedgewood v. Parr*, 112 Iowa 514; *Hodge v. Monroe Mercantile Co.*, 105 La. 668; *Baker v. Guinn*, 4 Tex. Civ. App. 539; *Davis v. Webb*, 46 W. Va. 6. See also *Ferguson v. Byers*, (Oregon 1902) 67 Pac. Rep. 1115, decided under Hill's Annot. Laws Oregon, § 908, subdiv. 2. But see *Barnard v. Devine*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 182, holding, under a statute (New York City Charter, § 1364, subdiv. 7) conferring jurisdiction of actions for the recovery of chattels where the value thereof does not exceed a certain amount, that jurisdiction in such actions depended exclusively upon the value of the chattels, regardless of the damages for detention. See further *Vance v. W. A. Vandercook Co.*, 170 U. S. 468 (construing the law of South Carolina, and following *Loeb v. Mann*, 39 S. Car. 465), in which case it was held that in an action for trover jurisdiction depends on the value of the property, regardless of damages claimed for its deten-

723. Divided Claims or Debt. — See note 2.

[4. **Several Suits Between Same Parties.** — When several suits between the same parties are consolidated, and a single judgment is rendered, the total amount of such judgment is the amount in controversy on appeal. See note 2a.]

724. IX. UNAGGREGATED AMOUNT — **Several Claims in One Suit.** — See note 1.

tion, such damages not being allowable in South Carolina.

In an Action to Foreclose a Mortgage. the amount of the mortgage lien and the value of the mortgaged property will not be consolidated to form the jurisdictional amount. *Conner v. Jacobs*, (Tex. Civ. App. 1899) 51 S. W. Rep. 640.

Relief Against Taxes. — In a suit by a taxpayer for relief against taxes claimed to be illegal, the amount in controversy is the aggregate of the taxes sought to be imposed by the alleged illegal assessment, and not merely the amount of such taxes which the plaintiff will have to pay. *Sentell v. Police Jury*, 48 La. Ann. 96. See also *Brown v. Trousdale*, 138 U. S. 389, which was a case in which many taxpayers of a county sued jointly for themselves and on behalf of all other taxpayers of the county, and also on behalf of the county, against the city authorities and the holders of certain county bonds, to invalidate the whole series of the bonds, and incidentally to enjoin a tax levied to pay the interest on the bonds. It was held that the pecuniary interests of the several plaintiffs and of all the taxpayers in the county were identical, and hence might be aggregated to form the jurisdictional amount. And see *infra*, IX. *Unaggregated Amount*, note, *Taxes and Assessments Not Aggregated*.

723. 2. *Parks v. Oskamp*, 97 Ga. 802; *State v. Newman*, 49 La. Ann. 52; *Norvell v. Mecke*, 127 N. Car. 401; *Bullard v. Thorpe*, 66 Vt. 599; *Richmond v. Henderson*, 48 W. Va. 389; *Wells v. Michigan Mut. L. Ins. Co.* 41 W. Va. 131; *Hale v. Weston*, 40 W. Va. 313.

Claims May Be Split and thus brought within the jurisdictional limit where they arise from separate transactions, or are in their nature divisible. *Starnes v. Mutual Loan, etc., Co.*, 102 Ga. 597; *Simpson v. Elwood*, 114 N. Car. 528.

In Georgia a creditor may, with his debtor's consent, split his claim and maintain several suits thereon in a

justice's court, though the total is in excess of such court's jurisdiction. *McDonald v. Tison*, 94 Ga. 549.

In Michigan a general account may be split up under How. Annot. Stat. Mich. (1882), § 6876. *Phelps v. Abbott*, 116 Mich. 624.

Splitting by Assignment will not be allowed. *German F. Ins. Co. v. Bul-lene*, 51 Kan. 764.

2a. *Reynolds v. Neal*, 91 Ga. 609; *Iustus's Succession*, 47 La. Ann. 302; *State v. Fraser*, 165 Mo. 242.

Consolidation Resulting in Excess of Jurisdiction. — Several actions pending between the same parties cannot be consolidated where the aggregate amount will be in excess of the court's jurisdiction. *Gillin v. Canary*, (Supm. Ct. App. T.) 26 Civ. Pro. (N. Y.) 230, 19 Misc. (N. Y.) 594.

724. 1. *Arkansas.* — *Friend v. Smith Sons' Gin, etc., Co.*, 59 Ark. 86. *Kentucky.* — *Oswald v. Morris*, 92 Ky. 48; *Smith v. Catlin*, (Ky. 1901) 63 S. W. Rep. 473, 23 Ky. L. Rep. 381.

Louisiana. — *Landry v. Caffery Cent. Sugar Refinery, etc., Co.*, 104 La. 757.

Ohio. — *Burnap v. Sylvania Butter Co.*, 1 Ohio Dec. 110, 7 Ohio N. P. 217.

Pennsylvania. — *Samson's Estate*, 201 Pa. St. 590; *Jennings' Estate*, 195 Pa. St. 406; *Staib's Estate*, 188 Pa. St. 238.

Texas. — *Meade v. Warring*, 90 Tex. 121.

Virginia. — *White v. Valley Bldg., etc., Co.*, 96 Va. 270.

Washington. — *Garneau v. Port Blakely Mill Co.*, 20 Wash. 97.

United States. — *Chamberlin v. Browning*, 177 U. S. 605; *Wilson v. Kiesel*, 164 U. S. 248; *Davis v. Schwartz*, 155 U. S. 631; *Chapman v. Handley*, 151 U. S. 443; *Auer v. Lombard*, (C. C. A.) 72 Fed. Rep. 209; *Busey v. Smith*, 67 Fed. Rep. 13; *Holt v. Bergevin*, 60 Fed. Rep. 1.

Illustrations of proceedings in which the doctrine has been applied are as follows:

Creditors' Bill. — *State v. Judges*, 105 La. 333; *Craig v. Williams*, 90 Va.

724. Separate Promises on One Instrument. — See note 2.

725. Claim and Set-off Cannot Be United. — See note 2.

On Appeals Judgments Cannot Be United. — See note 3.

726. X. VALUE DISTINGUISHED FROM AMOUNT — Property Rights Involved. — See note 1.

500; Davis v. Schwartz, 155 U. S. 631; Smithson v. Hubbell, 81 Fed. Rep. 593; Putney v. Whitmire, 66 Fed. Rep. 385. But see *infra*, X. *Value Distinguished from Amount*, par. In *Suits Annuling Instruments*.

Injunction. — Chamberlin v. Brown- ing, 177 U. S. 605; Ogden City v. Arm- strong, 168 U. S. 224; Citizens' Bank v. Cannon, 164 U. S. 319; Fishback v. Western Union Tel. Co., 161 U. S. 96; Hagge v. Kansas City St. R. Co., 104 Fed. Rep. 391; Smithson v. Hubbell, 81 Fed. Rep. 593. See also Wheless v. St. Louis, 96 Fed. Rep. 865, wherein many cases are cited, distinguished, and discussed.

Ancillary Injunction. — Where the same defense is made to several cases, and all but one, in which the amount is too small, are removed to a federal court, the prosecution of the one not removed, as well as of the others, may be enjoined to await the decision of the appellate court. Virginia-Carolina Chemical Co. v. Home Ins. Co., (C. C. A.) 113 Fed. Rep. 1. See also *supra*, V. 1. In *General*, note In *Ancillary and Incidental Proceedings*.

Garnishment. — Payne v. Chicago, etc., R. Co., 170 Ill. 607.

Quieting Title. — Stemmler v. Mc- Neill, 102 Fed. Rep. 660.

Mortgage Foreclosure. — Carlow v. Fowler, 62 Kan. 868, 63 Pac. Rep. 737.

Taxes and Assessments Not Aggregated. — Taxes which several taxpayers will each have to pay by reason of the issue of municipal bonds cannot be aggregated for the purpose of giving to a federal court jurisdiction of a joint suit to restrain the issue of such bonds. Colvin v. Jacksonville, 158 U. S. 456, citing El Paso Water Co. v. El Paso, 152 U. S. 157, and *distinguishing* Brown v. Trousdale, 138 U. S. 389.

Special Assessments against several property owners for local improve- ments cannot be aggregated to give to a federal court jurisdiction of a joint suit for relief against such assessments. Wheless v. St. Louis, 180 U. S. 379; Ogden City v. Armstrong, 168 U. S. 224; Walter v. Northeastern R. Co., 147 U. S. 370.

See also *supra*, VIII. 3. *Several Claims in One Suit*, note *Relief Against Taxes*.

724. 2. Hoosier Canning, etc., Co. v. Donovan, 9 Ohio Dec. 59, holding that in an action to recover subscriptions made by several parties for the purchase of a factory, the jurisdiction of the court is determined by the amounts of the several subscriptions, not by the aggregate thereof.

725. 2. See *supra*, II. 1. In *General*, par. *Jurisdiction Unaffected by Counter- claim or Set-off*.

3. Bradley v. Milwaukee Mechanics Ins. Co., 147 Mo. 634; Hunt v. Bender, 154 U. S. 556.

726. 1. Illustrations of proceedings in which value, instead of the claims of the parties, is determinative of jurisdiction are as follows:

Where Title to Realty Is Involved, the value of the realty controls. State v. Judges, 107 La. 487; State v. Judges, 52 La. Ann. 1503; Wight v. Roethlis- berger, 116 Mich. 241; Schulz v. Schulz, (Tex. Civ. App. 1894) 26 S. W. Rep. 107; Woodside v. Ciceroni, (C. C. A.) 93 Fed. Rep. 1; Cooper v. Preston, 105 Fed. Rep. 403; Green v. Fisk, 154 U. S. 668; Jones v. Fritschle, 154 U. S. 590.

Suits for Mere Possession of Realty involve only the value of the possession. Moore v. Richardson, 197 Ill. 437; Mc- Dole v. Shepardson, 156 Ill. 383; Herkimer v. Keeler, 109 Iowa 680; Towle v. Weise, (Kan. 1902) 68 Pac. Rep. 637; McClain v. Jones, 60 Kan. 630; Smith v. Benton, 7 Kan. App. 62; Casner v. Samis, 6 Kan. App. 920, 51 Pac. Rep. 802; State v. Judges, 107 La. 487; Norwood v. Wimby, 104 La. 648; Macedonia Baptist Church v. Dickin- son, 52 La. Ann. 704; Immanuel Presb. Church v. Riedy, 52 La. Ann. 1353; Newell v. Leathers, 50 La. Ann. 162; Waters Pierce Oil Co. v. New Iberia, 47 La. Ann. 863; Ross v. Enaut, 46 La. Ann. 1250; Lea v. Orleans, 46 La. Ann. 1444; Battle v. Atkinson, 115 Fed. Rep. 384; Reese v. Zinn, 103 Fed. Rep. 97.

Suits to Establish an Easement or Assert Rights involve the value of the easement or right claimed. Overall v. St. Louis Traction Co., 88 Mo. App.

175; Lanning v. Osborne, 79 Fed. Rep. 657.

Sequestration. — State v. Judges, 50 La. Ann. 1168.

Administration of Succession. — Duffy's Succession, 50 La. Ann. 795.

Redress of Corporate Wrongs. — A suit by a stockholder for the redress of corporate wrongs involves the value of the petitioner's stock. Bell v. Montgomery Light Co., 103 Ala. 275.

A Suit to Enjoin Infringement of a Trademark involves the value of the trademark. Hennessy v. Herrmann, 89 Fed. Rep. 669.

On a Motion to Quash an Execution, the face value of the execution is the amount involved. Force v. Van Patton, 149 Mo. 446.

An Application for a Receiver for a Corporation depends upon the value of the petitioner's stock. Robinson v. West Virginia Loan Co., 90 Fed. Rep. 770. *Compare* Towle v. American Bldg., etc., Soc., 60 Fed. Rep. 131.

In Attachment the amount in controversy between the plaintiff and the principal defendant, and not the value of the property attached, determines the right to issue the writ. Fly v. Grieb, 62 Ark. 209; Surine v. Ft. Dearborn Nat. Bank, 59 Ill. App. 329; Schnabel v. Jacobs, (Ky. 1899) 49 S. W. Rep. 774; Landa v. Mercantile Banking Co., 10 Tex. Civ. App. 582.

A Claimant of Attached Property may litigate the title thereto in the attachment proceedings though the value of such property exceeds the jurisdictional limit of the court trying the case. Fly v. Grieb, 62 Ark. 209; Corthell v. Mead, 19 Colo. 386; Springfield Engine, etc., Co. v. Glazier, 55 Mo. App. 95; Grambling v. Dickey, 118 N. Car. 986.

In Garnishment Proceedings the jurisdiction of the trial court is determined by the amount in controversy between the plaintiff and the principal defendant. Pomeroy v. Rand, 157 Ill. 176, reversing 54 Ill. App. 522; Holyoke Envelope Co. v. Heagler, 10 Kan. App. 572. But see Traylor v. Allen, 61 Ark. 13, wherein it was held that a justice must dismiss garnishment proceedings when the garnishee's answer discloses a debt in its nature indivisible and in excess of the justice's jurisdiction.

Trust Funds. — In suits for administration or distribution of trust or other specific funds, the amount of the fund is the test of jurisdiction. MacVeagh v. Roysten, 172 Ill. 515; Matter of

Pelican Saw Mill, etc., Co., 50 La. Ann. 404; *In re* Southern Liquor, etc., Co., 49 La. Ann. 1455; Fudickar v. Monroe Athletic Club, 49 La. Ann. 1457; Treyhan v. Berry, 49 La. Ann. 305; Murray v. Sweeney, 48 La. Ann. 760; Cleveland v. Peoples Nat. Bank, (Tex. Civ. App. 1899) 49 S. W. Rep. 523; Taylor v. Decatur Mineral, etc., Co., 112 Fed. Rep. 449; National Bank of Commerce v. Allen, (C. C. A.) 90 Fed. Rep. 545; Putnam v. Timothy Dry-Goods, etc., Co., 79 Fed. Rep. 454.

Liens on Personality. — In suits to enforce contractual liens on personality, the value of the property is the test of jurisdiction. Cantoni v. Betts, 70 Conn. 386; De Vaughn v. Byrom, 110 Ga. 904; Jecker v. Phytides, (Tex. Civ. App. 1901) 65 S. W. Rep. 1129; Conner v. Jacobs, (Tex. Civ. App. 1899) 51 S. W. Rep. 640; Schwartz v. Frees, (Tex. Civ. App. 1895) 31 S. W. Rep. 214; Lake Nav. Co. v. Austin Electrical Supply Co., (Tex. Civ. App. 1895) 30 S. W. Rep. 832; Endel v. Norris, 15 Tex. Civ. App. 140; Austin Real Estate, etc., Co. v. Bahn, 87 Tex. 582; Smith v. Carroll, (Tex. Civ. App. 1902) 66 S. W. Rep. 863; Wisbey v. Houston Nat. Bank, (Tex. Civ. App. 1902) 67 S. W. Rep. 195.

A Federal Court will not entertain a suit to enforce a chattel mortgage where the plaintiff's claim is less than the jurisdictional amount. Stillwell-Bierce, etc., Co. v. Williamson Oil, etc., Co., 80 Fed. Rep. 68.

General Liens. — In suits to subject property to a general lien thereon given by law, as a laborer's lien, etc., the amount of the lien claim is the amount in controversy, since only so much of the property is seizable as will be necessary to satisfy the lien. Irwin v. Bexar County, (Tex. Civ. App. 1901) 63 S. W. Rep. 550.

In Distress, the plaintiff's demand, not the value of the property, is determinative of the jurisdiction. Bohannon v. Roensch, 13 Tex. Civ. App. 218; Dazey v. Pennington, 10 Tex. Civ. App. 326; Yeiser v. Taylor, (Tex. Civ. App. 1895) 31 S. W. Rep. 84; Lawson v. Lynch, 9 Tex. Civ. App. 582.

Injunctions. — For the amount in controversy in injunction suits see INJUNCTIONS.

The Value as Alleged is *prima facie* the value in controversy. Thurston v. Lamb, 90 Iowa 363; Parker v. Bradford, 68 Minn. 437; Houston Ice, etc., Co. v.

727. Suits in Ejectment. — See note 1.

Enforcing Liens Against Land. — See note 3.

728. In Suits Annuling Instruments. — See note 1.

Specific Personal Property. — See note 2.

North Galveston Imp. Co., (Tex. Civ. App. 1902) 67 S. W. Rep. 1079; Eulless v. Russell, (Tex. Civ. App. 1895) 34 S. W. Rep. 176; Lake Nav. Co. v. Austin Electrical Supply Co., (Tex. Civ. App. 1895) 30 S. W. Rep. 832; Winchell v. Waukesha, 110 Wis. 101; Reese v. Zinn, 103 Fed. Rep. 97; Jones v. McCormick Harvesting Mach. Co., (C. C. A.) 82 Fed. Rep. 295; Smith v. Bivens, 56 Fed. Rep. 352. See also *supra*, II. 1. *In General.* But see Herrin v. Pugh, 9 Wash. 637, wherein it was held that a bare allegation of value in the plaintiff's petition, unsupported by anything else in the record, is insufficient to confer appellate jurisdiction. See further Denver First Nat. Bank v. Follett, 27 Colo. 512; Conly v. Boyvin, 25 Colo. 498.

727. 1. Matthews v. Rising, 194 Pa. St. 217.

3. Amato v. Ermann, 47 La. Ann. 967; Clotilde v. Lutz, 73 Mo. App. 37; Burton v. Archinard, (Tex. Civ. App. 1899) 49 S. W. Rep. 684; Cox v. Wright, (Tex. Civ. App. 1894) 27 S. W. Rep. 294. But see Florence v. Morien, 98 Va. 26; Cash v. Humphreys, 98 Va. 477.

On Appeal by the Plaintiff from the refusal of the court to enforce a lien, the amount of the lien, not the value of the land, is determinative of the jurisdiction. Hidy v. Hanson, (Iowa 1902) 89 N. W. Rep. 36; Forest Hill Bldg., etc., Assoc. v. McEvoy, (Ky. 1902) 66 S. W. Rep. 1031.

728. 1. Contra. — Showalter v. Rupe, (Va. 1897) 27 S. E. Rep. 840 [in which case the court ignored Kahn v. Kerngood, 80 Va. 342]; Alkire Grocery Co. v. Richesin, 91 Fed. Rep. 79; Werner v. Murphy, 60 Fed. Rep. 769.

Suit to Annul Title. — Where a former owner of land sues a purchaser thereof at a tax sale, to set such sale aside, the amount in controversy is the value of the land. Felch v. Travis, 92 Fed. Rep. 210. See also Cowell v. City Water-Supply Co., 96 Fed. Rep. 769, wherein the holder of a water company's bond for less than two thousand dollars, which was secured, with other bonds, by a deed of trust on property worth over two thousand dollars, was

allowed to sue in a federal court to set aside a sale under the deed of trust. The court laid stress on the fact that the plaintiff was not suing to enforce the payment of his bond, but merely to restore it and the deed of trust to their status before the sale, and to preserve the rights incident to such status.

In Louisiana the amount in controversy in a revocatory action is the plaintiff's claim when the value of the property is more than such claim, the reason being that the sale will be revoked only to the extent of the plaintiff's claim. Fishel v. Alexander, 48 La. Ann. 1533; Moore v. Ringuet, 45 La. Ann. 1115. But when the value of the property is less than the plaintiff's claim, the value is the only amount in controversy. State v. Judges, 50 La. Ann. 126.

Annuling Mortgages. — In a suit by a creditor to set aside a mortgage executed by his debtor, the amount in controversy in the trial court is the amount of the mortgage. Cantoni v. Betts, 70 Conn. 386.

In the Federal Courts a creditor cannot maintain a suit to annul a mortgage executed by his debtor where the creditor's claim is less than the jurisdictional amount. Putney v. Whitmire, 66 Fed. Rep. 385.

Nor can a creditor appeal to a federal court from a judgment sustaining a mortgage executed by his debtor, where the amount of the mortgage is less than the jurisdictional amount. Davis v. Schwartz, 155 U. S. 631.

2. Barnard v. Devine, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 182 (decided under New York City Charter, § 1364, subdiv. 7), wherein it was held that, in an action for the recovery of specific personalty, the Municipal Court's jurisdiction is determined exclusively from the value of the property, and that such court may render judgment for any amount of damages, the latter being merely incidental to the main purpose of the action. The provision under which this case was decided provides that the New York City Municipal Court has jurisdiction of actions to recover chattels, with or without damages, where the value of the

731. XII. APPEALABLE AMOUNT. — [The General Principle which governs the determination of the amount in controversy on appeal seems to be that the court will look to the amount or value of which the appellant will be deprived or for which he will be liable by virtue of the judgment, or portion thereof, complained of. See note *a*.]

chattels does not exceed five hundred dollars.

Value of Office. — *Peters v. Bell*, 51 La. Ann. 1621, *Krakauer v. Caples*, 5 Tex. Civ. App. 264. But see *State v. McKone*, 95 Wis. 216, wherein it was held that a suit to try title to an office does not involve any pecuniary amount within the meaning of the statute fixing the pecuniary limits of appeals.

In Replevin the amount in controversy is the value of the property. *Denver First Nat. Bank v. Follett*, 27 Colo. 512; *Conly v. Boyvin*, 25 Colo. 498; *Rohe v. Pease*, 189 Ill. 207; *Cruikshank v. W. W. Kimball Co.*, 75 Ill. App. 231; *George v. Hunter*, 5 Kan. App. 250; *Parker v. Bradford*, 68 Minn. 437; *Thomas v. Cooksey*, 130 N. Car. 148; *Houston Ice, etc., Co. v. North Galveston Imp. Co.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1079.

In Maryland a justice's jurisdiction in an action of replevin depends upon the value of the property, as ascertained by appraisers. *Darrell v. Biscoe*, 94 Md. 684, decided under Pub. Gen. Laws Md., art. 52, § 6.

Likewise in Nebraska, prior to Laws Neb. 1899, c. 92, Code Civ. Pro., § 1039, a justice's jurisdiction in replevin depended on the value of the property, as ascertained by appraisers. *Selby v. McQuillan*, 59 Neb. 158; *Kilpatrick-Koch Dry Goods Co. v. Rosenberger*, 57 Neb. 370, both of which cases were decided under Code Civ. Pro. Neb., § 1038. By Laws Neb. 1899, c. 92, a justice is divested of jurisdiction if it appears on trial that the value of the property is in excess of his jurisdiction, though the value as ascertained by the appraisers was within his jurisdiction.

Trover. — *Where No Damages Are Demanded* for the detention of property the amount in controversy in an action of trover is the value of the property. *Sharpe v. Barney*, 114 Ala. 361; *Barth v. Union Nat. Bank*, 67 Ill. App. 131; *Stinson v. Cook*, 53 Kan. 170; *Eulless v. Russell*, (Tex. Civ. App. 1895) 34 S. W. Rep. 176; *Schulz v. Schulz*, (Tex. Civ. App. 1894) 26 S. W.

Rep. 107; *Jones v. McCormick Harvesting Mach. Co.*, (C. C. A.) 82 Fed. Rep. 295.

Where Damages Are Demanded for the detention of the property, the amount in controversy is the value of the property plus the damages. *Thompson v. Willard*, 66 Ark. 346; *Wedgewood v. Parr*, 112 Iowa 514; *Baker v. Guinn*, 4 Tex. Civ. App. 539. But see *Vance v. W. A. Vandercook Co.*, 170 U. S. 468 (*construing* the laws of *South Carolina* in regard to trover, and *following* *Loeb v. Mann*, 39 S. Car. 465), in which case it was held that in South Carolina jurisdiction of an action of trover depends exclusively upon the value of the property, whether damages are or are not claimed, damages for detention not being allowed in that state.

The Plaintiff's Claim, and Not the Value of the Property, is determinative of jurisdiction of an action for the value of the property converted by the defendant, where such claim is less than the real value of the property, since in no event could the plaintiff recover more than he seeks to recover. *Hannon v. Bramley*, 65 Conn. 193; *Coleman v. Bell*, (Tex. Civ. App. 1899) 50 S. W. Rep. 155.

A Suit in Equity for the recovery of specific personalty involves the value of the property. *Ryan v. Seaboard, etc.*, R. Co., 89 Fed. Rep. 397.

731. a. Indiana. — *Dearborn County v. Kyle*, 137 Ind. 421.

Iowa. — *Miles v. Tomlinson*, 110 Iowa 322.

Kansas. — *Missouri Pac. R. Co. v. Johnston, etc.*, *Dry-Goods Co.*, 9 Kan. App. 738; *Grant v. Robb*, (Kan. 1902) 67 Pac. Rep. 852.

Kentucky. — *Guthrie v. Smith*, (Ky. 1896) 35 S. W. Rep. 918; *Mauk v. Harper*, (Ky. 1893) 24 S. W. Rep. 241; *Dunning v. Lacey*, 96 Ky. 611.

Louisiana. — *Wegmann v. Wegmann*, 52 La. Ann. 947; *State v. Judges*, 48 La. Ann. 672; *Armstrong v. Vicksburg, etc.*, R. Co., 46 La. Ann. 1448.

Ohio. — *Draper v. Clark*, 59 Ohio St. 336.

Texas. — *Baker v. Guinn*, (Tex. Civ.

App. 1895) 32 S. W. Rep. 370; Building, etc., *Assoc. v. Cunningham*, 92 Tex. 155; *Tufts v. Hodges*, 8 Tex. Civ. App. 240.

Virginia. — *Bunting v. Cochran*, 99 Va. 558; *Schmelz v. Rix*, 95 Va. 509; *Showalter v. Rupe*, (Va. 1897) 27 S. E. Rep. 840; *Hicks v. Roanoke Brick Co.*, 94 Va. 741; *Maddock v. Skinner*, 93 Va. 479.

West Virginia. — *Hedrick v. Mutual Guarantee Bldg., etc., Assoc.*, (W. Va. 1902) 41 S. E. Rep. 118; *Deaton v. Mitchell*, 45 W. Va. 670; *Faulconer v. Stinson*, 44 W. Va. 546.

Wisconsin. — *Troy Carriage Co. v. Bonell*, 102 Wis. 424; *Widman v. Gay*, 101 Wis. 325; *Burkhardt v. Elgee*, 93 Wis. 29.

United States. — *Decker v. Williams*, 73 Fed. Rep. 308; *Texas, etc., R. Co. v. Gentry*, 163 U. S. 363; *Keogh v. Orient F. Ins. Co.*, 154 U. S. 639.

Canada. — *Lachance v. La Société De Prêts*, 26 Can. Sup. Ct. 200; *Kinghorn v. Larue*, 22 Can. Sup. Ct. 347.

Compare Voigt v. Kersten, 164 Ill. 314; *Chicago, etc., R. Co. v. Davis*, 159 Ill. 53; *Gilmore v. Courtney*, 158 Ill. 432, which cases seem to be *contra*, but are not, as they depend upon the peculiar wording of the statute under which they were decided.

Trust Funds Involved. — On appeal from a judgment affecting the distribution of trust or other funds in the hands of the court, the whole amount to be distributed is the amount in controversy. *MacVeagh v. Roysten*, 172 Ill. 515; *Magi's Succession*, 107 La. 208; *Sligo Iron Store Co. v. Blanks*, 105 La. 663; *Receivership of Sheets Lumber Co.*, 104 La. 771; *White's Succession*, 51 La. Ann. 1702; *Hamilton v. His Creditors*, 51 La. Ann. 1035; *Mulledy's Succession*, 47 La. Ann. 1580. See also *Kuh v. Garvin*, 53 Mo. App. 64.

In Louisiana the amount to be distributed is expressly made a test of appeal to the Supreme Court. Const. La., art. 85. See also *Mascari's Succession*, 105 La. 322; *Kline v. Murphey*, 50 La. Ann. 518.

After Remand. — Where the lower court, after remand, imposes upon the appellant an additional burden not contemplated by the order of remand, he cannot appeal unless such burden is alone of sufficient amount. *City Bank v. Hunter*, 152 U. S. 512.

Cross-appeals involve the aggregate

amount of all the judgments complained of. *Douglas v. Kansas City*, 147 Mo. 428.

Consent of Parties cannot confer appellate jurisdiction. *McClaskey v. Lake View Min., etc., Co.*, 18 Colo. 65. See also *supra*, V. 3. *Amount Unaffected by Agreement of Parties*.

Trial de Novo. — Where the case will be tried *de novo* in the appellate court, the rule is the same as on other appeals. *Dunning v. Lacey*, 96 Ky. 611. *Compare Troy v. Hallgarth*, 35 Oregon 162.

Amount on Appeal Different from Amount in Trial Court. — *The Amount in Controversy Is Sometimes Less on Appeal* than it was in the trial court. *Cook v. Daugherty*, 99 Va. 590, holding that the plaintiff in a suit to enforce a lien for less than an appealable amount could not appeal from a judgment refusing to enforce the lien, though the value of the property exceeded the minimum appealable limit, and was determinative of the jurisdiction of the trial court; *Tufts v. Hodges*, 8 Tex. Civ. App. 240, holding that where *pendente lite* property on which a lien is claimed is destroyed, its value cannot be considered in determining the right to appeal, though such value was the amount in controversy in the trial court; *Cowen v. Evans*, 22 Can. Sup. Ct. 328, holding that where, pending a suit for the rescission of a building contract and for damages, the building is completed, the value of the contract cannot enter into the determination of the appealable amount. See also *Frost v. Rowan*, (Ky. 1900) 56 S. W. Rep. 427; *Kaufman v. Cade*, 107 La. 144; *Puyallup Light, etc., Co. v. Stevenson*, 21 Wash. 604; *Pittsburgh Locomotive, etc., Works v. National Bank*, 154 U. S. 626, *distinguishing Bennett v. Butterworth*, 8 How. (U. S.) 124; all holding that where, pending an action for the possession of property and for damages, the property is surrendered to the plaintiff, it is thereby eliminated from the controversy, and cannot enter into the question of the right of appeal. And see generally *supra*, III. 3. *Jurisdiction Ousted*; X. *Value Distinguished from Amount*; *infra*, XII. 1. *When Plaintiff Appeals*, and par. *On Appeal from a Refusal by Court to Enter a Judgment*.

The Appealable Amount Is Sometimes More than the Amount in the Trial Court. — See *infra*, XII, 1. *When Plaintiff*

731. 1. When Plaintiff Appeals. — See note 1.

Appeals, note Defendant's Counterclaim; 3. In Intermediate Appeals, note, Judgment and Counterclaim Consolidated.

Mandamus to Enforce Appeal. — Mandamus will not lie to compel a lower court to entertain an appeal in a case wherein the amount involved is less than the minimum limit of the appellate jurisdiction of the court to which the application for the mandamus is made. *State v. Superior Ct.*, 24 Wash. 605.

Garnishment. — *On an Appeal by a Garnishee* from a judgment against him the amount in controversy is the amount of the judgment. *Mayo v. Hanseu*, 94 Wis. 610. But see *Schreiner v. Emel*, 26 Wash. 555, wherein it was said that a garnishee's right of appeal depends upon the "amount claimed" from him. In this case the judgment against the garnishee as well as the amount claimed was less than the minimum appealable amount, and the appeal was denied.

On an Appeal by the Plaintiff from a judgment in favor of a garnishee, the amount in controversy is the amount claimed from the garnishee. *Payne v. Chicago, etc., R. Co.*, 170 Ill. 607.

Attachment. — *On an Appeal by the Claimant of Attached Property* the amount in controversy is the value of the property. *Herrin v. Pugh*, 9 Wash. 637.

The same rule has been applied on an appeal by the plaintiff from a judgment in favor of the claimant. *Martin v. Duncan*, 156 Ill. 274, wherein the appellate court assumed jurisdiction because of the value of the property, though the plaintiff's claim was below the court's jurisdiction. See also *Andrews v. Partee*, 79 Miss. 80 wherein the value of the property levied on under execution was held to be the test of a claimant's right to appeal, the amount in controversy between the plaintiff and the defendant being less than the appealable amount. *Compare White Castle Lumber, etc., Co. v. Hart*, 48 La. Ann. 1034, and *Lehman v. Hart*, 48 La. Ann. 1277, both cases holding that an intervener may appeal if the principal demand is sufficient, though his own claim is too small to confer appellate jurisdiction.

731. 1. Faulconer v. Stinson. 44 W. Va. 546, citing 1 ENCYC. OF PL. AND PR. 731. See also the following cases:

California. — *People v. Madden*, 134 Cal. 611.

Indiana. — *Conner v. Citizens St. R. Co.*, (Ind. App. 1895) 42 N. E. Rep. 247; *Dearborn County v. Kyle*, 137 Ind. 421.

Kansas. — *Beachy v. Ryan*, 4 Kan. App. 372.

Louisiana. — *Leverett v. Sharpe*, 52 La. Ann. 599; *Foster's Succession*, 51 La. Ann. 1670; *Moore v. Ringuet*, 45 La. Ann. 1115.

Mississippi. — *Schlicht v. Callicott*, 76 Miss. 487; *Biddle v. Paine*, 74 Miss. 494.

Missouri. — *Kane v. Kane*, 146 Mo. 605; *Hennessey v. Bavarian Brewing Co.*, 145 Mo. 104; *State v. Rombauer*, 130 Mo. 288.

Nebraska. — *Moise v. Powell*, 40 Neb. 671.

Texas. — *Grooms v. Atascosa County*, (Tex. Civ. App. 1895) 29 S. W. Rep. 73.

Washington. — *Moskeland v. Stephens*, 18 Wash. 693.

West Virginia. — *Case Mfg. Co. v. Sweeny*, 47 W. Va. 639; *Arnold v. Lewis County Ct.*, 38 W. Va. 142.

The Plaintiff's Claim Need Not Be Finally Adjudicated in order to make it determinative of his right to appeal. It is sufficient if it is substantially affected by the order complained of. *Cabell v. Patterson*, 98 Ky. 520, wherein the plaintiff, whose claim was sufficient to confer appellate jurisdiction, was allowed to appeal from an order denying the priority of such claim as a lien upon a certain fund, though the fund was too small to confer appellate jurisdiction; *In re Moss Cigar Co.*, 50 La. Ann. 789, wherein a creditor holding a claim against an insolvent corporation of sufficient amount to confer appellate jurisdiction was allowed to appeal, regardless of the amount of the assets of the corporation, from a judgment appointing a corporate receiver, and suspending the appellant's right to sue on his claim. *Compare Germania Sav. Bank v. Muller*, 52 La. Ann. 553.

Defendant's Counterclaim. — Where the plaintiff's claim is disallowed, and a judgment is rendered against him on the defendant's counterclaim, the plaintiff may appeal if the aggregate of his claim and the judgment reaches the appealable amount. *Walter A. Wood Mowing, etc., Mach. Co. v. Tay-*

lor, 104 Ky. 217; *Widman v. Gay*, 101 Wis. 325.

In Texas a plea in reconvention for an appealable amount will give to the plaintiff a right to appeal though his claim is less than the appealable amount. *Tucker v. Williams*, (Tex. Civ. App. 1900) 56 S. W. Rep. 585; *Schneider v. Luckie*, (Tex. Civ. App. 1898) 47 S. W. Rep. 685; *Crosby v. Crosby*, 92 Tex. 441. But as decided in these cases and also in *Kiel v. Campbell*, (Tex. Civ. App. 1901) 63 S. W. Rep. 659, the plaintiff's claim and the defendant's counterclaim cannot be added in order to confer appellate jurisdiction. Compare *Lister v. Campbell*, (Tex. Civ. App. 1898) 46 S. W. Rep. 876; *Winder v. Weaver*, (Tex. Civ. App. 1896) 37 S. W. Rep. 376, both cases holding that the claim and counterclaim may be added to confer appellate jurisdiction.

Trial on Cross-complaint. — Where a case is tried solely upon the issues presented by a cross-complaint, and judgment is rendered thereon for the defendant, the amount of the recovery is the test of the plaintiff's right to appeal. *Weiss v. Gullett*, (Colo. 1901) 67 Pac. Rep. 155.

Presumption that Amount Claimed Is Real Amount Overcome. — *The Amount Recoverable under the Plaintiff's Pleadings* determines his right to appeal. *Dearborn County v. Kyle*, 137 Ind. 421; *Pampel v. Downey*, (Kan. 1902) 68 Pac. Rep. 607.

The Amount Recoverable under the Plaintiff's Evidence determines his right to appeal. *McFadden v. Rhodes*, 19 Ind. App. 487; *Kirchgraber v. Lloyd*, 59 Mo. App. 59; *Widman v. Gay*, 101 Wis. 325; *Burkhardt v. Elgee*, 93 Wis. 29; *Gorman v. Havird*, 141 U. S. 206. See also *Thacher v. Hope Cemetery Assoc.*, 146 N. Y. 381, wherein it was held that if the plaintiff's claim is reduced below the appealable amount by the elimination of items which, according to his own method of computation, are barred by the statute of limitations, he cannot appeal.

The Difference Between the Claim and the Recovery is the amount in controversy on an appeal by the plaintiff from a judgment in his favor for less than his claim. *Biddle v. Pierce*, 141 Ind. 148; *Obert v. Oberlin Loan, etc., Co.*, 54 Kan. 750; *Douglas v. Kansas City*, 147 Mo. 428; *Holker v. Hen-*

nessey, 141 Mo. 527; *Dowd v. Westinghouse Air Brake Co.*, 57 Mo. App. 219; *People's Bldg., etc., Assoc. v. Zimmerman*, 65 Ohio St. 176; *Marchant v. Healy*, 94 Va. 614; *Keogh v. Orient F. Ins. Co.*, 154 U. S. 639. *Contra*, *Vaughn v. Gloer*, 108 Ga. 238; *Guyer v. Caldwell*, 189 Ill. 581.

The Difference Between the Claim and the Amount Admitted by the defendant is the test of the plaintiff's right to appeal from a judgment disallowing the balance of his claim. *State v. Judges*, 48 La. Ann. 672; *Henk v. Baumann*, 100 Wis. 28. See also *supra*, III. 3. *Jurisdiction Ousted*, note, *Amount Remitted Pendente Lite Prevents Appeal*.

In Indian Territory the amount of the judgment is the absolute criterion of an appeal from a decision of a United States commissioner though the plaintiff is the appellant. 28 U. S. Stat. at L. 696, c. 145, § 4; *Butler v. Penn.*, (Indian Ter. 1901) 61 S. W. Rep. 987; *Morrow v. Burney*, 2 Indian Ter. 440; *Baldwin v. Farris*, 2 Indian Ter. 438. See also *infra*, XII. 2. a. *No Counterclaim Filed*, note.

In Canada under 54 & 55 Vict., 25, the amount claimed below is the absolute criterion of an appeal whenever such amount is different from the recovery. *Laberge v. Equitable L. Assur. Soc.*, 24 Can. Sup. Ct. 59, wherein the rule announced was applied to an appeal by the plaintiff. This case reinstates the doctrine announced in *Levi v. Reed*, 6 Can. Sup. Ct. 482, which latter case had been previously overruled in accordance with the judgment of the Privy Council in *Allan v. Pratt*, 13 App. Cas. 780. Compare *Lachance v. La Société De Prêts*, 26 Can. Sup. Ct. 200, and *Kinghorn v. Larue*, 22 Can. Sup. Ct. 347, in both of which cases it was held that where the appeal depends upon the amount in controversy, as in a case of a third opposition contested by the plaintiff in the principal action, the right to appeal depends upon the pecuniary interest of the appellant.

Right to Appeal Not Conferred by Amendment. — *An Amendment Claiming Additional Damages*, but which was properly rejected, cannot be considered in determining the plaintiff's right to appeal. *Cully v. Louisville, etc., R. Co.*, 101 Ky. 319.

The Plaintiff Cannot Amend His Petition After Judgment against him so as to claim an appealable amount, the original claim shown by the petition

732. On Appeal from a Refusal by Court to Enter a Judgment. — See note 1.

2. When Defendant Appeals — a. NO COUNTERCLAIM FILED. — See note 2.

733. The Amount Claimed Below. — See note 1.

and the evidence being too small. *Trimble v. Missouri*, etc., R. Co., 10 Kan. App. 580, 61 Pac. Rep. 449. See also *supra*, II, 1. In *General*, note, *Amendments*; III. 2. *Jurisdiction Unaffected*; 3. *Jurisdiction Ousted*.

732. 1. *The Recovery, and Not the Claim*, is the test of the plaintiff's right to appeal from a refusal of the court to enter judgment on a verdict in his favor. *Buscher v. Lafayette*, 8 Ind. App. 590; *Culbertson v. Young*, 156 Mo. 261; *Peters v. Carner*, 183 Pa. St. 65.

2. *Troy v. Hallgarth*, 35 Oregon 162; *Faulconer v. Stinson*, 44 W. Va. 546, in which cases the courts cited 1 ENCYC. OF PL. AND PR. 732. See also the following cases:

Arizona. — *Phoenix Wholesale Meat Co. v. Moss*, (Ariz. 1901) 64 Pac. Rep. 443.

Colorado. — *Ducey v. Patterson*, (Colo. 1902) 68 Pac. Rep. 239.

Illinois. — *Hedley v. Geissler*, 189 Ill. 172; *Rimmer v. O'Brien-Green Co.*, 165 Ill. 31.

Indiana. — *Louisville*, etc., R. Co. v. *Steele*, 6 Ind. App. 183.

Iowa. — *Miles v. Tomlinson*, 110 Iowa 322.

Kansas. — *Grant v. Robb*, (Kan. 1902) 67 Pac. Rep. 852; *Richmond v. Brummie*, 52 Kan. 247; *Salina*, etc., R. Co. v. *Conger*, 2 Kan. App. 287.

Kentucky. — *Illinois Cent. R. Co. v. Landram*, (Ky. 1902) 66 S. W. Rep. 599; *Newton v. Porter*, (Ky. 1901) 65 S. W. Rep. 152, 23 Ky. L. Rep. 1388; *Hammond v. Lea*, (Ky. 1901) 68 S. W. Rep. 262, 23 Ky. L. Rep. 8; *Hill v. Booth*, (Ky. 1900) 58 S. W. Rep. 993, 22 Ky. L. Rep. 890; *American Acc. Co. v. Slaughter*, 101 Ky. 269; *Guthrie v. Smith*, (Ky. 1896) 35 S. W. Rep. 918; *Dunning v. Lacey*, 96 Ky. 611; *Mauk v. Harper*, (Ky. 1893) 24 S. W. Rep. 241.

Missouri. — *Mankameyer v. Egelhoff*, 161 Mo. 200; *Douglas v. Kansas City*, 147 Mo. 428; *McGregor v. Pollard*, 130 Mo. 332.

Virginia. — *Cash v. Humphreys*, 98 Va. 477.

West Virginia. — *Dickey v. Smith*, 42 W. Va. 205.

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United States. — *Hollander v. Fecheimer*, 162 U. S. 326; *Decker v. Williams*, 73 Fed. Rep. 308.

In *Indian Territory* the amount of the judgment of a United States commissioner is the absolute criterion of an appeal therefrom by either plaintiff or defendant. *Shapleigh Hardware Co. v. Brittain*, 2 Indian Ter. 242, decided under Act Cong. March 1, 1895, § 4 (28 U. S. Stat. at L. 695), and applying the rule announced to an appeal by the defendant. See also *supra*, XII, 1. *When Plaintiff Appeals*, note.

Where the Defendant Admits a Part of the Plaintiff's Claim, on an appeal from a judgment allowing the whole thereof, the amount in controversy is the amount not admitted. *In re Burke*, (Mo. 1902) 69 S. W. Rep. 277; *Hedrick v. Mutual Guarantee Bldg., etc., Assoc.*, (W. Va. 1902) 41 S. E. Rep. 118; *Blonde v. Menominee Bay Shore Lumber Co.*, 103 Wis. 284. See also *Decker v. Williams*, 73 Fed. Rep. 308. And see *supra*, III. 3. *Jurisdiction Ousted*, note *Amount Remitted Pendente Lite Prevents Appeal*.

733. 1. *Illinois*. — *Guyer v. Caldwell*, 189 Ill. 581.

Iowa. — *Fullerton v. Cedar Rapids*, etc., R. Co., 101 Iowa 156; *Sharp v. Nelson*, 93 Iowa 466.

Louisiana. — *Perkins v. Lapeyronnie*, 107 La. 502; *Solari v. Barras*, 45 La. Ann. 1128.

Oregon. — *Troy v. Hallgarth*, 35 Oregon 162, wherein the appeal was triable *de novo*, and the court based its decision to some extent upon that fact.

Texas. — *Gulf*, etc., R. Co. v. *Cunningham*, (Tex. 1902) 67 S. W. Rep. 888; *Mobley v. Porter*, (Tex. Civ. App. 1899) 54 S. W. Rep. 655.

Washington. — *Kirby v. Rainier Grand Hotel Co.*, (Wash. 1902) 69 Pac. Rep. 378; *Trumbull v. School Dist. No. 7*, 22 Wash. 631.

In *Canada*, under 54 & 55 Vict., c. 25, and Rev. Stat. Quebec, art. 2311, the amount demanded in the trial court is the test of the right to appeal whenever such amount is different from that recovered, even though the defendant

734. *b.* COUNTERCLAIM FILED. — See note 1.

735. 3. In Intermediate Appeals. — See note 1.

is the appellant. *Dufresne v. Guevremont*, 26 Can. Sup. Ct. 216.

In *Indiana*, under Acts 1901, p. 566, § 6, a defendant's right to appeal to the Supreme or the Appellate Court depends upon whether the case was originally within the jurisdiction of a justice of the peace, no appeal being permitted in cases within a justice's jurisdiction; and since under Horner's Stat. Ind. (1901), § 1433, the jurisdiction of a justice is confined to cases wherein the sum demanded does not exceed a certain amount, where it does exceed such amount the defendant may appeal from a judgment of a superior court, though the plaintiff's recovery is less than the appealable amount. *Dugdale v. Doney*, (Ind. App. 1902) 62 N. E. Rep. 643.

734. 1. *Faulconer v. Stinson*, 44 W. Va. 546, citing 1 ENCYC. OF PL. AND PR. 734, 735, note 1. See also the following cases:

Georgia. — *Withers v. John Hopkins Place Sav. Bank*, 104 Ga. 89.

Kentucky. — *Arthurs v. Thompson*, 97 Ky. 218; *Ward v. Rhorer*, (Ky. 1899) 53 S. W. Rep. 649; *Fordsville Banking Co. v. Gray*, (Ky. 1901) 60 S. W. Rep. 372, 22 Ky. L. Rep. 1258.

Louisiana. — *State v. Judges*, 48 La. Ann. 672; *Watkins Banking Co. v. Louisiana Lumber Co.*, 47 La. Ann. 581.

Missouri. — *Conrad v. De Montcourt*, 138 Mo. 311.

Texas. — *Texas, etc., R. Co. v. Hayes*, 4 Tex. Civ. App. 88.

West Virginia. — *Dickey v. Smith*, 42 W. Va. 805.

A Fictitious Counterclaim cannot confer a right of appeal. *Manchester Paper-Mills Co. v. Heth*, (Va. 1893) 18 S. E. Rep. 189. See also *supra*, IV. *Fictitious Amount*.

Counterclaim Eliminated from Controversy. — When, pending suit, the plaintiff satisfies the counterclaim, it cannot enter into the appealable amount. *Chicago, etc., R. Co. v. Minick*, 62 Kan. 867, 62 Pac. Rep. 1007.

735. 1. The text is supported by the following cases:

Alabama. — *Gunter v. Mason*, 125 Ala. 644.

Arkansas. — *Traylor v. Allen*, 61 Ark. 13.

Illinois. — *Cruikshank v. W. W. Kimball Co.*, 75 Ill. App. 231.

Indiana. — *Elgin v. Mathis*, 9 Ind. App. 277; *Lake Erie, etc., R. Co. v. Yard*, 8 Ind. App. 199; *Louisville, etc., R. Co. v. Steele*, 6 Ind. App. 183.

Maryland. — *Darrell v. Biscoe*, 94 Md. 684.

Missouri. — *Mitchell Planing Mill Co. v. Short*, 58 Mo. App. 320.

Pennsylvania. — *Antes v. Antes*, 12 Montg. Co. Rep. (Pa.) 33.

Texas. — *Gimbel v. Gomprecht*, 89 Tex. 497; *Miller v. Newbauer*, (Tex. Civ. App. 1901) 61 S. W. Rep. 974; *Hackney v. Schow*, 21 Tex. Civ. App. 613; *Brigman v. Aultman*, (Tex. Civ. App. 1900) 55 S. W. Rep. 509; *Pioneer Sav., etc., Co. v. Wilson*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1095; *Cain v. Culbreath*, (Tex. Civ. App. 1896) 35 S. W. Rep. 809; *Schwartz v. Frees*, (Tex. Civ. App. 1895) 31 S. W. Rep. 214; *Gulf, etc., R. Co. v. Farmer*, 3 Tex. Civ. App. 458, *overruling Williams v. Sims*, 4 Tex. App. Civ. Cas., § 151.

Washington. — *State v. Superior Ct.*, 9 Wash. 369.

Judgment and Counterclaim Consolidated — *Where the Defendant Denies the Plaintiff's Claim* and also files a counterclaim, on an appeal from a judgment allowing the claim and disallowing the counterclaim the two may be added to form the jurisdictional amount. *Smith v. Rountree*, 185 Ill. 219; *Charlton v. Scoville*, 144 N. Y. 691; *Buckstaff v. Russell*, 151 U. S. 626. *Contra, Crosby v. Crosby*, 92 Tex. 441; *Kiel v. Campbell*, (Tex. Civ. App. 1901) 63 S. W. Rep. 659; *Tucker v. Williams*, (Tex. Civ. App. 1900) 56 S. W. Rep. 585. But see *Lister v. Campbell*, (Tex. Civ. App. 1898) 46 S. W. Rep. 876; *Winter v. Weaver*, (Tex. Civ. App. 1896) 37 S. W. Rep. 376.

Where the Defendant Admits the Plaintiff's Claim and also files a counterclaim, his right to appeal from a judgment allowing the claim and disallowing the counterclaim is determined by the amount of the latter. *Faulconer v. Stinson*, 44 W. Va. 546, citing 1 ENCYC. OF PL. AND PR. 735, note 1. See also *Dickey v. Smith*, 42 W. Va. 805.

Counterclaim Must Be Provable. — *Heraughty v. Grant*, 6 Kan. App. 923, 50 Pac. Rep. 506; *Chesapeake, etc., R. Co. v. Roe*, (Ky. 1899) 54 S. W. Rep. 1; *Kendall v. Blinn*, 6 Ohio Dec. 4; *Bledsoe v. Gulf, etc., R. Co.*, 6 Tex. Civ.

App. 280. Compare *Arthurs v. Thompson*, 97 Ky. 218, in which an appeal was allowed from an order striking out a counterclaim as improperly pleaded; *Gabriel v. Seattle, etc., R. Co.*, 7 Wash. 515, holding that an order striking out a counterclaim is not reviewable except by certiorari.

Effect of Appearance in Appellate Court.

— *Where an Appeal Is Triable de Novo*, and the parties submit themselves to the jurisdiction of the appellate court, such court may render a valid judgment though the amount in controversy in the trial court was in excess of its jurisdiction. *De Jarnatt v. Marquez*, 132 Cal. 700, wherein *Ballerino v. Bigelow*, 90 Cal. 500, was distinguished, and also overruled in so far as it might be in conflict with the case under consideration, and *Hart v. Carnall-Hopkins Co.*, 103 Cal. 132, was followed.

When Appeal Is Not Triable de Novo.

— See *supra*, V. 3. **Amount Unaffected by Agreement of Parties.**

Judgment on Appeal in Excess of Trial Court's Jurisdiction. — *Where a Case Is Triable de Novo* on appeal the appellate court may render a judgment in excess of the jurisdictional limit of the trial court, where such excess is for interest accrued upon the judgment of the trial court. *Campbell v. Green, etc., Lumber Co.*, 99 Ill. App. 647; *Alley v. McCabe*, 147 Ill. 410, which latter case goes further and holds that damages for the detention of the property pending an appeal in an action of replevin may be included in the judgment of the appellate court, though the amount of such judgment is thereby raised above the jurisdictional limit of the trial court. See also *M'Cormick Harvesting Mach. Co. v. Marchant*, 11 Utah 68.

Amendments on Appeal. — **Lack of Jurisdiction in the Trial Court Cannot Be Cured on Appeal** by an amendment in the appellate court reducing the amount claimed to a sum within the jurisdictional limit of the trial court. *Brigman v. Aultman*, (Tex. Civ. App. 1900) 55 S. W. Rep. 509. See also *Antes v. Antes*, 12 Montg. Co. Rep. (Pa.) 33, wherein it was held that the plaintiff could not remedy lack of jurisdiction in the trial court by allowing, on appeal, a credit of an independent debt; *Cruikshank v. W. W. Kimball Co.*, 75 Ill. App. 231, wherein it was held that the plaintiff could not cure

the lack of jurisdiction by remitting in the appellate court the excess of the amount in controversy in the lower court over the jurisdiction of such court.

The Damages Claimed May Be Raised by Amendment in the appellate court, but not to an amount in excess of the trial court's jurisdiction. *Plano Mfg. Co. v. Nordstrom*, (Neb. 1901) 88 N. W. Rep. 164.

Where the Amount Claimed Is Raised on Appeal to a Sum in Excess of the Trial Court's Jurisdiction the defect may be cured by a further amendment reducing such amount to a sum within the trial court's jurisdiction. *Miller v. Newbauer*, (Tex. Civ. App. 1901) 61 S. W. Rep. 974.

Appeals from Intermediate Courts. —

When the Defendant Appeals from a judgment affirming a judgment against him, the amount in controversy is still the amount of the judgment. When he appeals from a judgment reversing a judgment in his favor, the amount in controversy is the plaintiff's original claim. *Draper v. Clark*, 59 Ohio St. 336.

When the Plaintiff Appeals from a judgment reversing a judgment in his favor, the amount in controversy is the amount of the original judgment. *Mayo v. Hansen*, 94 Wis. 610; *Cowen v. Evans*, 22 Can. Sup. Ct. 328.

In Illinois the amount on an appeal from the appellate court is the same as on the appeal thereto, *i. e.*, the amount in controversy in the trial court. *Voigt v. Kersten*, 164 Ill. 314, affirming 61 Ill. App. 42; *Chicago, etc., R. Co. v. Davis*, 159 Ill. 53, affirming 54 Ill. App. 130; *Gilmore v. Courtney*, 158 Ill. 432, reversing 54 Ill. App. 417. But see *Tucker v. Champaign County Agricultural Board*, 154 Ill. 593, holding that under the Appellate Court Act, § 8 (Starr & Curt. Annot. Stat. 1896, c. 37, par. 28), where a judgment for damages is affirmed by the appellate court, such judgment is the absolute criterion of the right of appeal by either party.

Elimination of Items on Appeal. —

Where on the trial of an appeal an item claimed below is abandoned, it cannot enter into the amount in controversy on a further appeal. *Houston, etc., R. Co. v. Perkins*, (Tex. Civ. App. 1898) 44 S. W. Rep. 547. See also *Chicago, etc., R. Co. v. Minick*, 62 Kan. 867, 62 Pac. Rep. 1007.

ANOTHER SUIT PENDING.

751. 1. AS A GROUND OF ABATEMENT — 1. General Statement of the Rule — a. AT LAW. — See notes 1, 2, 3.

752. b. IN EQUITY. — See note 2.

753. 2. A Former Suit. — See notes 1, 2, 3.

Suits Simultaneously Commenced. — See notes 4, 5.

751. 1. Actions in Rem and in Personam. — *Caine v. Seattle*, etc., R. Co., 12 Wash. 596.

Suit Pending in Equity. — *Garneau v. Kendall*, 61 Neb. 396; *Richardson v. Penny*, 6 Okla. 328; *Griswold v. Bacheller*, 77 Fed. Rep. 857. See also *Moore v. Chase*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 9; *Carmack v. Drum*, 27 Wash. 382. *Compare* *Shaughnessy v. St. Andrew's Church*, (Neb. 1902) 89 N. W. Rep. 263.

2. Lewis v. Schwinn, 71 Ill. App. 265; *Sanchez, etc., Co. v. Hirsch*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 202; *Davidson v. Jefferson*, (Tex. Civ. App. 1902) 68 S. W. Rep. 822; *Tacoma v. Commercial Electric Light, etc., Co.*, 15 Wash. 515. See also *Dunham v. Dunham*, 162 Ill. 589, *citing* 1 ENCYC. OF PL. AND PR. 750.

Unauthorized Suit. — The pendency of a prior suit instituted in the name of the plaintiff in the second suit but without his authority will not abate the second. *Wolf v. Great Northern R. Co.*, 72 Minn. 435.

As Defense to Counterclaim. — *Caine v. Seattle, etc., R. Co.*, 12 Wash. 596.

3. What Constitutes an Action — Proceeding by Petition. — *Worcester v. Lakeside Mfg. Co.*, 174 Mass. 299.

Mandamus. — *U. S. v. Norfolk, etc., R. Co.*, 114 Fed. Rep. 686. See also *MANDAMUS*.

Attachment Suit. — *Ferst v. Powers*, 58 S. Car. 411.

752. 2. Troy Fertilizer Co. v. Prestwood, 116 Ala. 119.

Pendency of Action at Law. — See *Carr v. Lyle*, 126 Mich. 655; *Providence Steam-Engine Co. v. Hathaway Mfg. Co.*, 79 Fed. Rep. 512. *Compare* *Consolidated Fruit Jar Co. v. Wisner* 38 N. Y. App. Div. 369; *Treanor v. Shel-*

don Bank, 90 Iowa 575. *Contra*, *Pennsylvania Co. v. Philadelphia Nat. Bank*, 3 Pa. Dist. 93. See also *Sandford v. Wright*, 164 Mass. 85, in which case the court held that a demurrer to a bill in equity on the ground of the pendency of a prior action at law should be sustained, unless the plaintiff should elect to discontinue the action at law.

In *Nebraska* the rule that the pendency of an action at law will not abate a suit in equity has been disapproved; and it is furthermore held to be inapplicable under the present code system, which practically abolishes the former distinctions between actions at law and suits in equity. *Monroe v. Reid*, 46 Neb. 316.

Election. — *Sandford v. Wright*, 164 Mass. 85.

753. 1. Phillips v. Southern Div., etc., R. Co., (Ky. 1901) 60 S. W. Rep. 941; *Consolidated Coal Co. v. Oeltjen*, 189 Ill. 85; *Willard v. Sturm*, 96 Iowa 555; *Steele v. Connecticut Gen. L. Ins. Co.*, 31 N. Y. App. Div. 389; *Banigan v. Woonsocket Rubber Co.*, 22 R. I. 93; *Hall v. Woolery*, 20 Wash. 440.

2. Tacoma v. Commercial Electric Light, etc., Co., 15 Wash. 515.

3. Gamble v. San Diego, 79 Fed. Rep. 487.

4. Dengler v. Hays, 63 N. J. L. 14.

At Different Times on Same Day. — See *Gamble v. San Diego*, 79 Fed. Rep. 487, in which case the court suspended further proceedings with leave to the respective parties to introduce proof as to which of the suits was commenced first.

5. Dengler v. Hays, 63 N. J. L. 14, in which case the court ordered that the writ should be quashed unless the plaintiff should obtain leave to withdraw his demurrer to the plea in abatement and reply.

754. 3. A Pending Suit — Commencement of Suit. — See note 1.

755. See note 1.

Discontinuance or Dismissal. — See note 3.

756. Evidence of Termination. — See note 2.

754. 1. When Summons Insufficient Without Complaint. — The failure of the plaintiff to appear upon the return of the summons and file his complaint amounts to a discontinuance of the action, so that it will not abate a subsequent action for the same cause. *Goldstein v. Loeb*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 72. See also *Curry v. Wiborn*, 12 N. Y. App. Div. 1.

Process Necessary. — An action is not pending as to one named as a defendant therein but who has not been served with process. *D. G. Burton Co. v. Cowan*, 80 Hun (N. Y.) 392.

755. 1. Gerber v. Gerber, 54 Ill. App. 370; *Gardner v. Kiehl*, 182 Pa. St. 194, *per* Mitchell, J.

Parol Evidence of Pendency. — *Curry v. Wiborn*, 12 N. Y. App. Div. 1.

Judgment on Demurrer in Former Suit. — After a judgment of dismissal on demurrer in a former suit it is no longer pending and cannot be pleaded in abatement. *Bunnett v. Southern R. Co.*, 62 S. Car. 281; *Smith v. Walke*, 43 S. Car. 381.

Where an appeal is taken, the pendency of proceedings in error to reverse a judgment on demurrer operates as a continuance of the original action and may be pleaded in abatement of a second action for the same cause. *Westervelt v. Jones*, 7 Kan. App. 70.

Former Action Abated by Death. — If the cause of action survive, the action itself does not abate, and after the death of the sole plaintiff it is a good plea in abatement to a subsequent action until the right of the successor in interest to continue the original action has been lost by laches. *Cheney v. Rankin*, (Supm. Ct. Tr. T.) 27 Misc. (N. Y.) 609.

Where a Voluntary Nonsuit Is Taken the action is no longer pending and cannot be pleaded in abatement in a second suit even though no final judgment on the nonsuit has been entered. *Karnes v. American F. Ins. Co.*, 53 Mo. App. 438.

Prior Suit Discontinued and Reinstated. — A suit which was discontinued before the bringing of a second suit, and subsequently reinstated, cannot be pleaded in abatement of the other suit,

since it was not pending at the time the other suit was commenced. *Jay v. Zeissness*, 6 Okla. 591.

3. Coaldale Brick, etc., Co. v. Southern Constr. Co., 110 Ala. 605; *Carson-Rand Co. v. Stern*, 129 Mo. 381, *per* Barclay, J. [both of which cases cited 1 ENCYC. OF PL. AND PR. 755]; *International, etc., R. Co. v. Barton*, 24 Tex. Civ. App. 122; *Connor v. Saunders*, 9 Tex. Civ. App. 56; *Winner v. Kuehn*, 97 Wis. 394.

Discontinuance After Plea. — *Banigan v. Woonsocket Rubber Co.*, 22 R. I. 93 [citing 1 ENCYC. OF PL. AND PR. 755]; *Evans v. Johnston*, 115 Cal. 180, *per* Temple, J.; *National Express, etc., Co. v. Burdette*, 7 App. Cas. (D. C.) 551; *Citizens' Nat. Bank v. Forman*, (Ky. 1901) 63 S. W. Rep. 454; *Wilson v. Milliken*, 103 Ky. 165; *Gardner v. Kiehl*, 182 Pa. St. 194, *per* Mitchell, J.; *Texas, etc., R. Co. v. Kenna*, (Tex. Civ. App. 1899) 52 S. W. Rep. 555.

Discontinuance Before Trial. — *Winner v. Kuehn*, 97 Wis. 394 [citing 1 ENCYC. OF PL. AND PR. 756]; *McDougald v. Hulet*, 132 Cal. 154; *Balfour-Guthrie Invest. Co. v. Woodworth*, 124 Cal. 169; *Snow v. Hudson*, 56 Kan. 378; *Harby v. Patterson*, (Tex. Civ. App. 1900) 59 S. W. Rep. 63, *per* Hunter, J.; *Texas, etc., R. Co. v. Kenna*, (Tex. Civ. App. 1899) 52 S. W. Rep. 555.

Striking Out Answer as Sham. — *Hallett v. Hallett*, (C. Pl. Spec. T.) 24 Civ. Pro. (N. Y.) 102, 10 Misc. (N. Y.) 304, in which case an answer alleging the pendency of a prior action which had been discontinued before the second was begun was stricken out as sham. See also *Toledo Sav. Bank v. Johnston*, 94 Iowa 212.

756. 2. Evans v. Johnston, 115 Cal. 180, holding that an action is still pending after the court has granted a motion to dismiss until a judgment of dismissal is entered. *Compare* *Council Bluffs Sav. Bank v. Griswold*, 50 Neb. 753.

Payment of Costs in First Suit. — A state court cannot abate an action because the costs were not paid on dismissal of a prior action for the same cause in a federal court. *Harby v.*

757. Writ of Error or Appeal. — See note 1.

4. Between the Same Parties — Substantial Identity. — See note 3.

758. Identity of Plaintiffs. — See note 1.

759. See notes 3, 4.

Patterson, (Tex. Civ. App. 1900) 59 S. W. Rep. 63.

A clerk's certificate that the costs of a prior action are not marked paid upon the docket is not sufficient proof of nonpayment. *Cochran Cotton Seed Oil Co. v. Kugelman*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 705.

757. 1. *Spencer v. Johnston*, 58 Neb. 44 [quoting 1 ENCYC. OF PL. AND PR. 756, 757]; *Meilinger v. People*, 83 Ill. App. 436, per Freeman, J.; *Shaughnessy v. St. Andrew's Church*, (Neb. 1902) 83 N. W. Rep. 263; *U. S. v. Norfolk, etc.*, R. Co., 114 Fed. Rep. 682.

Pleading. — The pendency of a writ of error must be pleaded in abatement and not in bar. *Meilinger v. People*, 83 Ill. App. 436.

3. Alabama. — *Davis v. Petrinovich*, 112 Ala. 654.

Arizona. — *Babbitt v. Field*, (Ariz. 1898) 52 Pac. Rep. 775.

California. — *Ashton v. Heggerty*, 130 Cal. 516.

Indiana. — *Paxton v. Vincennes Mfg. Co.*, 20 Ind. App. 253.

Maine. — *Cumberland County v. Central Wharf Steam Tow-Boat Co.*, 90 Me. 95.

North Carolina. — *Propst v. Mathis*, 115 N. Car. 526.

South Carolina. — *Walters v. Laurens Cotton Mills*, 53 S. Car. 155.

Texas. — *Cooper v. Mayfield*, 94 Tex. 107, citing 1 ENCYC. OF PL. AND PR. 757.

Virginia. — *McAllister v. Harman*, 97 Va. 543.

Washington. — *Hall v. Woolery*, 20 Wash. 440.

Wisconsin. — *Calteaux v. Mueller*, 102 Wis. 525; *Roberts v. Chicago, etc.*, R. Co., 101 Wis. 222; *Koch v. Peters*, 97 Wis. 492; *Gibson v. Southwestern Land Co.*, 89 Wis. 49.

United States. — *Degrauw v. Attrill*, 75 Fed. Rep. 764.

Election Contest and Quo Warranto. — A quo warranto proceeding in the name of the state will not be abated by the pendency of a similar proceeding previously instituted by the same officer on the relation of private persons. *State v. McSpaden*, 137 Mo. 628.

758. 1. *Pratt v. Howard*, 109 Iowa 504; *Johnson v. Robertson*, (Ky. 1898) 45 S. W. Rep. 523 [each citing with approval 1 ENCYC. OF PL. AND PR. 759, 758, respectively]; *Davis v. Petrinovich*, 112 Ala. 654; *Walters v. Laurens Cotton Mills*, 53 S. Car. 155; *Cooper v. Mayfield*, 94 Tex. 107.

Suits by Same Nominal Plaintiff. — Where two suits are brought upon the same cause of action by the same nominal plaintiff, but for the use of different beneficial plaintiffs, one suit will not abate the other. *Foreman Shoe Co. v. Lewis*, 191 Ill. 155.

Where Parties Are Reversed. — *Monroe v. Reid*, 46 Neb. 316.

Suits by Same Plaintiff in Different Capacities. — Where two actions are brought for the same cause by the same plaintiff in different capacities, and he is entitled in either capacity to the whole relief demanded, the second action should abate. *Shepard v. Meridian Nat. Bank*, 149 Ind. 20, citing 1 ENCYC. OF PL. AND PR. 750.

759. 3. **In Cases of Compulsory Set-off.** — Where the statute of set-off is compulsory, the pendency of an action wherein the cause of action sued for might have been set off is a good ground for abatement. *Stevens v. Home Sav., etc., Assoc.*, (Idaho 1898) 51 Pac. Rep. 779. Where the pleading of a set-off is not compulsory, the pendency of a prior action in which it might have been but was not set off will not abate a subsequent independent action for the same claim. *Jennison Hardware Co. v. Godkin*, 112 Mich. 57; *Notara v. De Kamalaris*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 337.

Counterclaims, etc. — The pendency of a prior action on a cause set up in a subsequent action as a counterclaim for which affirmative judgment is demanded is a good defense in abatement of the counterclaim. *Caine v. Seattle, etc.*, R. Co., 12 Wash. 596.

4. Suits by One of a Class. — The pendency of a creditors' bill brought by one creditor for the benefit of all cannot, until a decree has been rendered therein, be pleaded either in bar or

760. See note 2.

Identity of Defendants. — See note 3.

761. 5. For the Same Cause of Action — The Rule Stated. — See note 1.

abatement of a subsequent bill by different creditors. *Maxwell v. Peters Shoe Co.*, 109 Ala. 371, *per* Coleman, J.; *Hall v. Alabama Terminal, etc., Co.*, 104 Ala. 577; *Sweeney Mig. Co. v. Goldberg*, 66 Ill. App. 568.

The pendency of a suit by one of a class on behalf of himself and others may be pleaded in abatement of a subsequent suit by any one of that class who would be bound by the judgment rendered in the first. *Gamble v. San Diego*, 79 Fed. Rep. 487.

Any Lienor may commence a separate action to enforce a mechanics' lien, subject to the right of any party to move to consolidate the actions. *D. G. Burton Co. v. Cowan*, 80 Hun (N. Y.) 392.

In *West Virginia*, under Code 1891, c. 139, § 7, after a suit is begun by one lienholder on behalf of himself and others to enforce a lien against the realty of a living judgment debtor, no other lienholder can bring an independent suit. *Foley v. Ruley*, 43 W. Va. 513.

760. 2. Pendency of Garnishments. — *Orient Ins. Co. v. Moffatt*, 15 Tex. Civ. App. 385, holding that garnishment suits against an insurance company pending in other courts but not reduced to judgment will not abate a subsequent action on the same policy as that involved in the garnishment.

Contra. — *Glugermovich v. Zicovich*, 113 Cal. 64, holding, however, that it is ground for a stay of proceedings or stay of execution.

3. *Dengler v. Hays*, 63 N. J. L. 16, holding that where two suits are brought for the same cause against the same defendant, but in different capacities so that the two judgments would be capable of reaching different funds, one will not abate the other.

761. 1. California. — *Ashton v. Heggerty*, 130 Cal. 516; *Hall v. Susskind*, 109 Cal. 203.

Colorado. — *Smith v. McCourt*, 8 Colo. App. 146.

Illinois. — *Salomon v. People*, 191 Ill. 290.

Indiana. — *Paxton v. Vincennes Mfg. Co.*, 20 Ind. App. 253.

Iowa. — *Watson v. Richardson*, 110 Iowa 698, *citing* 1 ENCYC. OF PL. AND PR. 761.

Maine. — *Cherryfield, etc., Electric R. Co.*, 95 Me. 361; *Cumberland County v. Central Wharf Steam Tow-Boat Co.*, 90 Me. 95.

Michigan. — *Jennison Hardware Co. v. Godkin*, 112 Mich. 57.

Minnesota. — *Piper v. Sawyer*, 82 Minn. 474.

Nebraska. — *Richardson v. Opelt*, 60 Neb. 180.

New York. — *Cobb v. Cullen Bros., etc.*, Steel Co., 68 N. Y. App. Div. 179; *Lawrence v. Freeman*, 59 N. Y. App. Div. 55; *Smith v. New York Cooperage Co.*, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 203; *Flaheity v. Herring-Hall Marvin Safe Co.*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 329; *Walker v. Pease*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 415; *Lawatsch v. Cooney*, 86 Hun (N. Y.) 546.

North Carolina. — *Propst v. Mathis*, 115 N. Car. 526.

Ohio. — *Methodist Protestant Church v. Laws*, 7 Ohio Cir. Dec. 178.

Pennsylvania. — *Hessenbruch v. Markle*, 194 Pa. St. 581.

Rhode Island. — *Dodge v. Hogan*, 19 R. I. 4.

South Carolina. — *Walters v. Laurens Cotton Mills*, 53 S. Car. 155.

Texas. — *Simmang v. Braunagel*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1032.

Utah. — *Beardsley v. Morrison*, 18 Utah 478.

Virginia. — *McAllister v. Harman*, 97 Va. 543.

Washington. — *Hall v. Woolery*, 20 Wash. 440.

Wisconsin. — *Level Land Co. No. 3 v. Sivyver*, 112 Wis. 442; *Gibson v. Southwestern Land Co.*, 89 Wis. 47.

United States. — *The Haytian Republic*, 154 U. S. 124.

Another Statement of Rule. — It is not enough that the cause of action depends upon the same right or title or grows out of the same transaction. *Metropolis Mfg. Co. v. Lynch*, 68 Conn. 459; *Watson v. Richardson*, 110 Iowa 698.

Illustrations. — A prior action in replevin will not abate a subsequent action for the price of the goods. *Cobb v. Cullen Bros., etc.*, Steel Co., 68 N. Y. App. Div. 179.

762. Test of Identity. — See note 1.

763. Different Relief. — See note 1.

Formal Differences. — See note 2.

The pendency of an action by the purchaser for breach of a contract of sale is a good defense to a subsequent action by the seller to recover the purchase price, in that the issue as to damages in the first must include the issue as to payments in the second. *Bartholomay Brewing Co. v. Haley*, 16 N. Y. App. Div. 485.

Where a guardian lends his ward's money without authority to one of his bondsmen, taking the bondsman's note therefor, an action on the guardian bond to recover the money will not abate a subsequent action on the note. *Hervey v. Rawson*, 164 Mass. 501.

Parol Evidence of Identity is not admissible where the first action has proceeded no further than the service of summons. *Curry v. Wiborn*, 12 N. Y. App. Div. 1.

Proof of Identity on Appeal. — The opinion of the court below is a part of the record and will be examined by the appellate court together with the evidence taken on the trial below to determine the identity of the two causes of action. *U. S. v. Norfolk, etc., R. Co.*, 114 Fed. Rep. 682.

762. 1. *Ralli v. Pearsall*, 69 N. Y. App. Div. 254 [*quoting* 1 ENCYC. OF PL. AND PR. 762]; *Metropolis Mfg. Co. v. Lynch*, 68 Conn. 459; *Westervelt v. Jones*, 7 Kan. App. 70; *Piper v. Sawyer*, 82 Minn. 474; *Callahan v. Davis*, 125 Mo. 27; *Richardson v. Opelt*, 60 Neb. 180. See also *Pyle v. Piercy*, 122 Cal. 383.

Action for Instalments. — Separate actions for instalments may be maintained at the same time provided the action for the first is begun before the second instalment becomes due. *Aaronson v. David Meyer Brewing Co.*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 867.

Subsequent Suit upon a New or Different Title. — A pending suit by a husband for annulment of marriage on the ground of duress will not abate an action by the wife for divorce on the ground of nonsupport. *Simpson v. Simpson*, (Cal. 1895) 41 Pac. Rep. 804.

The pendency of an action for a penalty for alleged violations of a statute will not abate a similar action for violations occurring subsequent to the

beginning of the first action. *Shanklin v. Gray*, 111 Cal. 88.

Attachment Suits and Personal Actions. — It is not ground for refusing or dissolving an attachment that there is another suit pending for the same indebtedness as set forth in the affidavit in the attachment proceedings. *Netter v. Harding*, 6 Pa. Dist. 169.

Splitting of Actions. — Actions for distinct matters, each of which would authorize independent relief, may be prosecuted separately although they existed at the same time and might have been considered together. *Richardson v. Opelt*, 60 Neb. 180; *The Haytian Republic*, 154 U. S. 124.

763. 1. *Heuschkel v. Heuschkel*, 86 Ill. App. 132; *Snow v. Hudson*, 56 Kan. 378; *Johnson v. Robertson*, (Ky. 1898) 45 S. W. Rep. 523; *Mattingly v. Elder*, (Ky. 1898) 44 S. W. Rep. 215; *Gilpin v. Carroll*, 92 Md. 44; *Carr v. Lyle*, 126 Mich. 655; *Ernest v. Woodworth*, 124 Mich. 1; *Boyd v. Boyd*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 679; *McGrath v. Maxwell*, 17 N. Y. App. Div. 246; *Hessenbruch v. Markle*, 194 Pa. St. 581; *Koch v. Peters*, 97 Wis. 492. See also *Powers v. Blue Grass Bldg., etc., Assoc.*, 86 Fed. Rep. 705.

Enforcement of Liens or Mortgages and Personal Actions for the Debt. — *Garneau v. Kendall*, 61 Neb. 396.

The pendency of an action for breach of contract, in which the debt for which a lien is claimed might have been set up as a counterclaim, will not abate a subsequent action to enforce the lien. *Smith v. Fleischman*, 23 N. Y. App. Div. 355.

2. *Monroe v. Reid*, 46 Neb. 316 [*quoting* 1 ENCYC. OF PL. AND PR. 763]; *Kansas City Southern R. Co. v. Railroad Commission*, 106 La. 583; *Shaughnessy v. St. Andrew's Church*, (Neb. 1902) 89 N. W. Rep. 263; *Alexander v. Norwood*, 118 N. Car. 381; *Spencer v. Goodlett*, 104 Tenn. 648; *Page v. Letcher*, 11 Utah 134.

Adequacy of Remedy and Criterion. — To sustain the plea of another suit pending, the whole relief sought in the second suit must be attainable in the first. *Gilpin v. Carroll*, 92 Md. 44; *Carr v. Lyle*, 126 Mich. 655; *Grieling v.*

764. 6. In the Same Jurisdiction — Suits in Foreign Jurisdictions. — See note 1.

What Jurisdictions Regarded as Foreign. — See note 2.

765. See notes 1, 2.

7. Garnishments in Foreign Jurisdictions. — See note 4.

766. See note 1.

8. Where the Former Suit Is Defective. — See note 2.

767. See notes 1, 2.

Griffing Iron Co., 61 N. J. Eq. 269; Larter v. Canfield, 59 N. J. Eq. 461; McAllister v. Harman, 97 Va. 543; Foley v. Ruley, 43 W. Va. 513; Level Land Co. No. 3 v. Sivyer, 112 Wis. 442. But see U. S. v. Norfolk, etc., R. Co., 114 Fed. Rep. 682, holding that where the second suit in a material and substantial part is the same as the first it is for the same cause of action and will abate the second although other causes of action are inserted therein. See also McNeill v. Currie, 117 N. Car. 341, in which case actions for the same and also for additional relief are abated.

764. 1. Hill v. Hill, 51 S. Car. 134; Humphrey v. Thorp, 89 Fed. Rep. 66 [citing 1 ENCYC. OF PL. AND PR. 764]; Zimmerman v. So Relle, (C. C. A.) 80 Fed. Rep. 417, per Thayer, J.; Merritt v. American Steel Barge Co., (C. C. A.) 79 Fed. Rep. 228, per Thayer, J.

2. Dunham v. Dunham, 162 Ill. 589; Hill v. Hill, 51 S. Car. 134 [each citing with approval 1 ENCYC. OF PL. AND PR. 764]; Smith v. Crocker, 14 N. Y. App. Div. 245; Ostby, etc., Co. v. Goldman, 21 R. I. 280.

The Rule Not Changed by Code Provisions. — Hill v. Hill, 51 S. Car. 134; Caine v. Seattle, etc., R. Co., 12 Wash. 596.

765. 1. State v. Superior Ct., 14 Wash. 686; Caine v. Seattle, etc., R. Co., 12 Wash. 596; Humphrey v. Thorp, 89 Fed. Rep. 66.

2. To the Effect that It Is Not Ground of Abatement, see Garneau v. Kendall, 61 Neb. 396; Kilpatrick v. Kansas City, etc., R. Co., 38 Neb. 680; Litchfield v. Brooklyn, (Brooklyn City Ct. Spec. T.) 13 Misc. (N. Y.) 693; Harby v. Patterson, (Tex. Civ. App. 1900) 59 S. W. Rep. 63; International, etc., R. Co. v. Barton, 24 Tex. Civ. App. 122; Rice v. Ashland County, 114 Wis. 130; Bunker Hill, etc., Min., etc., Co. v. Shoshone Min. Co., (C. C. A.) 109 Fed. Rep. 304; Ogden City v. Weaver, (C. C. A.) 108 Fed. Rep. 564, per Thayer,

J.; Rodgers v. Pitt, 96 Fed. Rep. 668, per Hawley, J.; Green v. Underwood, (C. C. A.) 86 Fed. Rep. 427; Brendel v. Charch, 82 Fed. Rep. 262; Gamble v. San Diego, 79 Fed. Rep. 487; Wonderly v. Lafayette County, 77 Fed. Rep. 665; Holton v. Guinn, 76 Fed. Rep. 97; Marks v. Marks, 75 Fed. Rep. 321, per Clark, J.; Short v. Hepburn, (C. C. A.) 75 Fed. Rep. 113; North Muskegon v. Clark, 62 Fed. Rep. 604, per Taft, J.; Wilcox, etc., Guano Co. v. Phoenix Ins. Co., 61 Fed. Rep. 199, per Simonton, J.

Contra, Wilson v. Milliken, 103 Ky. 165; Foley v. Hartley, 72 Fed. Rep. 570, per Hawley, J., in which case, however, a stay of proceedings only was granted. See also Ryan v. Seaboard, etc., R. Co., 89 Fed. Rep. 397, holding that, through comity, the court in which the second suit is instituted should suspend proceedings until the determination of the first.

4. Atkinson v. Mackey, 3 Pa. Dist. 634. Compare Willard v. Sturm, 96 Iowa 555; Mack v. Winslow, (C. C. A.) 59 Fed. Rep. 316, in which cases the decision seems to be based upon the ground that the proceedings pleaded in abatement were subsequently instituted.

766. 1. Summary Statement. — To the same effect see Howland v. Chicago, etc., R. Co., 134 Mo. 474.

2. Coaldale Brick, etc., Co. v. Southern Constr. Co., 110 Ala. 605, per Haralson, J.; Campbell v. Potts, 119 N. Car. 530; Silcock v. Bradford, (Tex. Civ. App. 1897) 40 S. W. Rep. 234. See also Wilson v. Atlanta, etc., R. Co., 115 Ga. 171, quoting 1 ENCYC. OF PL. AND PR. 766, 767.

Where Want of Jurisdiction Not Obvious. — To the same effect see Orman v. Lane, 130 Ala. 305; Wilson v. Atlanta, etc., R. Co., 115 Ga. 171.

767. 1. Griffin v. Levee Com'rs, 71 Miss. 767; Rothschild v. Hasbrouck, 65 Fed. Rep. 283. Compare Gage v. Allen, 89 Wis. 98.

The prior suit must be so defective

767. II. AS A GROUND FOR CONTINUANCE OR STAY — 1. Continuance — Appeal Pending. — See note 4.

768. 2. Stay of Proceedings — In General. — See note 5.

770. Pendency of Garnishment. — See note 1.

Suit in Foreign Jurisdiction. — See note 2.

In Equity. — See note 4.

that no legal recovery can possibly be had therein. *Orman v. Lane*, 130 Ala. 305; *Wilson v. Atlanta*, etc., R. Co., 115 Ga. 171.

Prior Suit Unauthorized. — Where the prior suit is instituted in the name of the plaintiff in the second, but without his authority, its pendency will not abate the second. *Wolf v. Great Northern R. Co.*, 72 Minn. 435.

Void Process. — *Chicago*, etc., R. Co. v. *Campbell*, 5 Kan. App. 423, in which case the notice by publication was attempted without the affidavit required by statute.

Suit in Erroneous Representative Character. — A prior suit which is ineffectual because brought in an erroneous representative capacity cannot be pleaded in abatement of a subsequent suit properly instituted. *National Express*, etc., Co. v. *Burdette*, 7 App. Cas. (D. C.) 551.

Defective Writ of Error. — Where the writ is so defective that no recovery can be had thereon the second action will not abate. *Gilmore v. Georgia R.*, etc., Co., 93 Ga. 482.

767. 2. Ralli v. Pearsall, 69 N. Y. App. Div. 254, holding that the intentional destruction of papers in an action does not constitute a discontinuance.

4. See *Brown v. Campbell*, 110 Cal. 644.

768. 5. Robinson v. Ruprecht, 191 Ill. 424.

Where the judgment in the first action will dispose of the controversy in the second the court may stay proceedings in the second until the determination of the first. *Post v. Banks*, 67 N. Y. App. Div. 187.

Where Different Relief Is Sought. — The stay will not be granted unless a judgment in the prior suit will settle all the issues raised in the second. *Clark v. National Bank*, 22 N. Y. App. Div. 605; *Lowenstein v. Schiffer*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 477.

770. 1. Orient Ins. Co. v. Moffatt, 15 Tex. Civ. App. 385.

2. *Dunham v. Dunham*, 162 Ill. 589; *Hill v. Hill*, 51 S. Car. 134 [each citing

1 ENCYC. OF PL. AND PR. 770]; *Allentown Foundry*, etc., *Works v. Loretz*, 16 N. Y. App. Div. 72.

The stay will not usually be granted where it appears that the opportunity to obtain satisfaction in the foreign suit is not as good as the domestic suit affords. *Wallace v. Leber*, 67 N. J. L. 26.

State and Federal Courts — Stay through Comity. — While an action pending in a state or federal court cannot be pleaded in abatement of a subsequent suit in the other court, yet in all cases where it may be necessary for the court to take possession of property, appoint a receiver, or do any act that would lead to an unseemly conflict of authority, the court in which the second suit is brought should stay proceedings until the determination of the first. *State v. Tallman*, (Wash. 1902) 69 Pac. Rep. 1115; *Bunker Hill*, etc., Min., etc., Co. v. *Shoshone Min. Co.*, (C. C. A.) 109 Fed. Rep. 504; *Ogden City v. Weaver*, (C. C. A.) 108 Fed. Rep. 564, *per Thayer*, J.; *Rodgers v. Pitt*, 96 Fed. Rep. 668, *per Hawley*, J.; *Green v. Underwood*, (C. C. A.) 86 Fed. Rep. 427, *per Phillips*, J.; *Hughes v. Green*, 84 Fed. Rep. 833; *Zimmerman v. So Relle*, (C. C. A.) 80 Fed. Rep. 417; *Marks v. Marks*, 75 Fed. Rep. 321, *per Clark*, J.; *Foley v. Hartly*, 72 Fed. Rep. 570; *Hatch v. Bancroft-Thompson Co.*, 67 Fed. Rep. 802. See also *Merritt v. American Steel Barge Co.*, (C. C. A.) 79 Fed. Rep. 228.

Review of Discretion on Appeal. — The decision will not be reviewed on appeal except in a clear case of abuse of discretion. *Hill v. Hill*, 51 S. Car. 134.

4. *Little Falls Nat. Bank v. King*, 53 N. Y. App. Div. 640, 67 N. Y. Supp. 1138.

Stay Pending Insolvency Proceedings. — Under Rev. Laws Vt. 1797, the court must grant a stay of proceedings or stay of execution in any action to enforce a claim against an insolvent estate from the time of filing a petition of insolvency until the determination of the question of discharge. *Patterson v. Smith*, 66 Vt. 633.

770. III. TAKING THE OBJECTION — 1. At Common Law —

a. OBJECTION, HOW TAKEN. — See note 5.

771. See note 1.

b. AT WHAT STAGE OF PROCEEDINGS. — See note 3.

c. REQUISITES OF THE PLEA. — See notes 5, 9, 10.

772. See notes 1, 2, 3, 4, 5.

d. PROCEEDINGS SUBSEQUENT TO PLEA — Replication. —

See note 7.

773. Judgment. — See note 3.

2. In Equity — Demurrer. — See note 5.

Plea. — See note 7.

774. Form of Plea. — See note 1.

Proceedings upon Plea. — See note 6.

770. 5. Not by Motion to Quash. — *Ryan v. Mills*, (Mich. 1901) 88 N. W. Rep. 392; *Gardner v. Kiehl*, 182 Pa. St. 194.

771. 1. Meilinger v. People, 83 Ill. App. 436; *North Muskegon v. Clark*, (C. C. A.) 62 Fed. Rep. 694.

3. See Orient Ins. Co. v. Moffatt, 15 Tex. Civ. App. 385.

5. Needham v. Wright, 140 Ind. 190.

9. Green v. Underwood, (C. C. A.) 86 Fed. Rep. 427, holding that the plea must state whether the prior suit is pending in a court of law or of equity.

10. Polsey v. White Rose Mfg. Co., 19 R. I. 492, holding that the plea must allege the return and entry of the writ in the prior action.

772. 1. Gardner v. Kiehl, 182 Pa. St. 194; *Polsey v. White Rose Mfg. Co.*, 19 R. I. 492.

2. Green v. Underwood, (C. C. A.) 86 Fed. Rep. 427; *Griswold v. Bacheller*, 77 Fed. Rep. 857.

3. Carbolineum Wood Preserving, etc., Co. v. Meyer, 76 Miss. 586, holding that a plea was bad which alleged that the court in which the prior suit was pending had full jurisdiction, but which failed to allege further that the remedy in that suit was "as ample and efficient" as in the second.

4. Foley v. Ruley, 43 W. Va. 513, holding that the prayer of the plea should be that the writ be quashed, and not whether the defendant should further answer.

5. Ryan v. Mills, (Mich. 1901) 88 N. W. Rep. 392.

Want of Verification. — Objection on account of want of verification is waived by filing a general demurrer to the plea. *Griswold v. Bacheller*, 77 Fed. Rep. 857.

In New Jersey. — Being a dilatory plea the only affidavit necessary is that required by Practice Act, § 115, stating that the facts alleged in the plea are true. *Robert v. Moore*, 62 N. J. L. 618.

7. See Wilson v. Milliken, 103 Ky. 165. See also *Wolf v. Great Northern R. Co.*, 72 Minn. 435, in which case the plaintiff replied to the plea in abatement, alleging that the prior suit was instituted without his authority.

773. 3. See State v. Superior Ct., 9 Wash. 366, in which case, after issue upon the plea in abatement had been decided in favor of the plaintiff, the plaintiff's motion for judgment was refused and the defendant allowed to amend his answer and plead to the merits.

5. Troy Fertilizer Co. v. Prestwood, 116 Ala. 119; *Williamson v. Smith*, 4 Pa. Dist. 307; *Foley v. Ruley*, 43 W. Va. 513.

7. Maxwell v. Peters Shoe Co., 109 Ala. 371.

774. 1. Griffing v. Griffing Iron Co., 61 N. J. Eq. 269, holding that it is sufficient to allege facts showing that the subject-matter is the same in each suit without making an express averment to that effect.

Although great strictness is required as to the averments of pleas in abatement, the plea must be held good where no reasonable doubt exists as to the identity of the suits. *O'Brien v. Alpena Circuit Judge*, 106 Mich. 42.

6. Zimmerman v. So Relle, (C. C. A.) 80 Fed. Rep. 417, in which case it was declared that the rule requiring a reference is not applicable where the suits are pending in different jurisdictions, and that under such circumstances where the plea is set down for

775. 3. Under Code Systems — a. OBJECTION, HOW TAKEN.

— See notes 4, 5.

b. AT WHAT STAGE OF PROCEEDINGS. — See note 6.

776. c. ANSWERS IN ABATEMENT — Necessary Avertments.

See notes 1, 3, 4.

Joinder with Matter in Bar. — See note 5.

argument the complainant cannot be considered as having waived his right to take issue on the facts alleged in the plea and to determine its sufficiency in substance as well as in form.

775. 4. *Alexander v. Norwood*, 118 N. Car. 381, *per* Faircloth, J.; *Caine v. Seattle*, etc., R. Co., 12 Wash. 596, *per* Anders, J. It is otherwise where the pendency of the prior action does not appear upon the face of the complaint. *Hardon v. Ongley Electric Co.*, 89 Hun (N. Y.) 487; *Jackson v. McAuley*, 13 Wash. 298. For the demurrer to be successful the face of the complaint must show that the prior action is between the same parties and for the same cause. *Parker v. Selye*, 3 N. Y. App. Div. 149; *Level Land Co. No. 3 v. Sivyler*, 112 Wis. 442.

Form of Demurrer. — A demurrer "for want of facts" is insufficient. The demurrer must be on the specific ground that it appears from the complaint that another action is pending. *Basye v. Basye*, 152 Ind. 172.

5. *Stevens v. Home Sav., etc., Assoc.*, (Idaho 1898) 51 Pac. Rep. 986; *Treanor v. Sheldon Bank*, 90 Iowa 575, *per* Rothrock, J.; *Alexander v. Norwood*, 118 N. Car. 381, *per* Faircloth, J.; *Caine v. Seattle*, etc., R. Co., 12 Wash. 596, *per* Anders, J.

Not by Motion. — *Witte v. Foote*, 90 Wis. 235.

Either a Motion or a Formal Plea may be resorted to, the latter being preferable. *State v. Superior Ct.*, 14 Wash. 686, in which case a stay was granted on motion. See also *Ferst v. Powers*, 58 S. Car. 411, holding that where two

suits are instituted for the same cause and attachments issued in each the second attachment may be quashed on motion.

Waiver. — *Brown v. Campbell*, 110 Cal. 614.

Objection on Appeal. — *Smith v. Spaulding*, 40 Neb. 339; *Heyward v. Farmer's Min. Co.*, 42 S. Car. 138, in which case the defense of another suit pending was pleaded, but not presented at the trial.

Must Be Specially Plead. — The defense of another suit pending is not available under a general denial. *State v. Riedy*, 50 La. Ann. 258.

6. *Glover v. St. Louis Mut. Bond Invest. Co.*, 138 Mo. 408. See also *Orient Ins. Co. v. Moffatt*, 15 Tex. Civ. App. 385.

776. 1. Pendency when Second Action Commenced. — The answer must allege that the action pleaded in abatement was pending at the time the second action was begun. *Dodge v. Cornelius*, 168 N. Y. 242.

3. *Larson v. Shook*, 68 Minn. 30; *Monroe v. Reid*, 46 Neb. 316.

4. *Needham v. Wright*, 140 Ind. 190; *Monroe v. Reid*, 46 Neb. 316; *Beardsley v. Morrison*, 18 Utah 478.

Same Parties. — The answer must allege that the parties in each action are the same. *Needham v. Wright*, 140 Ind. 190; *Dodge v. Cornelius*, 168 N. Y. 242.

5. Rule Followed by Federal Courts. — Since the adoption of Rev. Stat. U. S., § 914, this rule is followed by federal courts sitting in code states. *Green v. Underwood*, (C. C. A.) 86 Fed. Rep. 427.

ANSWERS IN CODE PLEADING.

779. I. INTRODUCTORY — CONTENTS OF ANSWER. — See note 1.

782. II. FORM OF DENIAL — 2. What Constitutes Good General Denial. — See note 2.

"Each and Every" Allegation Denied. — See note 3.

Denial of "Material" Allegations. — See note 4.

779. 1. *State v. Cooley*, 56 Minn. 540, 58 Minn. 514; *Missouri Edison Electric Co. v. Lewis*, 86 Mo. App. 612; *Cruikshank v. Press Pub. Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 152; *Durst v. Brooklyn Heights R. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 124; *Staten Island Midland R. Co. v. Hinchcliffe*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 49; *Zimmerman v. Meyrowitz*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 307; *Feder v. Samson*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 111; *Henderson v. Bennett*, 58 S. Car. 30; *Flourance Oil, etc., Co. v. Farrar*, (C. C. A.) 109 Fed. Rep. 254.

Denial on Information and Belief — Idaho. — The only qualified denial which is provided by the Idaho statute must be made upon information and belief. *Stickney v. Hanrahan*, (Idaho 1900) 63 Pac. Rep. 189.

Nebraska. — The only denials for which Code Civ. Pro. Neb. (§ 99) provides are either general or specific. No provision is made for the qualified form. *National L. Ins Co. v. Martin*, 57 Neb. 350, cited in *Chicago First Nat. Bank v. Stoll*, 57 Neb. 758.

Facts and Not Evidence should be alleged. *Morse v. Press Pub. Co.*, 49 N. Y. App. Div. 375.

A Letter Addressed to the Plaintiff's Attorney which is verified, but not in the form required by the statute, and which does not purport to be an answer, cannot be regarded as a pleading by the defendant. *Matter of Kimball*, 155 N. Y. 62.

782. 2. *Cornett v. Smith*, 15 Colo. App. 53; *Weser v. Welty*, 18 Ind. App. 664.

In Georgia it has been held that prior to Act Ga. Dec. 15, 1893, the marking of the word "answered" on the docket

was sufficient in effect as a plea of the general issue. *Cunningham v. Cureton*, 96 Ga. 489.

3. *Carr v. Miller-Morris Canal, etc., Co.*, 105 La. 239; *Russell v. Amundson*, 4 N. Dak. 112; *Nix v. Gilmer*, 5 Okla. 740. See also *Paden v. Goldbaum*, (Cal. 1894) 37 Pac. Rep. 759.

Defendant Says He Denies. — For the defendant to allege that he says that he denies each and every allegation, although disapproved in form, has been held to be a sufficient denial. *Humble v. McDonough*, (Buffalo Super. Ct. Gen. T.) 5 Misc. (N. Y.) 508; *Denver v. Spokane Falls*, 7 Wash. 226.

Necessity to Deny Knowledge or Information. — A denial of each and every allegation is good, although coupled with an allegation of lack of knowledge, and the defendant need not deny on information or belief, nor allege a lack of knowledge or information to form a belief. *Smith v. Allen*, (Neb. 1901) 88 N. W. Rep. 155.

Specified Allegations Not Denied. — A denial of each and every allegation, except as admitted, qualified, or controverted, will be sustained when the allegations which are intended to be admitted, qualified, or controverted are so clearly specified that there can be no doubt. *Zimmerman v. Meyrowitz*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 307. But see *Barton v. Griffin*, 36 N. Y. App. Div. 572.

4. *Mead v. Pettigrew*, 11 S. Dak. 529 [citing 1 ENCYC. OF PL AND PR. 782]; *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 75. *Contra*, *Nix v. Gilmer*, 5 Okla. 740.

Objection Waived. — The objection that an answer denies "each and every material matter and thing" contained in the complaint cannot be made on

783. Counter-averment. — See note 1.

Form of General Issue. — See note 2.

784. 3. What Constitutes Good Specific Denial — Denial of What Is Between Certain Specified Words, or in Folios or Paragraphs. — See notes 2, 3.

Must Be Categorical. — See note 4.

785. Hypothetical Denial. — See note 1.

III. SPECIFIC DENIALS AND THEIR SCOPE — 1. Optional to Use Specific Denial. — See notes 5, 7.

786. See note 1.

787. 2. Construction. — See note 3.

Suits on Notes. — See note 5.

788. Plaintiff's Right to Sue. — See note 1.

Contracts. — See note 2.

789. Torts. — See note 1.

appeal when it was not presented to the trial court. *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 75.

783. 1. *Contra*, *Bernstein v. Crow*, (Supm. Ct. App. T.) 22 Misc.(N.Y.) 99.

2. *Storey v. Kerr*, (Neb. 1902) 89 N. W. Rep. 601.

784. 2. *Laurie v. Duer*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 154.

3. *People v. Banfield*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 13; *Burkert v. Bennett*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 318. See *contra*, *Hoffman v. Susemihl*, 15 N. Y. App. Div. 405.

Negative Pregnant. — A denial of an averment "as alleged in paragraph No. 3" of the plaintiff's complaint constitutes a negative pregnant. *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630.

Denial of Each Paragraph of Both Counts. — It is sufficient for the answer to deny all the allegations of each paragraph of both counts of the plaintiff's petition. *Ocean Steamship Co. v. Anderson*, 112 Ga. 835.

Repeating Allegations Denied. — A good specific denial of the allegations of a certain paragraph is not vitiated by subsequently repeating the allegations. *Hoffman v. Susemihl*, 15 N. Y. App. Div. 405.

4. *Collins v. Fenley*, (Ky. 1899) 53 S. W. Rep. 667.

785. 1. *State v. Hill*, 47 Neb. 456.

5. *Cruikshank v. Press Pub. Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 152.

Special and General Denials Joined. — When special denials of particular facts are coupled with a general denial, the defendant does not thereby confess the

allegations so particularly denied. *Gifford v. Hess*, 15 Ind. App. 450.

7. In Georgia by Statute it is provided that the defendant shall distinctly and severally answer each paragraph of the petition, and shall not file a general denial. *Johnson v. Cobb*, 100 Ga. 139.

786. 1. *Texas*. — *Hoxie v. Farmers, etc.*, Nat. Bank, 20 Tex. Civ. App. 462. See also *Schauer v. Beitel*, 92 Tex. 601.

The Correctness of a Verified Account should be denied under oath in *Kansas*. *Haldeman v. Johnson*, 8 Kan. App. 473.

787. 3. *Raker v. Bucher*, 100 Cal. 214, holding that such a mere clerical error as the use of the word "when" for "where" will be disregarded.

5. **Denial of Delivery.** — Inasmuch as the execution includes signature and delivery, a denial of the authority to deliver is a negation of power to execute. *Lomax v. Haskell First Nat. Bank*, (Tex. Civ. App. 1897) 39 S. W. Rep. 655. And see NEGOTIABLE INSTRUMENTS.

788. 1. *Meyer v. Barth*, 97 Wis. 352, holding that an objection to the plaintiff's right to sue must be affirmatively taken, if not by demurrer by answer, and that otherwise it is waived.

2. **Denial Coupled with Admission.** — An undoubtedly good denial may be so immediately followed by an admission that its denying effect will be destroyed. *Hand v. Miller*, 58 N. Y. App. Div. 126.

789. 1. *McKay v. Southern Bell Telephone Co.*, 111 Ala. 337, holding that an averment that a telephone wire was in good order and condition, and

789. Deeds. — See note 2.

[**3. Repugnant Answer and Cross-complaint.** — A specific denial in the answer is neither overcome nor waived by an admission in a cross-complaint which is inconsistent with the denial. See note 2a.]

IV. ALLEGATIONS ADMITTED BY FAILURE TO DENY —

1. Generally. — See note 4.

properly located, was not a denial of an allegation that the wire was frail, insecurely fastened, and liable to fall, and that the defendant knew such facts.

Fraud. — In an action to set aside certain conveyances as fraudulent, an affirmative allegation that the deeds attacked for fraud were made for the purpose of paying the defendant's debts is equivalent to a specific denial. *National Wall Paper Co. v. M'Pherson*, 19 Mont. 355. See also **FRAUD**.

789. 2. La Mesnager v. Hamilton, 101 Cal. 532. Compare *Johnson v. Johnson*, 44 S. Car. 364, holding that an averment of facts showing nondelivery of a deed constitutes a good specific denial, although the making of the deed is admitted.

"Executed" Construed to Mean "Signed." — Where it appears that the word "executed" was used not in its technical but in its popular signification, the court may construe it to mean nothing more than "signed." *Buffington v. Thompson*, 98 Ga. 416.

2a. Meyers v. Merillion, 118 Cal. 352.

4. Dillery v. Borwick, 36 Oregon 255, citing 1 ENCYC. OF PL. AND PR. 789. See also the following cases:

Alabama. — *Dreyspring v. Loeb*, 119 Ala. 282.

California. — *Latta v. Tutton*, 122 Cal. 279; *Oakland Sav. Bank v. Sullivan*, 107 Cal. 428; *Wolff v. Wolff*, 102 Cal. 433; *Lothrop v. Golden*, (Cal. 1899) 57 Pac. Rep. 394; *Cunningham v. Norton*, (Cal. 1895) 40 Pac. Rep. 491.

Colorado. — *Amanda Gold Min., etc., Co. v. Peoples Min., etc., Co.*, 28 Colo. 251; *Ensley v. Page*, 13 Colo. App. 452.

Connecticut. — *Jacobs v. Curtiss*, 67 Conn. 502; *Greenthal v. Lincoln*, 67 Conn. 372.

Georgia. — *Cowart v. Stanton*, 104 Ga. 520; *Hight v. Barrett*, 34 Ga. 792.

Iowa. — *Kent v. Muscatine, etc., R. Co.*, (Iowa 1902) 88 N. W. Rep. 935.

Kentucky. — *Emison v. Walker*, (Ky. 1895) 31 S. W. Rep. 461.

Missouri. — *Call v. Moll*, 89 Mo. App. 386; *Hax v. Hax*, 84 Mo. App. 306.

Nebraska. — *Baker v. Peterson*, 57 Neb. 375; *National L. Ins. Co. v. Martin*, 57 Neb. 350; *Gadsden v. Thrush*, 56 Neb. 565; *Lonergan v. Lonergan*, 55 Neb. 641; *Bouscaren v. Brown*, 40 Neb. 722; *Zarrs v. Keck*, 40 Neb. 456.

New York. — *Twelfth Ward Bank v. Brooks*, 63 N. Y. App. Div. 220; *McEvoy v. New York*, 56 N. Y. App. Div. 222; *Alexander Lumber Co. v. Abrahams*, (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 425; *Finklestein v. Barnett*, (N. Y. City Ct. Gen. T.) 16 Misc. (N. Y.) 488.

North Carolina. — *Tiddy v. Graves*, 127 N. Car. 502; *Hauser v. Harding*, 126 N. Car. 295; *Vanstory v. Thornton*, 114 N. Car. 375.

Oregon. — *Capital Lumbering Co. v. Learned*, 36 Oregon 544.

South Dakota. — *Mattoon v. Fremont, etc., R. Co.*, 6 S. Dak. 301; *Calkins v. Seabury-Calkins Consol. Min. Co.*, 5 S. Dak. 299.

Utah. — *Peterson v. Bean*, 22 Utah 43.

Proper Mode to Make Admission. — *Galbraith v. Daily*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 156; *Cruikshank v. Press Pub. Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 152, affirmed 59 N. Y. App. Div. 620; *Flack v. O'Brien*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 399.

Judgment on Pleadings. — *Hanna v. Savage*, 7 Wash. 414.

Amendment and Withdrawal. — When the complaint is amended but merely repeats allegations contained in the original complaint upon which issue has been joined, a failure to answer the amended complaint does not admit its averments. *Brossard v. Morgan*, (Idaho 1900) 61 Pac. Rep. 1031.

Neither Admitted nor Denied. — *Maxwell v. Higgins*, 38 Neb. 671.

Admission by Implication. — The allegations of the complaint may be admitted by implication. *Johnson v. Hesser*, 61 Neb. 631; *Battelle v. McIntosh*, 62 Neb. 647.

Where the defendant alleges that he shot the plaintiff accidentally, and does

791. 3. Denial of Immaterial Allegations. — See note 3.

792. 6. Value and Damages. — See note 3.

793. See note 1.

7. Time. — See note 2.

8. Legal Conclusions. — See note 3.

794. 9. Possession and Ownership. — See notes 1, 3.

not set up self-defense, the answer stands as an admission that he did not fire in self-defense. *Hollingsworth v. Warnock*, (Ky. 1901) 65 S. W. Rep. 163.

Admission of Due Service. — Where a complaint alleges seasonable service of a notice of injury, an answer which admits the service of a notice is an admission of the allegations of the complaint on that subject. *Althouse v. Jamestown*, 91 Wis. 46.

Admission of Damage or Injury. — A denial in an answer of carelessness, negligence, or fault, is not a denial of damage or injury. *South Covington, etc., St. R. Co. v. Herrklotz*, 104 Ky. 400.

A Denial that the Plaintiff Furnished Sufficient Proofs of Loss is not a denial that he furnished proofs. *Germania Ins. Co. v. Ashby*, (Ky. 1901) 65 S. W. Rep. 611.

Admission by Codefendant. — When the defendants have filed separate answers, an admission by one defendant is not binding upon another party defendant. *Harvey v. Smith*, 179 Mass. 592.

A Finding by the Jury Is Not Dispensed With when a general denial is joined with a special answer which admits certain allegations of the complaint. *Silliman v. Gano*, 90 Tex. 637.

Force of Admissions. — Admissions have the force and the effect of a finding by the jury. *Cook v. Guirkin*, 119 N. Car. 13.

Admissions Coupled with a General Denial may not be used to aid the plaintiff's cause of action. *Hynes v. Packard*, 92 Tex. 44.

Affirmative Allegations Coupled with Admissions. — Where the defendant admits his ownership of certain premises and the making of certain excavations thereon, the plaintiff is entitled to the full benefit of such admissions without regard to affirmative and unproved allegations in the answer. *Dwyer v. McLaughlin*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 510. But see *Hoes v. Nagele*, 28 N. Y. App. Div. 374.

Admission Must Be Clear. — To preclude the defendant from denying the existence of a fact which the plaintiff

urges to have been admitted, the admission must be clear and unequivocal. *Brady v. Hutkoff*, (N. Y. Super. Ct. Gen. T.) 13 Misc. (N. Y.) 515, *affirmed* 155 N. Y. 631.

Account Stated. — A failure to deny the rendition of a statement of an account is not an admission of rendition of an account stated. *McKenzie v. Poorman Silver Mines*, (C. C. A.) 88 Fed. Rep. 111.

791. 3. Mandigo v. Bailey, 64 N. Y. App. Div. 432.

A Denial of Surplusage contained in a complaint tenders no material issue. *Shasta Bank v. Boyd*, 99 Cal. 604; *Gattis v. Kilgo*, 128 N. Car. 402. See also SURPLUSAGE, IRRELEVANT OR REDUNDANT MATTER.

792. 3. Equitable Bldg., etc., Assoc. v. Holloway, 114 Ga. 780.

793. 1. Equitable Bldg., etc., Assoc. v. Holloway, 114 Ga. 780, holding that as a demand for mesne profits is a claim for unliquidated damages, a failure to deny an allegation as to the value of the land for rent does not operate as an admission.

3. Compare Lingard v. Beta Theta Pi Hall Assoc., (Cal. 1899) 56 Pac. Rep. 58, where it was held that the peculiar phraseology of the answer amounted to an admission.

3. Lanier v. Union Mortg., etc., Co., 64 Ark. 39. See also LEGAL CONCLUSIONS.

What Are Not Legal Conclusions. — It has been held that an admission of right to tenancy by the curtesy is an admission not of a legal conclusion but of a fact. *Tiddy v. Graves*, 127 N. Car. 302.

Immaterial Admissions. — A defendant cannot be prejudiced by admitting a conclusion of law. *Greer v. Latimer*, 47 S. Car. 176; *Verhire v. Ragsdale*, 96 Tenn. 532.

794. 1. Possession Is Admitted when the answer denies that the use and occupation of the property was worth a specified sum since the defendant came into possession. *Yorks v. Mooberg*, 84 Minn. 302.

3. State v. Henderson, 86 Mo. App.

- 794.** 10. Notes, Bills, and Other Instruments. — See notes 4, 5.
795. See note 1.
 11. Libel and Slander. — See LIBEL AND SLANDER.
 13. Release and Payment. — See PAYMENT; RELEASE.
796. 14. Pleading Different Contract or Tort. — See note 1.
 15. Mandamus. — See MANDAMUS.
 16. Divorce Proceedings. — See DIVORCE.
 17. Allegations of Status and Capacity. — See note 4.
V. NEGATIVES PREGNANT — 1. Generally. — See note 5.

482, holding that an allegation of ownership, not denied, stands admitted; *Peterson v. Bean*, 22 Utah 43, holding that a failure to deny either possession or ownership admits both.

Chain of Title. — When the complaint alleges a complete chain of title, the plaintiff's failure to prove a particular link in the chain is a harmless omission when the answer admits the allegations of the complaint as to the link in question. *McMillan v. Gambill*, 115 N. Car. 352.

Waiver of Objections to Answer. — Although a denial of certain allegations in the complaint as to title is insufficient, the answer may be treated as perfect in the absence of a motion to make it more definite and certain. *Nicklace v. Dickerson*, 65 Ark. 422.

794. 4. *Rauer v. Broder*, 107 Cal. 282; *Solomon v. Brodie*, 10 Colo. App. 353; *Bauman v. Chambers*, 91 Tex. 108. See also NEGOTIABLE INSTRUMENTS.

A Mere Deduction which is not a denial presents no issue as to execution. *Mutzenburg v. McGowan*, 10 Colo. App. 486.

Admission by Implication. — Where the answer alleges the execution of a note to the same payee, on the same date, for the same amount, and payable at the same time, this is an admission of the execution of the note on which the plaintiff sues. *Mutzenburg v. McGowan*, 10 Colo. App. 486.

An answer alleging that "defendant further answering says that since the making of said note," etc., is an admission of execution. *Wisdom v. Shanklin*, 74 Mo. App. 428.

Admission of Ratification. — Although execution is denied, if there has been a ratification, the facts constituting the ratification should likewise be denied. Otherwise ratification is admitted. *Gribble v. Columbus Brewing Co.*, 100 Cal. 67.

Nullification of Denial. — A denial of consideration is nullified by an admis-

sion in the same paragraph that the defendant succeeded to the rights, properties, and liabilities of his assignor. *Ryan v. Middlesborough Townlands Co.*, (Ky. 1899) 52 S. W. Rep. 33.

5. Contract and Breach. — Where the plaintiff alleges that the defendant sold tobacco contrary to contract, and the defendant does not deny, he admits the contract and its breach. *Emison v. Walker*, (Ky. 1895) 31 S. W. Rep. 461.

795. 1. See generally the statutes of the various states, and see the following cases: *Garland v. Gaines*, 73 Conn. 662; *Woroniecki v. Pariskiego*, 74 Conn. 224; *Harris v. Randolph County Bank*, 157 Ind. 120; *Cincinnati Barbed Wire Fence Co. v. Chenoweth*, 22 Ind. App. 685; *Spencer v. Society of Shakers*, (Ky. 1901) 64 S. W. Rep. 468; *Faircloth v. Tinsley*, 83 Mo. App. 586.

796. 1. **Effect of Ambiguity.** — Where it is impossible for the court to determine whether the pleader intended to admit or to deny the allegations of tort contained in the complaint, they will be held to stand admitted. *Boles v. Bennington*, 136 Mo. 522.

4. *Dreyspring v. Loeb*, 119 Ala. 282; *Missouri, etc., R. Co. v. Elliott*, 2 Indian Ter. 407; *Billings v. Cal. Hirsch, etc., Iron, etc., Co.*, 86 Mo. App. 228; *Chicago First Nat. Bank v. Stoll*, 57 Neb. 758; *Manhattan Brick, etc., Co. v. Clark*, (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 819. See also CORPORATIONS; PARTNERSHIP; PRINCIPAL AND AGENT.

Execution of Deed by Agent. — Where it is not denied that a deed was executed by a corporation, but it is admitted that the deed was duly executed, it is impliedly admitted that the deed was executed by an agent having due authority. *Woroniecki v. Pariskiego*, 74 Conn. 224.

5. *Duckworth v. McKinney*, 58 S. Car. 418, citing 1 ENCYC. OF PL. AND PR. 796.

797. See note 1.

2. Conjunctive Denials. — See note 2.

798. **3. Literal Denials.** — See note 1.

Particular Amount. — See note 2.

799. **VI. ARGUMENTATIVE DENIALS** — **1. Defined.** — See note 4.

800. **2. What Constitutes Argumentative Denial** — **Contracts.** — See notes 1, 2, 3.

797. **1. Curnow v. Phoenix Ins. Co.,** 46 S. Car. 79, *citing* with approval 1 ENCYC. OF PL. AND PR. 796. See also the following cases:

Colorado. — Grand Valley Irrigation Co. v. Leshner, 28 Colo. 273; Sargent v. Chapman, 12 Colo. App. 529; Lozier v. Hannan, 12 Colo. App. 59; Brennan v. State Bank, 10 Colo. App. 368.

Indian Territory. — Missouri, etc., R. Co. v. Elliott, 2 Indian Ter. 407.

Kentucky. — Germania Ins. Co. v. Ashby, (Ky. 1901) 65 S. W. Rep. 611; Hendrick v. Robert Mitchell Furniture Co., (Ky. 1895) 29 S. W. Rep. 750.

Montana. — Missoula Mercantile Co. v. O'Donnell, 24 Mont. 75; Edgerton v. Power, 18 Mont. 350.

New York. — De Forest v. Andrews, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 145; Kelly v. Sammis, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 6.

Utah. — Peterson v. Bean, 22 Utah 43; Podlech v. Phelan, 13 Utah 333.

Washington. — Columbia Nat. Bank v. Western Iron, etc., Co., 14 Wash. 162.

Wisconsin. — Carpenter v. Rolling, 107 Wis. 559.

Illustrations. — A denial on information and belief of a matter presumptively within the defendant's knowledge is a negative pregnant. Carpenter v. Momsen, 92 Wis. 449.

A denial that no greater sum than five dollars has been paid is equivalent to an allegation of the payment of any greater sum. Randall v. Simmons, (Oregon 1902) 67 Pac. Rep. 513.

Good unless Objected To. — Armstrong v. Danahy, 75 Hun (N. Y.) 405.

Missouri. — Law v. Crawford, 67 Mo. App. 150.

Negative Pregnant Disregarded. — Where an inspection of the answer shows that the design of the pleader is to put in issue a material allegation of the complaint, a negative pregnant may be disregarded. Queen City Bank v. Hudson, 8 N. Y. App. Div. 27.

2. Curnow v. Phoenix Ins. Co., 46 S. Car. 79 [*citing* 1 ENCYC. OF PL. AND PR. 796]; Tate v. People, 6 Colo. App. 202;

Bach v. Montana Lumber, etc., Co., 15 Mont. 345; Queen City Bank v. Hudson, 8 N. Y. App. Div. 27.

Construction of Denial. — Although a denial is in the conjunctive form and framed in *hac verba*, since it must be read as a unit, it may be held to be a sufficient denial. Byxbee v. Dewey, (Cal. 1896) 47 Pac. Rep. 52.

798. **1. Curnow v. Phoenix Ins. Co.,** 46 S. Car. 79, *citing* 1 ENCYC. OF PL. AND PR. 796. And see the following cases:

California. — Santa Ana v. Brunner, 132 Cal. 234. See also Burris v. People's Ditch Co., 104 Cal. 248.

Colorado. — Lowell v. Bonney, 14 Colo. App. 230.

Kentucky. — Hendrick v. Robert Mitchell Furniture Co., (Ky. 1895) 29 S. W. Rep. 750.

New York. — Pascekwitz v. Richards, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 250; Laurie v. Duer, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 154; De Forest v. Andrews, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 145; Schnitzer v. Gordon, 28 N. Y. App. Div. 341; Kelly v. Sammis, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 6; McClave v. Gibb, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 44.

Oklahoma. — Spencer v. Turney, 5 Okla. 683.

South Dakota. — Board of Education v. Prior, 11 S. Dak. 292.

Washington. — Seattle Nat. Bank v. Meerwaldt, 8 Wash. 630.

Wisconsin. — Grimm v. Washburn, 100 Wis. 229.

2. Duckworth v. McKinney, 58 S. Car. 418.

799. **4. Gifford v. Hess,** 15 Ind. App. 450.

Special Denial. — An argumentative denial, it would seem, is sometimes denominated a special denial. Citizens Nat. Bank v. Greensburg Third Nat. Bank, 19 Ind. App. 81.

800. **1. Crum v. Yundt,** 12 Ind. App. 308.

2. Kirshbaum v. Hanover F. Ins. Co., 16 Ind. App. 606.

Fraudulent Representations. — Allega-

800. Ownership. — See notes 4, 5.

801. Matters Showing that Facts Do Not Exist. — See note 3.

3. Effect. — See note 4.

802. See notes 1, 2.

VII. GENERAL DENIAL COUPLED WITH ADMISSIONS — 1.

Generally. — See note 3.

803. See notes 1, 2, 3.

804. 2. Answer Must Be Definite and Specific as to Admissions. — See note 1.

The Proper Form. — See note 2.

805. VIII. DENIALS OF LEGAL CONCLUSIONS — 1. Generally. — See note 1.

2. Denial of Indebtedness. — See note 2.

tions that a contract was obtained by false and fraudulent representations are, in effect, a denial of the *factum* of the contract. *Pittenger v. Southern Tier Masonic Relief Assoc.*, 15 N. Y. App. Div. 26.

800. 3. *Shrum v. Salem*, 13 Ind. App. 115.

4. *Corbin v. Thompson*, 12 Ind. App. 511.

5. Denial of Ownership as Assignee. — A denial that the plaintiff is the owner "as the assignee of the vendors in the deed of A and others" is argumentative. *McClure v. Bigstaff*, (Ky. 1896) 37 S. W. Rep. 294.

801. 3. *Luther v. Brown*, 66 Mo. App. 228.

4. *Smith v. Coe*, 170 N. Y. 162; *Rodgers v. Clement*, 162 N. Y. 422; *Bernstein v. Crow*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 99; *Hand v. Miller*, 58 N. Y. App. Div. 126; *Berry v. Rowley*, 11 N. Y. App. Div. 396.

802. 1. General Denial and Argumentative Denial Both Pleaded. — *Wood v. State*, 155 Ind. 1; *Gifford v. Hess*, 15 Ind. App. 450; *Shrum v. Salem*, 13 Ind. App. 115. But see *Seiberling v. Rodman*, 14 Ind. App. 460.

2. *Childers v. Jeffersonville First Nat. Bank*, 147 Ind. 430; *Boos v. Morgan*, 146 Ind. 111.

3. *Barton v. Griffin*, 36 N. Y. App. Div. 572.

When a General Denial Is Coupled with an Express Admission of execution or an implied admission of nonpayment, the denial may be unavailing. *Reiff v. Mullholland*, 65 Ohio St. 178.

Restriction of Denial. — Where the denial is neither general nor specific it may be restricted to matters not expressly covered by the specific allega-

tions of the answer. *Althouse v. Jamestown*, 91 Wis. 46.

803. 1. *Van Dyke v. Doherty*, 6 N. Dak. 263. See also *Hardy v. Purlington*, 6 S. Dak. 382.

2. *Zimmerman v. Meyrowitz*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 307.

3. *Mason v. Dutcher*, (C. Pl. Spec. T.) 24 Civ. Pro. (N. Y.) 345; *Zimmerman v. Meyrowitz*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 307; *Pittenger v. Southern Tier Masonic Relief Assoc.*, 15 N. Y. App. Div. 26.

804. 1. *Johnson v. Johnson*, 44 S. Car. 364 [quoting with approval 1 ENCYC. OF PL. AND PR. 804]; *Zimmerman v. Meyrowitz*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 307.

2. Disapproved Form. — A denial almost identical with that given in the text has been strongly disapproved. *Hardy v. Purlington*, 6 S. Dak. 382.

805. 1. *Zimmerman v. Meyrowitz*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 307.

2. *Taylor v. Purcell*, 60 Ark. 606; *Harter v. Shull*, (Colo. App. 1902) 67 Pac. Rep. 911; *Boston, etc., Smelting Co. v. Reed*, 23 Colo. 523; *Graham v. Marks*, 98 Ga. 67; *Randall v. Simmons*, (Oregon 1902) 67 Pac. Rep. 513; *Farmers', etc., Nat. Bank v. Taylor*, 91 Tex. 78.

Action on Note. — In an action on a note, an answer which merely denies an indebtedness is insufficient inasmuch as the plaintiff is not suing on an indebtedness but on a note. *Spencer v. Turney*, 5 Okla. 683.

In Georgia, by Statute, a general denial of an indebtedness is insufficient. *Johnson v. Cobb*, 100 Ga. 139.

Denial of Indebtedness Joined with Defense. — When a denial that any sum is

806. 3. Fraud. — See note 2.

807. 4. Denial that Act Was "Duly" Done. — See note 1.

6. Answer Containing Legal Conclusion. — See note 3.

809. IX. DENIALS OF KNOWLEDGE — 2. Form. — See notes 1, 2.

due to the plaintiff is coupled with an allegation that the debt has not matured, the contention that the denial is a mere conclusion of law and therefore raises no issue is without merit. *Beach v. Shanley*, 35 N. Y. App. Div. 566.

806. 2. *Freeman v. Stewart*, 119 Ala. 156.

807. 1. *People v. Lyman*, 69 N. Y. App. Div. 399.

3. *Alabama*. — *Alabama State Fair, etc., Assoc. v. Alabama Gas Fixture, etc., Co.*, (Ala. 1901) 31 So. Rep. 26; *Freeman v. Stewart*, 119 Ala. 158.

California. — *Buffalo Cycle Co. v. Todd*, 133 Cal. 292.

Colorado. — *Ensley v. Page*, 13 Colo. App. 452.

Georgia. — *Graham v. Marks*, 98 Ga. 67.

Indiana. — Voluntary Relief Dept. v. Spencer, 17 Ind. App. 123.

Kentucky. — *McClure v. Bigstaff*, (Ky. 1896) 37 S. W. Rep. 294; *Hendrick v. Robert Mitchell Furniture Co.*, (Ky. 1895) 29 S. W. Rep. 750.

Minnesota. — *Dennis v. Nelson*, 55 Minn. 144.

Nebraska. — *Scroggin v. National Lumber Co.*, 41 Neb. 195.

New York. — *Twelfth Ward Bank v. Brooks*, 63 N. Y. App. Div. 220; *Binghamton Trust Co. v. Clark*, 32 N. Y. App. Div. 151; *Sbarboro v. Health Department*, 26 N. Y. App. Div. 177.

North Carolina. — *Lassiter v. Roper*, 114 N. Car. 17.

North Dakota. — *Van Dyke v. Doherty*, 6 N. Dak. 263.

Oklahoma. — *Territory v. Caffrey*, 3 Okla. 193.

Texas. — *Branch v. DeBlanc*, (Tex. Civ. App. 1901) 62 S. W. Rep. 134.

Utah. — *Voorhees v. Fisher*, 9 Utah 303.

Washington. — *Young v. Borzone*, 26 Wash. 4.

And see LEGAL CONCLUSIONS.

809. 1. *Grand Valley Irrigation Co. v. Leshner*, 28 Colo. 273; *Woodcock v. Bostic*, 128 N. Car. 243; *Fagg v. Southern Bldg., etc., Assoc.*, 113 N. Car. 364; *Sigmund v. Minot Bank*, 4 N. Dak. 164; *Singer v. Effer*, (N. Y. City Ct.) 16 Misc. (N. Y.) 334; *Stein-*

back v. Diepenbrock, 1 N. Y. App. Div. 417.

Denial of Belief. — The denial should likewise negative both information and belief. *Massachusetts L. & T. Co. v. Twichell*, 7 N. Dak. 440, citing 1 ENCYC. OF PL. AND PR. 809.

In the Municipal Court of the City of New York a denial of knowledge or information sufficient to form a belief is wholly unauthorized. *Pennsylvania, etc., Oil Co. v. Spitelnik*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 557; *Sanchez, etc., Co. v. Hirsch*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 202; *Boston Woven Hose, etc., Co. v. Jackson*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 781; *Nicoll v. Clark*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 128; *Steinam v. Bell*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 318.

In the City Court of Albany a denial of knowledge or information sufficient to form a belief is not allowable. *Alexander v. Albany*, 55 N. Y. App. Div. 238.

2. *Colorado Coal, etc., Co. v. John*, 5 Colo. App. 213; *Sayles v. Fitz Gerald*, 72 Conn. 391; *Rosensteil v. Van Cott*, 5 N. Y. App. Div. 128; *Pray v. Todd*, 71 N. Y. App. Div. 391; *Burkert v. Bennett*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 318; *Johnson v. Andrews*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 89; *Campbell v. Patton*, 113 N. Car. 481; *Gilreath v. Furman*, 57 S. Car. 289; *Wilson v. Commercial Union Ins. Co.*, (S. Dak. 1902) 89 N. W. Rep. 649; *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630.

Should Be Specific. — A qualified denial upon information and belief must be specific and unequivocal to put in issue the material allegation in the complaint. *Ward v. Edge*, 100 Ky. 757; *Queen City Bank v. Hudson*, 8 N. Y. App. Div. 27.

Forms Held Good. — *Colorado Coal, etc., Co. v. John*, 5 Colo. App. 213; *Pray v. Todd*, 71 N. Y. App. Div. 391; *Humble v. McDonough*, (Buffalo Super. Ct. Gen. T.) 5 Misc. (N. Y.) 508; *Rosensteil v. Van Cott*, 5 N. Y. App. Div. 128; *Campbell v. Patton*, 113 N. Car. 481; *Gilreath v. Furman*, 57 S. Car. 289; *Wilson v. Commercial Union Ins. Co.*, (S. Dak. 1902) 89 N. W. Rep.

810. 3. Denials "upon Information and Belief." — See note 1.

811. 4. When Denial of Knowledge or Information Cannot Be Interposed. — See note 1.

649; *Denver v. Spokane Falls*, 7 Wash. 226.

Defendant Says He Denies. — An allegation that the defendant says that, upon information and belief, he denies certain averments of the complaint, although inartistic as a denial, has been held to be in substance a sufficient denial upon information and belief. *Humble v. McDonough*, (Buffalo Super. Ct. Gen. T.) 5 Misc. (N. Y.) 508; *Denver v. Spokane Falls*, 7 Wash. 226.

Forms Held Bad. — *English v. Grant*, 102 Ga. 35; *Ward v. Edge*, 100 Ky. 757; *Rossiter v. Loeber*, 18 Mont. 372; *State v. Butte City Water Co.*, 18 Mont. 199; *Burkert v. Bennett*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 318; *Johnson v. Andrews*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 89; *N. K. Fairbank Co. v. Blaut*, (Supm. Ct. Spec. T.) 24 Civ. Pro. (N. Y.) 334; *Queen City Bank v. Hudson*, 8 N. Y. App. Div. 27.

A mere statement that the defendant has not sufficient knowledge or information, and therefore demands legal proof of the allegations set forth in the complaint, raises no issue. *National L. Ins. Co. v. Martin*, 57 Neb. 350.

An allegation upon information and belief that the defendant "has no knowledge of the truth of the facts" set forth in a certain allegation in the complaint, "and therefore denies the same," is a bad denial. *Galbraith v. Dally*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 156.

Partial Denial upon Information and Belief. — A denial in part upon information and belief and in part upon the defendant's own knowledge is bad. The plaintiff has a right to know which allegations are denied absolutely and which are controverted only upon information and belief. *N. K. Fairbank Co. v. Blaut*, (Supm. Ct. Spec. T.) 24 Civ. Pro. (N. Y.) 334.

The Idaho Statute provides for a denial according to information and belief. Denials upon knowledge or information are unauthorized. *Stickney v. Hanrahan*, (Idaho 1900) 63 Pac. Rep. 189.

810. 1. Under the Colorado Statute a denial upon information and belief is wholly unauthorized. *Solomon v. Brodie*, 10 Colo. App. 353.

Under the Former Montana Code (Comp. Stat. 1887, § 89) it was held that for a denial upon information and belief the defendant might not substitute a denial of knowledge or information sufficient to form a belief. *State v. Butte City Water Co.*, 18 Mont. 199, cited in *Rossiter v. Loeber*, 18 Mont. 372.

In North Dakota a denial made upon the defendant's best information and belief is good in those cases wherein the defendant is unable to interpose a general denial or to deny knowledge or information sufficient to form a belief. *Russell v. Amundson*, 4 N. Dak. 112.

Informed and Believes He Denies. — It is not sufficient for the defendant to allege that as he is informed and believes, he denies those parts of the complaint against which his denial is directed. *Shain v. Dujardin*, (Cal. 1894) 38 Pac. Rep. 529.

811. 1. Bartow v. Northern Assur. Co., 10 S. Dak. 132, quoting 1 ENCYC. OF PL. AND PR. 811. See also the following cases:

California. — *Etchas v. Orena*, 121 Cal. 270.

Colorado. — *Colorado Coal, etc., Co. v. John*, 5 Colo. App. 213.

Kentucky. — *Nashville, etc., R. Co. v. Carrico*, 95 Ky. 489; *McClure v. Bigstaff*, (Ky. 1896) 37 S. W. Rep. 294; *Nashville, etc., R. Co. v. Hamilton*, (Ky. 1894) 26 S. W. Rep. 537.

New York. — *Humble v. McDonough*, (Buffalo Super. Ct. Gen. T.) 5 Misc. (N. Y.) 508; *Singer v. Effier*, (N. Y. City Ct.) 16 Misc. (N. Y.) 334.

Ohio. — *Wentzel v. Zinn*, 10 Ohio Dec. 97.

South Dakota. — *Risdon v. Davenport*, 4 S. Dak. 555.

Wisconsin. — *Carpenter v. Rolling*, 107 Wis. 559; *Carpenter v. Momsen*, 92 Wis. 449; *Pearson v. Neeves*, 92 Wis. 319.

Wyoming. — *Appel v. State*, 9 Wyo. 187.

Inability to Obtain Knowledge. — A qualified denial is defective unless it avers that the defendant is unable to obtain sufficient knowledge or information upon which to base a belief. *Jones v. Perot*, 19 Colo. 141.

Denial by Corporation. — A corporation may not deny for want of suffi-

813. 5. What Matters Are Presumptively Within Defendant's Knowledge — Personal Acts. — See note 1.

Sales. — See note 3.

Contents of Records. — See note 4.

814. Making of Contracts and Notes. — See note 3.

815. Ownership. — See note 2.

cient information and belief if it has presumptive knowledge, although the verifying agent has no knowledge himself. *Sloane v. California Southern R. Co.*, 111 Cal. 668.

Possession Implies Knowledge. — A defendant who must be presumed to have been in possession of property may not deny upon information and belief that certain appliances were attached to the realty. *Gribble v. Columbus Brewing Co.*, 100 Cal. 67.

Knowledge of Merely Some Matters. — A denial of knowledge or information may be sufficient even though the affiant has knowledge of some of the matters contained in that part of the complaint against which the answer is directed. *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630; *Colby v. Spokane*, 12 Wash. 690.

813. 1. Ensley v. Page, 13 Colo. App. 452; *Nashville, etc., R. Co. v. Carrico*, 95 Ky. 489; *Nashville, etc., R. Co. v. Hamilton*, (Ky. 1894) 26 S. W. Rep. 537; *Campton v. Beecher*, 17 N. Y. App. Div. 38; *Hardman v. Cincinnati, etc., R. Co.*, 9 Ohio Dec. (Reprint) 578, 15 Cinc. L. Bul. 164; *Raymond v. Johnson*, 17 Wash. 232. But see *Hand v. Miller*, 58 N. Y. App. Div. 126.

Where Plaintiff Alleges Details. — When the defendant requests that the plaintiff be required to set forth details as to an alleged usurious transaction, and this is done, the defendant may not say that he has not sufficient knowledge or information to form a belief as to whether the information given is true. *Rudd v. Deposit Bank*, (Ky. 1899) 40 S. W. Rep. 207.

3. If the Defendant Was Mentally Incompetent when she made the contract on which the plaintiff sues, she may deny upon information and belief. *Hensberry v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 37. See also *INSANE PERSONS; SALES*.

Sale of Realty. — A defendant is supposed to know who his grantor was. *Daisy Realty Co. v. Brown*, (Ky. 1896) 35 S. W. Rep. 637. See also *VENDOR AND PURCHASER*.

4. Oakes v. Ziemer, 61 Neb. 6, citing 1 ENCYC. OF PL. AND PR. 813, note 4. See also the following cases:

California. — *Mullalley v. Townsend*, 119 Cal. 47.

Idaho. — *Work v. Kinney*, (Idaho 1900) 63 Pac. Rep. 596; *Simpson v. Remington*, (Idaho 1899) 59 Pac. Rep. 360; *Moscow First Nat. Bank v. Martin*, (Idaho 1898) 55 Pac. Rep. 303.

Kentucky. — *McClure v. Bigstaff*, (Ky. 1896) 37 S. W. Rep. 294; *Daisy Realty Co. v. Brown*, (Ky. 1896) 35 S. W. Rep. 637.

Nebraska. — *Oakes v. Ziemer*, 62 Neb. 603.

New York. — *Austen v. Westchester Telephone Co.*, (N. Y. Super. Ct. Gen. T.) 8 Misc. (N. Y.) 11.

Ohio. — *Wentzel v. Zinn*, 10 Ohio Dec. 97.

Utah. — *Thompson v. Skeen*, 14 Utah 209.

United States. — *Wallace v. Bacon*, 86 Fed. Rep. 553.

In an Action to Foreclose a Mortgage the defendant may deny knowledge or information sufficient to form a belief as to the allegations of the complaint save that the plaintiff claims a lien on the premises, unless the defendant has personal knowledge of the due execution and delivery of the mortgage. *Bidwell v. Sullivan*, 10 N. Y. App. Div. 135.

Payment of Taxes. — Subsequent purchasers or incumbrancers may properly deny all knowledge or information in respect to the payment of taxes. *Pearson v. Neeves*, 92 Wis. 319. *Contra*, *Van Dyke v. Doherty*, 6 N. Dak. 263.

814. 3. Angier v. Equitable Bldg., etc., Assoc., 109 Ga. 625; *Smith v. Champion*, 102 Ga. 92.

Defendant as Indorsee. — The defendant is presumed to know whether a note came into his hands by indorsement or otherwise. *Carpenter v. Momsen*, 92 Wis. 449.

815. 2. Where the Plaintiff Declares as an Assignee, a denial on information and belief that any assignment was made to the plaintiff is sufficient.

817. X. WHAT MAY BE PROVED UNDER GENERAL DENIAL —**1. Nature of General Denial — To What Evidence Defendant Is Limited. —**

See note 1.

2. Payment. — See PAYMENT.**818. 3. Actions on Contracts. —** See CONTRACTS.**820. Sales. —** See SALES.**Notes and Bills. —** See NEGOTIABLE INSTRUMENTS.**4. Judgments. —** See note 3.**821. 5. Torts — Trespass De Bonis Asportatis. —** See TRESPASS.**Trover and Conversion. —** See TROVER AND CONVERSION.**822. Replevin. —** See note 1.**823. Malicious Prosecution. —** See MALICIOUS PROSECUTION.**824. Fraud. —** See note 1.**Negligence. —** See note 2.*Lewis v. Weyerhorst*, 16 Mont. 267; *Hughes v. Wilcox*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 32.**817. 1. Alabama. —** *Behrman v. Newton*, 103 Ala. 525.*Indiana. —* *Hess v. Union State Bank*, 156 Ind. 523; *Kirschbaum v. Hanover F. Ins. Co.*, 16 Ind. App. 606; *Crum v. Yundt*, 12 Ind. App. 308.*Missouri. —* *Huber Mfg. Co. v. Hunter*, 87 Mo. App. 50; *Missouri Edison Electric Co. v. Lewis*, 86 Mo. App. 612; *Westbay v. Milligan*, 74 Mo. App. 179.*Nebraska. —* *American Bldg., etc., Assoc. v. Rainbolt*, 48 Neb. 434.*New York. —* *Whitney v. Whitney*, 171 N. Y. 176; *Brady v. Hutkoff*, (N. Y. Super. Ct. Gen. T.) 13 Misc. (N. Y.) 515, *affirmed* 155 N. Y. 681; *Eisert v. Brandt*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 393.*South Carolina. —* *Henderson v. Bennett*, 58 S. Car. 30.*Washington. —* *Bruce v. Foley*, 18 Wash. 96.**That Cause of Action Never Existed. —** The defendant may prove facts under general denial which go to show that the plaintiff never had the cause of action on which he sues. *Scudder v. Atwood*, 55 Mo. App. 512; *Hardwick v. Cox*, 50 Mo. App. 509.**Confession and Avoidance. —** The defendant may not prove matters which confess but avoid the plaintiff's claim. *Keens v. Robertson*, 46 Neb. 837. And see CONFESSION AND AVOIDANCE.**820. 3. Ownership in Defendant. —** The defendant may show that he himself is the owner of the judgment. *Branch v. De Blanc*, (Tex. Civ. App. 1901) 62 S. W. Rep. 134. See also JUDGMENTS.**822. 1. Conner v. Knott, 8 S. Dak. 304 [*citing* 1 ENCYC. OF PL. AND PR. 822]; *Jenkins v. Mitchell*, 40 Neb. 664; *Dobson v. Owens*, 5 Wyo. 325. See also REPLEVIN.****824. 1. Contra. —** *National Wall Paper Co. v. M'Pherson*, 19 Mont. 355, holding that a general denial of all the allegations not specifically admitted is not a denial of the averments that conveyances were made for the purpose of defrauding creditors.**Provable under General Denial. —** Under a general denial to an interplea, fraud may be shown in the disposition of the defendant's goods to the interpleader. Fraud is likewise provable when it goes to show that no cause of action ever existed. *Gregory v. Simcox*, 75 Mo. App. 143; *Hardwick v. Cox*, 50 Mo. App. 509.**Waiver. —** Under a general denial in an action sounding in fraud, the defendant may show a waiver of the fraud. *American Bldg., etc., Assoc. v. Rainbolt*, 48 Neb. 434.**2. Negligence of Third Person. —** Under a general denial, when sued to recover damages for negligence, a defendant railroad company may prove that it is being operated by a receiver. *Dayhoff v. International, etc., R. Co.*, (Tex. Civ. App. 1894) 26 S. W. Rep. 517.**Negligence as Defense. —** In an action brought by an attorney to recover fees, the defendant, under a general denial, may not show that he was negligently advised and badly served. *Perkins v. West Coast Lumber Co.*, (Cal. 1893) 33 Pac. Rep. 1118.**Contributory Negligence** may be shown under the general denial. *Kennedy v. Southern R. Co.*, 59 S. Car. 535 [*quoting* with approval 1 ENCYC. OF PL. AND

825. 6. Ejectment and Other Matters Pertaining to Real Estate. — See note 1.

826. Trespass Quare Clausum Fregit. — See TRESPASS.
Statute of Limitations. — See LIMITATIONS.

827. Statute of Frauds. — See FRAUDS, STATUTE OF.
7. Mitigating Circumstances. — See note 2.

828. XI. GENERAL DENIAL AS PLEA IN ABATEMENT. — See note 1.

Existence of Corporation. — See CORPORATIONS.

829. Partnership. — See PARTNERSHIP.

XII. GENERAL DENIAL LIMITED IN SCOPE BY STATUTE. — See notes 2, 4.

830. See note 1.

Conditions Precedent. — See note 2.

XIII. NEW MATTER — 1. General Nature — Definition. — See note 3.

Must Be Plead. — See note 4.

Pr. 824, note 2]; *Wiley v. Rouses' Point*, 86 Hun (N. Y.) 495. And see CONTRIBUTORY NEGLIGENCE.

Aggravation of Injuries. — A defendant sued by reason of its alleged negligence may show, under a general denial, that the plaintiff's injuries were aggravated by reason of the use of intoxicants. *Bogges v. Metropolitan St. R. Co.*, 118 Mo. 328.

Unreasonableness of Statute. — A defendant railroad corporation, when sued to recover damages for negligence, may not show under a general denial that the statute which prohibited its trains from running in excess of a certain rate of speed was unreasonable and therefore void. *Bluedorn v. Missouri Pac. R. Co.*, 121 Mo. 258.

825. 1. Corbin v. Thompson, 141 Ind. 312, citing 1 ENCYC. OF PL. AND PR. 825. See also EJECTMENT.

827. 2. Libel and Slander. — The truth of the libel may not be shown under the general issue in mitigation of damages. *Continental Nat. Bank v. Bowdre*, 92 Tenn. 723. See LIBEL AND SLANDER.

Circumstances Mitigating a Failure to Present a Draft may be shown under a general denial. *Citizens Nat. Bank v. Greensburg Third Nat. Bank*, 19 Ind. App. 69.

828. 1. Hanesley v. Monroe, 97 Ga. 471; *Elektron Mfg. Co. v. Jones Bros. Electric Co.*, 1 Ohio Dec. 692.

829. 2. Hoxie v. Farmers, etc., Nat. Bank, 20 Tex. Civ. App. 462.

Indorsement must likewise be denied

by a sworn plea attacking the indorsement as a forgery. *Schauer v. Beitel*, 92 Tex. 601.

4. Harris v. Randolph County Bank, 157 Ind. 120; *Cincinnati Barbed Wire Fence Co. v. Chenoweth*, 22 Ind. App. 685.

830. 1. Faircloth v. Tinsley, 83 Mo. App. 586. See also *Garland v. Gaines*, 73 Conn. 662; *Woronieki v. Parliskiego*, 74 Conn. 224; *Spencer v. Society of Shakers*, (Ky. 1901) 64 S. W. Rep. 468.

2. Reed v. Union Cent. L. Ins. Co., 21 Utah 295, citing 1 ENCYC. OF PL. AND PR. 830. See also CONDITIONS PRECEDENT.

Contra. — A general denial is sufficient, when interposed to a complaint which alleges that the plaintiff "duly performed all the conditions on his part," to put in issue all that can be proved under the complaint. *McManus v. Western Assur. Co.*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 269, affirmed 167 N. Y. 602.

3. Cordner v. Roberts, 58 Mo. App. 440; *Huber Mfg. Co. v. Hunter*, 87 Mo. App. 50; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756; *Staten Island Midland R. Co. v. Hinchcliffe*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 49. See also *Petrakion v. Arbelly*, (C. Pl. Spec. T.) 23 Civ. Pro. (N. Y.) 183.

4. Iselin v. Simon, 62 Minn. 128, citing 1 ENCYC. OF PL. AND PR. 831. See also the following cases:

Alabama. — *American Oak Extract Co. v. Ryan*, 112 Ala. 337.

831. 2. Manner of Pleading — Introductory. — See note 1.

832. See note 1.

833. Payment. — See PAYMENT.

Fraud. — See FRAUD.

834. Want of Consideration. — See CONTRACTS.

Justification. — See note 2.

California. — *Crusoe v. Clark*, 127 Cal. 341; *Paden v. Goldbaum*, (Cal. 1894) 37 Pac. Rep. 759; *Perkins v. West Coast Lumber Co.*, (Cal. 1893) 33 Pac. Rep. 1118.

Georgia. — *Hanesley v. Monroe*, 97 Ga. 471.

Indiana. — *Crum v. Yundt*, 12 Ind. App. 308.

Minnesota. — *Netzer v. Crookston City*, 59 Minn. 244.

Missouri. — *Huber Mfg. Co. v. Hunter*, 87 Mo. App. 50.

Nebraska. — *Denney v. Stout*, 59 Neb. 731; *Lowe v. Prospect Hill Cemetery Assoc.*, 58 Neb. 94; *Medland v. Connell*, 57 Neb. 10; *Burlington Voluntary Relief Dept. v. Moore*, 52 Neb. 719; *Home F. Ins. Co. v. Berg*, 46 Neb. 600.

New York. — *Cruikshank v. Press Pub. Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 152, *affirmed* 59 N. Y. App. Div. 620; *Donohue v. Syracuse, etc., R. Co.*, 11 N. Y. App. Div. 525.

Oregon. — *Farmers', etc., Nat. Bank v. Hunter*, 35 Oregon 188.

Texas. — *Ricker Nat. Bank v. Brown*, (Tex. Civ. App. 1897) 43 S. W. Rep. 909.

Denials and New Matter. — Denials should not be mingled with allegations of new matter. *Pascekwitz v. Richards*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 250; *Recknagel v. Steinway*, 58 N. Y. App. Div. 352; *Burkert v. Bennett*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 318; *Staten Island Midland R. Co. v. Hinchcliffe*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 49; *Carter v. Eighth Ward Bank*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 128; *Cruikshank v. Press Pub. Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 152, *affirmed* 59 N. Y. App. Div. 620; *Fay v. Hauerwas*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 421, *affirmed* 43 N. Y. App. Div. 621; *Green v. Brown*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 280.

831. 1. Gentry v. Walker, 101 Ga. 123.

Letting Out Proofs. — An allegation that the note was to be renewed at maturity is not demurrable for failure to aver that the evidence relied on is

in writing. *Francis v. Earle*, 77 Fed. Rep. 712.

832. 1. The proposition stated in the text is supported by the following cases:

Alabama. — *Scharf v. Moore*, 102 Ala. 468; *Electric Lighting Co. v. Elder*, 115 Ala. 138; *Krebs Mfg. Co. v. Brown*, 108 Ala. 508.

Arkansas. — *Taylor v. Purcell*, 60 Ark. 606.

Connecticut. — *Jacobs v. Curtiss*, 67 Conn. 497.

Georgia. — *Hart v. Phenix Ins. Co.*, 113 Ga. 859; *Smith v. Champion*, 102 Ga. 92; *Graham v. Marks*, 98 Ga. 67.

Indiana. — *Anthony v. Masters*, (Ind. App. 1902) 62 N. E. Rep. 505; *Moore v. Morris*, 142 Ind. 354; *Shirk v. Mitchell*, 137 Ind. 185; *Queen Ins. Co. v. Hudnut Co.*, 8 Ind. App. 22.

New York. — *Craft v. Brandow*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 306.

Texas. — *Sullivan v. Creamer*, (Tex. Civ. App. 1890) 50 S. W. Rep. 431; *Janes v. Ferd Heim Brewing Co.*, (Tex. Civ. App. 1897) 44 S. W. Rep. 896; *Blagge v. Shaw*, (Tex. Civ. App. 1897) 41 S. W. Rep. 756.

United States. — *Francis v. Earle*, 77 Fed. Rep. 712.

Extension of Time when alleged should be so set forth as to show some consideration therefor. *Denison University v. Manning*, 65 Ohio St. 138.

Forfeiture. — One who relies upon forfeiture as a defense must set forth the facts. *Power v. Sla*, 24 Mont. 243; *Bishop v. Baisley*, 28 Oregon 119.

Allegations in Alternative. — Averments of new matter should not be coupled by such words as the inartistic "if" and "or." *Peyman v. Bowery Bank*, 14 N. Y. App. Div. 432; *Springfield Second Nat. Bank v. Hart*, 8 Ind. App. 19; *Wiggins v. Kirkpatrick*, 114 N. Car. 298.

Not Real Party in Interest. — See PARTIES TO ACTIONS.

834. 2. Turner Coal Co. v. Glover, 101 Ala. 289; *Greenthal v. Lincoln*, 67 Conn. 372; *Pyle v. Peyton*, 146 Ind. 90; *Sbarboro v. Health Dept.*, 26 N. Y.

835. Usury. — See USURY.

Illegality of Contract. — See CONTRACTS.

Duress. — See DURESS AND COMPOUNDING FELONY.

Accord and Satisfaction. — See ACCORD AND SATISFACTION.

Estoppel in Pais. — See ESTOPPEL.

836. Res Judicata. — See FORMER ADJUDICATION.

Statute of Limitations. — See LIMITATIONS.

Equitable Defenses. — See EQUITABLE DEFENSES.

Contributory Negligence. — See CONTRIBUTORY NEGLIGENCE.

GENCE.

837. Statute of Frauds. — See FRAUDS, STATUTE OF.**8. What Constitutes New Matter** — *b.* EQUITABLE DEFENSES. — See EQUITABLE DEFENSES.**839. c. MATTER IN ABATEMENT.** — See note 1.**840. d. PARTIAL DEFENSES** — *How Partial Defenses Should Be Pleaded.* — See note 2.**841. e. MITIGATING CIRCUMSTANCES.** — See DAMAGES.**842. f. PAYMENT.** — See PAYMENT.**843. g. RES JUDICATA.** — See note 1.*h.* ESTOPPEL IN PAIS. — See ESTOPPEL.**844. i. FRAUD.** — See FRAUD.*j.* ILLEGALITY OF CONTRACT. — See note 2.

App. Div. 177; *Jones v. McQueen*, 13 Utah 178; *Kansas City Star Co. v. Carlisle*, (C. C. A.) 108 Fed. Rep. 344. See also FALSE IMPRISONMENT; LIBEL AND SLANDER; MALICIOUS PROSECUTION.

Short Plea. — When the parties mutually agree that the plea may be taken in short, the court may spell out the defense of justification. *Steele v. Walker*, 115 Ala. 485.

839. 1. *Southey v. Dowling*, 70 Conn. 153, *citing* 1 ENCYC. OF PL. AND PR. 839, 840. See also ABATEMENT IN PLEADING.

840. 2. *Breyfogle v. Stotsenburg*, 148 Ind. 552; *Sparta School Tp. v. Mendell*, 138 Ind. 188; *Cole v. Beyland*, (Supm. Ct. Spec. T.) 67 N. Y. Supp. 1024; *Burkert v. Bennett*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 318; *Silberman v. New Amsterdam Gas Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 42; *Stewart v. Ashtabula*, (C. C. A.) 107 Fed. Rep. 857; *Metropolitan Trust Co. v. Toledo, etc., R. Co.*, 107 Fed. Rep. 628.

Complete Defense Presumed. — Unless interposed expressly as a partial defense the court may presume that the answer was pleaded as a complete defense. *Bernascheff v. Roeth*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 558; *Ma-*

son v. Dutcher, (C. Pl. Spec. T.) 24 Civ. Pro. (N. Y.) 345; *Golden v. Health Department*, 21 N. Y. App. Div. 426.

Where, however, it clearly appears on the face of the answer that it was interposed not as a complete but as a partial defense, it is sufficient without stating in terms that it is only partial. *Foye v. Guardian Printing, etc., Co.*, 109 Fed. Rep. 368.

Demurrer. — When a partial defense is pleaded as a complete defense, it is subject to demurrer. *Emshwiler v. Tyner*, 21 Ind. App. 347; *Cole v. Beyland*, (Supm. Ct. Spec. T.) 67 N. Y. Supp. 1024.

Reallegation of Facts. — The same facts may be pleaded both as a partial defense and as constituting a complete defense. *Coyle v. Ward*, 167 N. Y. 240; *Zacharias v. French*, (C. Pl. Spec. T.) 10 Misc. (N. Y.) 202.

843. 1. *Boston, etc., Smelting Co. v. Reed*, 23 Colo. 523, *citing* 1 ENCYC. OF PL. AND PR. 821, 836, 843. See also FORMER ADJUDICATION.

844. 2. *Bernstein v. Downs*, 112 Cal. 197; *George v. Williams*, 58 Mo. App. 138; *Boyer v. Fenn*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 128; *Miller v. Hirschberg*, 27 Oregon 522; *Jefferson v. Burhans*, (C. C. A.) 85 Fed. Rep. 949.

- 845.** *k.* JUSTIFICATION. — See note 1.
846. *l.* STATUTE OF LIMITATIONS. — See LIMITATIONS.
847. *m.* CONTRIBUTORY NEGLIGENCE. — See CONTRIBUTORY NEGLIGENCE.
 n. STATUTE OF FRAUDS. — See FRAUDS, STATUTE OF.
848. *o.* WANT AND FAILURE OF CONSIDERATION. — See CONTRACTS.
849. *q.* CHAMPERTY. — See note 1.
 s. ACCORD AND SATISFACTION. — See ACCORD AND SATISFACTION.
 t. RELEASE. — See RELEASE.
 w. IMMATURITY OF INDEBTEDNESS. — See note 7.
 x. DISCHARGE IN BANKRUPTCY. — See UNITED STATES COURTS.
850. *y.* USURY. — See USURY.
 z. BONA-FIDE PURCHASER. — See note 2.
 *z*¹. OBJECTION TO STATUTE OR ORDINANCE. — See note 3.
 *z*². TITLE IN ACTION OF TRESPASS. — See TRESPASS.
 *z*³. LIENS. — See LIENS.
851. *z*⁴. MINING RULES AND CUSTOMS. — See MINES AND MINING; USAGES AND CUSTOMS.
 *z*⁵. MISTAKE. — See MISTAKE.
 *z*⁷. CONTRACT NOT PROPERLY PERFORMED. — See CONTRACTS.
 *z*⁸. ALL MATTER IN AVOIDANCE. — See note 5.
852. XIV. JOINDER OF DEFENSES — 1. Defendant May Plead as Many Defenses as He Has. — See note 1.

845. 1. *Henderson v. Bennett*, 58 S. Car. 30 [*citing* 1 ENCYC. OF PL. AND PR. 845]; *Greenthal v. Lincoln*, 67 Conn. 372; *Mitchell v. Cody*, (N. Y. Super. Ct. Gen. T.) 6 Misc. (N. Y.) 307; *Roeber v. New Yorker Staats Zeitung*, 1 N. Y. App. Div. 427.

849. 1. *Ten Eyck v. Witbeck*, 55 N. Y. App. Div. 165, *citing* 1 ENCYC. OF PL. AND PR. 849, *affirmed* 170 N. Y. 564.

7. *Southey v. Dowling*, 70 Conn. 153 [*citing* 1 ENCYC. OF PL. AND PR. 839, 849]; *Iseltin v. Simon*, 62 Minn. 128 [*citing* 1 ENCYC. OF PL. AND PR. 831]; *Fiore v. Ladd*, 29 Oregon 528 [*citing* 1 ENCYC. OF PL. AND PR. 22, 32]; *New England L. & T. Co. v. Browne*, 157 Mo. 116.

Extension.—An answer which alleges an extension of time within which the indebtedness may be discharged should aver whether the extension was in writing, whether there was a consideration, and if so when the consideration was

paid. *Union Nat. Bank v. Cross*, 100 Wis. 174.

850. 2. *Ricker Nat. Bank v. Brown*, (Tex. Civ. App. 1897) 43 S. W. Rep. 909, holding that the defense that the plaintiff is not a holder in due course must be alleged by the defendant in his answer. See also NEGOTIABLE INSTRUMENTS.

3. *Burlington Voluntary Relief Dept. v. Moore*, 52 Neb. 719.

851. 5. *Donohue v. Syracuse, etc., R. Co.*, 11 N. Y. App. Div. 525, *quoting* 1 ENCYC. OF PL. AND PR. 851. See also CONFESSION AND AVOIDANCE.

852. 1. *Ansley v. Piedmont Bank*, 113 Ala. 467; *Murphy v. Russell*, (Idaho 1901) 67 Pac. Rep. 421; *Zimmerman v. Meyrowitz*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 307; *Crompton, etc., Loom Works v. Brown*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 513; *Farmers', etc., Nat. Bank v. Hunter*, 35 Oregon 188; *Veasey v. Humphreys*, 27 Oregon 515.

852. 2. Manner of Pleading Several Defenses — **Completeness.** — See note 2.

853. Separate Statement. — See notes 1, 2.

Nullification of One Defense by Another. — When several defenses are alleged in the same answer, one may not be used to destroy another. *Eppinger v. Scott*, 112 Cal. 369; *Gilreath v. Furman*, 57 S. Car. 289; *Ft. Worth, etc., R. Co. v. McNulty*, 7 Tex. Civ. App. 321.

General Denial and Confession and Avoidance. — When a general denial is coupled with allegations which confess and avoid the plaintiff's cause of action, the denial is not weakened by the defenses which follow. *Lehman v. Shiver*, 129 Ala. 318; *People's Mut. Ben. Soc. v. Templeton*, 16 Ind. App. 126; *McKasy v. Huber*, 65 Minn. 9; *Manhattan Brick, etc., Co. v. Clark*, (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 819; *Young v. Katz*, 22 N. Y. App. Div. 542; *Kelly v. Theiss*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 530; *Gillett v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1902) 68 S. W. Rep. 61. See also *Miles v. Woodward*, 115 Cal. 308.

Legal and Equitable Defenses. — In actions of ejectment the defendant may plead both equitable and legal defenses. *Power v. Sla*, 24 Mont. 243.

Attachment Proceedings. — In *Missouri* proceedings by attachment are excepted from the rule that a defendant may set forth as many defenses as he may have. *Houghland v. Dent*, 52 Mo. App. 237.

Denials and Admissions Not Defenses. — Neither a denial nor an admission is a defense. Neither should be pleaded or classed as such. *Galbraith v. Daily*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 156; *Cruikshank v. Press Pub. Co.* (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 152, *affirmed* 59 N. Y. App. Div. 620; *Flack v. O'Brien*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 399.

General Demurrer. — The defendant may include in his answer a general demurrer. *Alliance Milling Co. v. Eaton*, (Tex. Civ. App. 1893) 23 S. W. Rep. 455.

852. 2. Brookline Nat. Bank v. Moers, 19 N. Y. App. Div. 155 [*quoting* with approval 1 ENCYC. OF PL. AND PR. 852]; *Pate v. Allison*, 114 Ga. 651 [*quoting* with approval 16 ENCYC. OF PL. AND PR. 561]; *Smith v. Heineman*, 118 Ala. 195; *Breyfogle v. Stotsenburg*, 148 Ind. 552; *Taylor v. Calvert*, 138 Ind.

67; *Hollingsworth v. McColly*, 26 Ind. App. 609; *De Kalb Nat. Bank v. Nicely*, 24 Ind. App. 147; *Walter A. Wood Mowing, etc., Mach. Co. v. Niehaus*, 8 Ind. App. 502; *Jackson v. Independent School Dist.*, (Iowa 1899) 77 N. W. Rep. 860; *Recknagel v. Steinway*, 58 N. Y. App. Div. 352; *Sbarboro v. Health Department*, 26 N. Y. App. Div. 177; *Harman v. Harman*, 54 S. Car. 100.

Partial Answer. — If a paragraph of an answer purports to answer the whole complaint but is only a partial answer, the defect is fatal. *Emshwiler v. Tyner*, 21 Ind. App. 347.

Cannot Be Construed as a Counterclaim. — *Stout v. Harlem*, 20 Ind. App. 200; *Huber Mfg. Co. v. Busey*, 16 Ind. App. 410.

A defense may not be changed to a counterclaim when some emergency would make the alteration desirable. *Saratoga Springs First Nat. Bank v. Slattery*, 4 N. Y. App. Div. 421.

Hypothetical Allegations. — That a defendant may not be precluded from pleading all of his defenses he may allege some of them in a hypothetical form if necessary. *McKasy v. Huber*, 65 Minn. 9.

Reallocation of Same Facts. — The defendant may plead the same facts once as a plea of partial defense and again, if he so chooses, as a counterclaim. *Garfield Nat. Bank v. Kirchwey*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 310; *Zacharias v. French*, (C. Pl. Spec. T.) 10 Misc. (N. Y.) 202; *Nollman v. Evenson*, 5 N. Dak. 344. But see *Scott v. Independent Dist.*, 91 Iowa 156.

853. 1. St. Louis, etc., Packet Co. v. McPeters, 124 Ala. 451; *Taylor v. Purcell*, 60 Ark. 606; *Foley v. Mercantile Nat. Bank*, (C. Pl. Spec. T.) 24 Civ. Pro. (N. Y.) 249; *Zacharias v. French*, (C. Pl. Spec. T.) 10 Misc. (N. Y.) 202; *McLamb v. McPhail*, 126 N. Car. 218.

Separately Stating and Numbering. — The defendant's several defenses must be not only separately stated but also numbered. *Taylor v. Purcell*, 60 Ark. 606; *Mullikin v. Mullikin*, (Ky. 1893) 23 S. W. Rep. 352; *Kager v. Brenne-man*, 33 N. Y. App. Div. 452; *Fay v. Hauerwas*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 421, *affirmed* 43 N. Y. App. Div. 621.

854. See note 1.

How Stated. — See note 2.

3. Matter in Abatement, and Matter in Bar. — See ABATEMENT IN PLEADING.

855. **4. States Where Inconsistent Defenses Are Allowed.** — See note 1.

856. **5. What Defenses Are Inconsistent — Introductory.** — See note 2.

857. *Question of Fact.* — See note 1.

A statutory provision as to separate statement and numeration has been held to apply only when the court can, of itself, see that there is more than one defense. *Hatch v. Matthews*, (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 307, and see also 85 Hun (N. Y.) 522.

Objection Waived. — Although the paragraphs are not separately stated and numbered the answer is sufficient when questioned for the first time on a motion to exclude evidence thereunder. *Eppinger v. Scott*, 112 Cal. 369.

853. **2. Douglass v. Phenix Ins. Co.**, 138 N. Y. 209; *Gilreath v. Furman*, 57 S. Car. 289.

One Admission in Several Paragraphs. — When the answer of the defendant admits the plaintiff's right to recover "unless it sustains its affirmative defense set out in the other counts of the answer," this confession is made a part of each count and by implication admits the plaintiff's right to recover. *Jackson v. Independent School Dist.*, 110 Iowa 313.

854. **1. Manhattan Brick, etc., Co. v. Clark**, (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 819.

Contra. — Prior defense may not be made a part of a subsequent defense by mere reference. *Denison University v. Manning*, 65 Ohio St. 138; *Eureka F. & M. Ins. Co. v. Baldwin*, 62 Ohio St. 368. See also *Pate v. Allison*, 114 Ga. 651.

2. Kager v. Brenneman, 33 N. Y. App. Div. 452.

855. **1. Alabama.** — *St. Louis, etc., Packet Co. v. McPeters*, 124 Ala. 451; *Ansley v. Piedmont Bank*, 113 Ala. 467.

California. — *Miles v. Woodward*, 115 Cal. 308; *Eppinger v. Scott*, 112 Cal. 369.

Colorado. — *Koll v. Bush*, 6 Colo. App. 294.

Iowa. — *Thorson, etc., Co. v. Baker*, 107 Iowa 49; *Jackson v. Independent*

School Dist., (Iowa 1899) 77 N. W. Rep. 860.

New York. — *Brady v. Hutkoff*, (N. Y. Super. Ct. Gen. T.) 13 Misc. (N. Y.) 515, *affirmed* 155 N. Y. 681; *MacColl v. American Union L. Ins. Co.*, 89 Hun (N. Y.) 490; *Wendling v. Pierce*, 27 N. Y. App. Div. 517; *Seeman v. Bandler*, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 328; *Young v. Katz*, 22 N. Y. App. Div. 542; *Kelly v. Theiss*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 530; *Sirlani v. Deutsch*, (N. Y. Super. Ct. Spec. T.) 12 Misc. (N. Y.) 213; *Zacharias v. French*, (C. Pl. Spec. T.) 10 Misc. (N. Y.) 202. But see *Haas v. Selig*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 504.

North Carolina. — *Upton v. South Carolina, etc., R. Co.*, 128 N. Car. 173; *McLamb v. McPhail*, 126 N. Car. 218; *Millan v. Southern R. Co.*, 54 S. Car. 485.

South Dakota. — *Green v. Hughitt School Tp.*, 5 S. Dak. 452.

Texas. — *Bauman v. Chambers*, 91 Tex. 108; *McGregor v. Sima*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1021.

Wisconsin. — *Kerslake v. McInnis*, 113 Wis. 659.

In *Idaho* the defenses may be, to a certain extent, inconsistent. *Murphy v. Russell*, (Idaho 1901) 67 Pac. Rep. 421.

856. **2. Smith v. Doherty**, (Ky. 1901) 60 S. W. Rep. 381; *Oakes v. Ziemer*, 61 Neb. 6; *Veasey v. Humphreys*, 27 Oregon 515.

857. **1. Murphy v. Russell**, (Idaho 1901) 67 Pac. Rep. 421; *De Lissa v. Fuller Coal, etc., Co.*, 59 Kan. 319; *Cox v. Bishop*, 55 Mo. App. 135; *Cate v. Hutchinson*, 58 Neb. 232; *Blodgett v. McMurry*, 39 Neb. 210, 34 Neb. 782; *Hooven, etc., Co. v. National Cordage Co.*, 11 Ohio Dec. (Reprint) 434, 27 Cinc. L. Bul. 18; *Davis v. Seattle Nat. Bank*, 19 Wash. 65; *Seattle Nat. Bank v. Carter*, 13 Wash. 281, *Gates v. Avery*, 112 Wis. 271.

857. What Defenses May Be Plead with General Denial. — See notes

3, 4, 5.

858. See note 1.

859. See note 1.

Statute of Limitations Joined with Other Affirmative Defenses. —

See note 2.

Fraud and Breach of Warranty. — See note 3.

Consistent with Itself. — Although there may sometimes be some inconsistency as between the several defenses, each defense must be consistent within itself. *Banta v. Siller*, 121 Cal. 414; *Carlile v. People*, 27 Colo. 116; *Murphy v. Russell*, (Idaho 1901) 67 Pac. Rep. 421. See also *Haas v. Selig*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 504.

Although the affirmations of an answer are inconsistent, they will, nevertheless, be allowed to stand if the tenor of the whole answer is of a consistent character. *Spencer v. Terrel*, 17 Wash. 514.

857. 3. *Collins v. Fenley*, (Ky. 1899) 53 S. W. Rep. 667; *Green v. Hughitt School Tp.*, 5 S. Dak. 452; *Gates v. Avery*, 112 Wis. 271.

4. *Spencer v. Society of Shakers*, (Ky. 1901) 64 S. W. Rep. 468; *Paducah First Nat. Bank v. Wisdom*, (Ky. 1901) 63 S. W. Rep. 461; *Smith v. Doherty*, (Ky. 1901) 60 S. W. Rep. 380. But see *contra*, *Brann v. Brann*, (Ky. 1898) 44 S. W. Rep. 424.

An Allegation of Want of Consideration in an action on a note is inconsistent with an admission that the note was executed for certain realty which had value. *Ryan v. Middlesborough Townlands Co.* (Ky. 1899) 52 S. W. Rep. 33.

The Pleas of Non Est Factum and Non-performance are not so inconsistent that they may not stand together. *Cox v. Bishop*, 55 Mo. App. 135.

5. **Denial of Execution and Fraudulent Intent.** — A denial of the execution of a guaranty may be joined with an allegation that the guaranty was executed for a fraudulent purpose. *Corbitt v. Harrington*, 14 Wash. 197.

A denial of the execution of a mortgage is so inconsistent with an allegation that the mortgage was executed to defraud creditors that the denial is destroyed by the allegations of *factum*. *Veasey v. Humphreys*, 27 Oregon 515.

858. 1. *Randall v. Simmons*, (Oregon 1902) 67 Pac. Rep. 513, quoting with approval 1 ENCYC. OF PL. AND PR. 856.

859. 1. *Millan v. Southern R. Co.*,

54 S. Car. 485; *Fisher v. Stevens*, 143 Mo. 181; *Cate v. Hutchinson*, 58 Neb. 232; *Brown v. Porter*, 7 Wash. 327.

A General Denial of Rendition of Services is wholly inconsistent with an allegation that they were badly performed. *Black v. Holloway*, (Ky. 1897) 41 S. W. Rep. 576.

Superiority of Plaintiff's Mortgage. — A defendant may not deny the superiority of the plaintiff's mortgage lien and in addition claim the right to redeem from the plaintiff under a mortgage which the defendant denies is inferior. *Oakes v. Ziemer*, 61 Neb. 6, citing 1 ENCYC. OF PL. AND PR. 813, and note 4.

A Denial of Indebtedness Is Overcome by subsequent admissions of facts which clearly establish the indebtedness. *Stephens v. Cox*, 124 Ala. 448.

Insurance. — In an action to recover on a tornado-insurance policy, a denial of damage by a tornado is inconsistent with special allegations that the insured building was ruined by reason of the fact that a heavy wind forced a steamboat against it. *Queen Ins. Co. v. Hudnut Co.*, 8 Ind. App. 22.

Inconsistent Cross-complaint and Answer. — When the cross-complaint contains an averment which is inconsistent with a denial in the answer, the former cannot be used to destroy the effect of the latter. *Meyers v. Merillon*, 118 Cal. 352.

Judgment on Pleadings. — When the denials are inconsistent with express admissions in the answer, or are clearly evasive and omit to put in issue the direct and specific statements of the complaint, a judgment will be granted on the pleadings. *Hoffman v. Gallatin County*, 18 Mont. 224.

Motion to Strike. — Merely because a general denial is inconsistent with an affirmative defense, it cannot be stricken from the defendant's answer. *Sheldon v. Heaton*, 78 Hun (N. Y.) 50.

2. *Mitchell v. Ripley*, 5 Kan. App. 818.

3. **Breach of Warranty and Settlement** are not inconsistent defenses. *Robinson v. Hill*, (Ky. 1902) 66 S. W. Rep. 623.

859. All Affirmative Defenses May Be Joined. — See note 4.

860. 6. Remedies for Inconsistency — Election. — See note 1.

Bound by Allegations Against Him. — See note 2.

XV. JOINT AND SEVERAL ANSWERS — 1. The Right to Join in an Answer — Optional to Join. — See note 4.

861. 2. How Joint Answer Is Construed. — See note 1.

4. Defense in One Answer Inuring to All. — See note 5.

862. 5. Adoption of Answer. — See note 2.

Rescission and Breach of Contract as defenses are not inconsistent. *South Milwaukee Boulevard Heights Co. v. Haite*, 95 Wis. 592.

859. 4. *Phillips v. W. T. Adams Mach. Co.*, 52 La. Ann. 442; *Osborne v. Waller*, 73 Minn. 52; *Kline v. Hanke*, 14 Mont. 361; *Hooven, etc., Co. v. National Cordage Co.*, 11 Ohio Dec. (Reprint) 434, 27 Cinc. L. Bul. 18; *Farmers', etc., Nat. Bank v. Hunter*, 35 Oregon 188; *Pugh v. Oregon Imp. Co.*, 14 Wash. 331; *Allen v. Olympia Light, etc., Co.*, 13 Wash. 307.

A Settlement and Counterclaim, when set up in the answer, are inconsistent. If there was a settlement there could be no counterclaim growing out of the matter settled. *Ferguson v. Prince*, 2 Kan. App. 7.

Self-defense and Accident. — The defendant may not plead both that he fired in self-defense and that his pistol was accidentally discharged. These defenses are irreconcilably inconsistent. *Hollingsworth v. Warnock*, (Ky. 1901) 65 S. W. Rep. 163.

Right to Purchase. — In an action for unlawful detainer an allegation that the defendant is entitled to purchase a title in fee simple is inconsistent with an averment which shows that the defendant's assignor was a mere tenant of the plaintiff. *Kemp v. Jennings*, (Indian Ter. 1901) 64 S. W. Rep. 616.

860. 1. *Murphy v. Russell*, (Idaho 1901) 67 Pac. Rep. 421; *Ferguson v. Prince*, 2 Kan. App. 7; *Hollingsworth v. Warnock*, (Ky. 1901) 65 S. W. Rep. 163; *Lane v. Bryant*, 100 Ky. 138; *Dunn v. Bozarth*, 59 Neb. 244.

In Oregon it would seem that it is proper for the plaintiff to move to strike

out. *Randall v. Simmons*, (Oregon 1902) 67 Pac. Rep. 513.

The Complete Defense Must Be Abandoned, and not merely the inconsistent words and allegations therein contained. *Black v. Holloway*, (Ky. 1897) 41 S. W. Rep. 576.

2. *Mitchell v. Ripley*, 5 Kan. App. 818.

4. *Aultman v. Forgey*, 10 Ind. App. 397.

861. 1. *Whitcomb v. Hardy*, 68 Minn. 265 [*citing* 1 ENCYC. OF PL. AND PR. 861]; *Supreme Council, etc., v. Boyle*, (Ind. App. 1896) 42 N. E. Rep. 827.

5. *Hoxie v. Farmers', etc., Nat. Bank*, 20 Tex. Civ. App. 462.

862. 2. **Adopted Part Must Be Defined.** — When a defendant's answer adopts the answer of a codefendant "except wherein this answer conflicts therewith," the adopting answer is defective in that it fails to designate the portion of the codefendant's answer which is adopted. *Bexar Bldg., etc., Assoc. v. Lockwood*, (Tex. Civ. App. 1899) 54 S. W. Rep. 253.

Relation of Adoption. — When an invalid answer is filed at one term of the court, but validated by proper adoption at a following term, the answer does not become a defense until such adoption. The adoption does not relate back to the date when the invalid answer was filed. *Steiner v. Birmingham First Nat. Bank*, 115 Ala. 379.

The second defendant may adopt the answer of the first, and the third defendant the answer of the second, even though the first defendant, at the time of the last adoption, has been dismissed from court. *Alliance Milling Co. v. Eaton*, (Tex. Civ. App. 1893) 23 S. W. Rep. 455.

ANSWERS IN EQUITY PLEADING.

- 865.** II. FORM OF ANSWERS — 1. Parties. — See note 2.
866. 2. Frame of Answer — Reservation. — See note 1.
867. 3. Oath — a. NECESSITY OF OATH. — See notes 1, 3.
868. c. BEFORE WHOM TAKEN. — See note 4.
 4. Signature. — See notes 5, 6.

865. 2. Answer Must Be by Party. — No one but a party to a bill in equity can make a defense to it by demurrer or answer. The court may require the plaintiff to bring into the suit by an amended bill all nonadverse interests. *Gall v. Gall*, 50 W. Va. 523.

866. 1. *Matney v. Ratliff*, 96 Va. 231. But see *Schack v. McKey*, 97 Ill. App. 460, in which case it was held that the reservation of all advantages he might have had by demurring to the bill enabled the defendant on the hearing to raise the question that the plaintiff had an adequate remedy at law.

Reservation Clause Prohibited. — In *New Jersey* Equity Rule 208 forbids the incorporation of the reservation clause in an answer. *Plum v. Smith*, 56 N. J. Eq. 468.

867. 1. *Ballard v. Kennedy*, 34 Fla. 483.

Where the Issue Is One of Law Only, the bill and answer are to be regarded as mere pleadings, and it is immaterial whether the answer be verified or not. *Musgrove v. Gray*, 123 Ala. 376.

Several Defendants. — An answer to a bill in equity, unless the verification thereof is waived, must be sworn to by the defendant whose answer it purports to be, and when a joint or joint and several answer is interposed on behalf of several defendants, it can be considered and treated as the answer only of those of the defendants who sign and verify it. *Ballard v. Kennedy*, 34 Fla. 483.

Verification Nunc pro Tunc. — Upon an objection that the answer is not verified, the court may allow the proper verification to be made. *Holton v. Guinn*, 65 Fed. Rep. 450.

3. *Ballard v. Kennedy*, 34 Fla. 483; *James T. Hair Co. v. Daily*, 161 Ill. 379, in which case the court said that under Act Ill. March 15, 1872,

to regulate the practice of courts of chancery, it is not permissible to waive the oath to the answer in a bill for discovery only, but the oath may be waived in a bill for discovery if other relief is asked

In *Michigan* the present rule is that an answer under oath must be deemed to be waived in all cases except where a sworn bill is filed and a sworn answer is demanded. *World Mfg. Co. v. Kent* Circuit Judge, 115 Mich. 652.

Effect and Purpose of Waiving Oath. — By waiving the oath of the defendant to his answer the complainant disclaims his right to a discovery. *Stettauer v. Dwight*, 54 Ill. App. 194.

"The sole purpose of a waiver of an oath to an answer is to affect the evidential character and value of the answer." *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 83 Fed. Rep. 26.

If the Complainant Expressly Waives Discovery he is generally deemed to have waived a sworn answer. *Ray v. Home, etc., Invest., etc., Co.*, 106 Ga. 492.

868. 4. *United States.* — "Or before any notary public." Equity Rule 59, 129 U. S. 701.

5. In *New Jersey* the practice of the defendant signing the answer has not obtained, the signature of counsel only being required. *Tynan v. Warren*, 53 N. J. Eq. 313.

Signature After Objection. — Where the defendant has neglected to sign his answer, the court may permit him to affix his signature after objection has been made. *Holton v. Guinn*, 65 Fed. Rep. 450.

6. *Ballard v. Kennedy*, 34 Fla. 483, in which case it was held that the defendant's signature to the affidavit appended to his answer was a sufficient signing.

870. III. NATURE OF ANSWER. — See note 1.

871. Answer Not Demurrable. — See note 2.

Cross-bill Necessary for Affirmative Relief. — See note 3.

872. Waiver. — See note 1.

Certificate of Counsel. — There is no equity rule requiring a certificate of counsel to an answer to the merits of the bill. *McGorray v. O'Connor*, (C. C. A.) 87 Fed. Rep. 586.

870. 1. Matters of Law and of Fact. — In equity practice it is permissible to set forth in the answer matters of law as well as matters of fact constituting a defense. *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 76 Fed. Rep. 15.

The Pennsylvania Chancery Rules provide that all issues of fact must be made by answer. *Moore v. Bush*, 17 Pa. Co. Ct. 252.

Several Defenses. — A defendant who sets up certain facts in his answer and states that the consequence of such facts is to exhibit a particular defense cannot on final hearing use the same facts to support a different ground of defense to which the attention of the complainant is not called. *Bannister v. Miller*, 54 N. J. Eq. 121.

Misjoinder. — The defect of a misjoinder should be raised by demurrer, and where such alleged defect is not set up by demurrer or in the answer, it will not avail on appeal. *Treat v. Pennsylvania Mut. L. Ins. Co.*, 199 Pa. St. 326.

871. 2. Bennett v. Pierce, 45 W. Va. 654; *Stokes v. Farnsworth*, 99 Fed. Rep. 836; *Walker v. Jack*, (C. C. A.) 88 Fed. Rep. 576.

3. Hendrix v. Southern R. Co., (Ala. 1901) 30 So. Rep. 536; *Miltimore v. Ferry*, 171 Ill. 219; *McCann v. O'Connell*, 54 Ill. App. 209; *Hagar v. Wilson*, (Tenn. Ch. 1897) 46 S. W. Rep. 1033. See also **CROSS-BILLS**.

In California, under the Code, if a balance is found to be due to the defendant, the court may grant affirmative relief on the answer. *Vierra v. Fontes*, 135 Cal. 126.

By Consent, an answer may be regarded as a cross-bill. *Gray v. Taylor*, (N. J. 1897) 38 Atl. Rep. 951.

Varianco. — Where the agreement set up in the answer and established by the evidence is different from that which the complainant sought to enforce, the court may grant affirmative relief upon the answer. *Barlow v. Elliott*, 56 Mo.

App. 374; *Brighton, etc., Irrigation Co. v. Little*, 14 Utah 42.

To Be Effectual as a Cross-bill the answer must contain the essential features of a cross-bill, *McGillis v. Hogan*, 190 Ill. 176; *Harrison v. Brewster*, 38 W. Va. 294; and must not set up matters of defense not germane to the case made by the bill, *Johnson v. Stancliff*, 113 Ga. 886.

Cost Bond. — In *Tennessee* an answer will not be treated as a cross-bill unless a cost bond is filed. *Cumberland Land Co. v. Canter Lumber Co.*, (Tenn. Ch. 1895) 35 S. W. Rep. 886.

Necessity to Make New Parties. — If the affirmative relief sought by means of an answer in the nature of a cross-bill affects persons not before the court, they must be made parties to the suit and duly summoned before such relief can be granted. *Martin v. Kester*, 46 W. Va. 438.

Issues Entirely Independent of those raised by the original petition cannot be raised in an answer in the nature of a cross-bill. *Ray v. Home, etc., Invest., etc.*, Co., 106 Ga. 492.

Dismissal of Bill. — A dismissal of the complainant's bill will not affect the defendant's right to a hearing on the matters alleged in the answer filed as a cross-bill entitling him to independent equitable relief. *Ray v. Home, etc., Invest., etc., Co.*, 106 Ga. 492; *Ryan v. Fulghum*, 96 Ga. 234.

Dismissal of Answer with Bill. — If the bill fails, no relief can be administered between codefendants on answer filed praying it. Such answer must be dismissed with the bill, without prejudice to the rights of the defendants as between themselves. *Kennewig Co. v. Moore*, 49 W. Va. 323.

872. 1. Cocke v. Clausen, 67 Ark. 455, quoting 1 ENCYC. OF PL. AND PR. 872.

Answer After Demurrer Overruled. — By filing his answer after a general demurrer has been overruled, the defendant waives his right to assign error to the overruling of his demurrer. *Bauerle v. Long*, 165 Ill. 340.

Multifariousness Waived. — Where the defendants filed answers to the bill upon the merits and consented to the

873. IV. REQUIREMENTS OF ANSWER — 1. Must Be Full. — See note 1.

875. 2. Must Be Certain. — See note 2.

876. 3. Must Be on Knowledge, Information, Remembrance, or Belief. — See note 3.

877. See notes 1, 2.

878. 5. Must State Facts. — See note 3.

V. DEFENSES TAKEN BY ANSWER — 1. Usury. — See USURY.

880. 2. Statute of Limitations. — See LIMITATIONS.

3. Laches. — See LACHES.

882. 5. Undue Influence. — See DURESS.

6. Res Judicata. — See FORMER ADJUDICATION.

submission to a jury of the issues of fact so made by the bill and answers, it was held that objection that the bill was multifarious was waived. *Ring v. Lawless*, 190 Ill. 520. See also *Miner v. Wilson*, 107 Mich. 57.

Matters in Abatement. — In the United States courts, matters in abatement can in general be set up only by plea or demurrer, and the defendant by answering waives any such objection. *Marshall v. Otto*, 59 Fed. Rep. 249.

873. 1. Cameron v. Groveland Imp. Co., 20 Wash. 169 [*citing* 1 ENCYC. OF PL. AND PR. 875, 876]; *Amberg v. Nachtway*, 92 Ill. App. 608; *Riley v. Hodgkins*, 57 N. J. Eq. 278; *McTwiggan v. Hunter*, 19 R. I. 68.

Answer to Cross-bill. — If the defendant by cross-bill calls upon the complainant to disclose certain matters, and the complainant submits to answer, the answer must be full. *Manley v. Mickle*, 55 N. J. Eq. 563.

Whole Transaction. — If a plaintiff states an act, transaction, or contract as the foundation of his equity, the defendant has a right to state the whole of such act, transaction, or contract in his answer. *McCoy v. Kane*, 19 Pa. Super. Ct. 187.

875. 2. Mobile, etc., R. Co. v. Alabama Midland R. Co., 123 Ala. 145; *Aulick v. Reed*, 104 Ky. 465; *Applewhite v. Foxworth*, 79 Miss. 773; *Goggins v. Risley*, 13 Pa. Super. Ct. 316; *Hoyt v. Kingston Coal Co.*, 8 Kulp (Pa.) 352.

Want or Failure of Consideration. — In order that an answer setting up a want or failure of consideration may have the effect to impose the burden of proof on the complainant as to such offense, it should be direct, positive,

and free from uncertainty. *Kellogg v. Singer Mfg. Co.*, 35 Fla. 99.

The Defendant Must Answer Each Interrogatory contained in the bill or else set forth distinctly his reason for not answering, and a general excuse for not answering is not sufficient. *Boyer v. Keller*, 113 Fed. Rep. 580. But he is not compelled to answer all the circumstances set out in support of the complainant's allegations. *Mohler v. Ephrata Water Co.*, 16 Pa. Co. Ct. 493.

General Denial. — In the absence of statute, a general denial is not sufficient. *Moog v. Barrow*, 101 Ala. 209.

Where an answer concludes with a general denial of material matters not specifically denied, if no exceptions are taken to it, such matters will be in issue. *Stackpole v. Hancock*, 40 Fla. 362; *Bunting v. Cochran*, 99 Va. 558; *Sandusky v. Faris*, 49 W. Va. 150.

876. 3. German Sav., etc., Soc. v. De Lashmutt, 83 Fed. Rep. 33.

877. 1. Failure to Deny Information and Express Belief — Effect. — *Moog v. Barrow*, 101 Ala. 209; *Starr v. De Lashmutt*, 76 Fed. Rep. 907.

If the Matters Charged Are Not Within the Defendant's Knowledge he may answer as to his information and belief, stating the source of his information. *Earle v. Art Library Pub. Co.*, 95 Fed. Rep. 544.

2. Hanchett v. Blair, (C. C. A.) 100 Fed. Rep. 817; *Blair v. Silver Peak Mines*, 93 Fed. Rep. 332.

878. 3. British, etc., Mortg. Co. v. Norton, 125 Ala. 522; *Gamble v. Aultman*, 125 Ala. 372; *Freeman v. Stewart*, 119 Ala. 158; *McBride v. Ross*, 13 App. Cas. (D. C.) 576; *Aulick v. Reed*, 104 Ky. 465. See also LEGAL CONCLUSIONS.

882. 7. Statute of Frauds. — See FRAUDS, STATUTE OF.

883. 8. Fraud. — See FRAUD.

884. 9. Want of Jurisdiction. -- See JURISDICTION; REMEDY AT LAW.

885. VI. ANSWERS BY PERSONS UNDER DISABILITY — 1. Married Women. — See HUSBAND AND WIFE.

886. 2. Infants, Lunatics, Etc. — See GUARDIANS; INFANTS; INSANE PERSONS.

887. 3. Corporations Aggregate. — See CORPORATIONS.

888. VII. ANSWERS IN PATENT CASES. — See PATENTS.

889. VIII. JOINDER OF SEVERAL DEFENSES. — See note 3.

890. See notes 2, 3.

889. 3. Bennett v. Bennett, (N. J. 1901) 49 Atl. Rep. 501.

Answer in Support of Plea. — An answer in support of a plea must be limited to a denial of the facts alleged in the bill which would be evidence to dispute the plea, and such an answer is not necessary in support of a plea to a bill which stands solely upon the bare averment of a fact. *Rhino v. Emery*, 79 Fed. Rep. 483.

False Plea. — If the defendant pleads a false plea and it is so found, he cannot claim the right to file an answer, although if the complainant desires a discovery, which the plea sought to avoid, he may undoubtedly insist upon it. *Adriaans v. Lyon*, 8 App. Cas. (D. C.) 532.

890. 2. Droste v. Hall, (N. J. 1894) 29 Atl. Rep. 437; *New York, etc., Coal Co. v. Spencer*, 3 Pa. Dist. 604.

Allowing Withdrawal of Answer. — Where both a demurrer and an answer to the whole bill are filed, the court may allow the withdrawal of the answer and hear the case on the demurrer. *Finley's Estate*, 196 Pa. St. 140; *Saunders v. Savage*, (Tenn. Ch. 1900) 63 S. W. Rep. 218.

It is within the discretion of the court to allow defendants to withdraw their answers and to demur if there is no unreasonable delay in moving for leave to do so. *Weisiger v. Richmond Ice Mach. Co.*, 90 Va. 795.

Second Demurrer in Answer Filed After Demurrer Overruled. — After a demurrer has been overruled the defendant may not incorporate in the answer a second demurrer without leave of court, unless the bill has been amended. *Fields v. Killion*, 129 Ala. 373.

Demurrer Included in Answer After Answering in Full. — The defendant cannot include in his answer a demurrer

to all or any part of the bill after having answered in full. *Gleason, etc., Mfg. Co. v. Hoffman*, 168 Ill. 25; *Bird v. Magowan*, (N. J. 1898) 43 Atl. Rep. 278.

In Tennessee it is held that the rule that a demurrer is overruled by answer applies where the demurrer is to the form of the action or to the jurisdiction of the subject-matter or the person, but a demurrer which goes to the merits of the case as presented by the bill may be incorporated in the answer and is not overruled thereby. *Johnson v. Wingfield*, (Tenn. Ch. 1897) 42 S. W. Rep. 203.

United States Equity Rules. — "Formerly, as pleas raise the question whether the defendant ought to answer the bill, or a part of it pleaded to, an answer to the bill, or to that part, was deemed to be a waiver of the pleas." This has been modified in the federal courts by Equity Rule 37, which provides that "no demurrer or plea shall be held bad and overruled upon argument only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea." *Mercantile Trust Co. v. Missouri, etc., R. Co.*, 84 Fed. Rep. 379.

Although Equity Rule 37 provides that no demurrer or plea shall be held to be bad and overruled upon argument because the answer may extend to some part of the same matter as may be covered by such demurrer or plea, this will not protect a demurrer which goes to the whole bill and is accompanied by an answer covering all the allegations of the bill. *Strang v. Richmond, etc., R. Co.*, (C. C. A.) 101 Fed. Rep. 511.

A defendant may demur to part, plead to part, and answer to the resi

891. IX. FILING AND SERVING ANSWERS.— See FILING PLEADINGS AND PAPERS.

892. X. STRIKING ANSWERS FROM FILE.— See note 2.

893. See notes 1, 2.

895. XII. TAKING BILL PRO CONFESSO.— See DECREES.

896. XIII. EXCEPTIONS TO ANSWERS— 1. Definition and Object. — See note 1.

due of a bill, and under Equity Rule 32, if the bill specially charges fraud or combination, a plea to such part must be accompanied by an answer fortifying the plea. Under this rule, if the defendant pleads to the whole bill, and also answers, but in such answer only denies the fraud and combination charged, such answer will not overrule the plea. *Huntington v. Laidley*, 79 Fed. Rep. 865.

Under Equity Rule 39 a defendant is entitled in his answer to insist upon all matters of defense in bar or to the merits of the bill. *Holton v. Guinn*, 65 Fed. Rep. 450.

890. 3. Incorporation of Special Plea in Answer— *Alabama Statute.*—The rule that if the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred, even though the plea is not good either in point of form or of substance, cannot be applied to answers. The statute (Civ. Code Ala., § 699) does not abrogate the old rule, but is permissive; and while a defendant may incorporate all his defenses in his answer, yet if he wishes to take advantage of the rule as to pleas, he must incorporate his special plea, as such, in his answer, or plead it separately. *Stein v. McGrath*, (Ala. 1900) 30 So. Rep. 792, *distinguishing* *Tyson v. Decatur Land Co.*, 121 Ala. 414.

892. 2. Holland v. Webster, (Fla. 1901) 29 So. Rep. 625, holding that where the answer presents facts so unrelated to the plaintiff's claim as to be unworthy of any consideration as a defense, or mere conclusions of the pleader which clearly appear from the face of the answer to be erroneous, it may be stricken from the files. *Compare* *Haberman v. Kaufer*, 60 N. J. Eq. 271, in which case it was declared that if the answer sets up matter which may fairly be deemed to present some question of either law or fact, the legal sufficiency of the answer cannot be decided by a motion to strike out. See also *Vanstory v. Thornton*, 114 N. Car. 375. And see generally STRIKING OUT.

Answer Filed Without Permission.— In a case where permission to file an answer is necessary and such permission is not obtained, the answer may be stricken out. *Pickering v. Townsend*, 118 Ala. 351.

Time of Making Motion.— The motion to strike from the files, where the time is not specially limited by the court rules, must be made within the time in which exceptions may be filed. *Ireland v. Kelly*, 60 N. J. Eq. 308.

A Motion to Strike Out Parts of the Answer must be specific, and identify the portions to be stricken out, or it will be denied. *McGorray v. O'Connor*, (C. C. A.) 87 Fed. Rep. 586.

It is not error to strike out such portion of a defendant's answer as merely refers to reasons or evidence why the defendant is confirmed in his recollection of the facts which he is allowed to set up in his defense. *Perkins v. Morgan*, 107 Ga. 835.

Under United States Equity Rule 37, providing that no demurrer or plea shall be held to be bad on argument because the answer may extend to some part of the same matter covered by such demurrer or plea, pleas in bar and estoppel to the complaint will not be stricken out because they go to the same matter covered by the answer, when such pleas do not cover the whole bill, and where covering the same ground as the answer show different grounds of defense. *Mercantile Trust Co. v. Missouri*, etc., R. Co., 84 Fed. Rep. 379.

Waiver of Irregularity.— In *McKell v. Collins Colliery Co.*, 46 W. Va. 625, it was held that the plaintiff will be deemed to have waived his right to object to the improper filing of the answer where the objection is not raised until after both parties have taken depositions.

893. 1. Ballard v. Kennedy, 34 Fla. 483.

2. Osgood v. A. S. Aloe Instrument Co., 69 Fed. Rep. 291.

896. 1. Bennett v. Pierce, 45 W. Va. 654 [*citing* 1 ENCYC. OF PL. AND PR.

896. 2. Exceptions for Insufficiency — a. WHEN THEY LIE. — See note 3.

897. Material Allegation or Interrogatory Unanswered. — See note 2.

898. b. WHEN THEY DO NOT LIE — New Matter. — See note 6.

900. Oath. — See notes 1, 2.

902. 3. Form. — See note 6.

903. Should Be Specific. — See note 3.

895]; *Ward v. Ward*, 50 W. Va. 517; *Barrett v. Twin City Power Co.*, 111 Fed. Rep. 45; *Walker v. Jack*, (C. C. A.) 88 Fed. Rep. 576; *Schultz v. Phenix Ins. Co.*, 77 Fed. Rep. 375.

Effect of Exception. — Where the answer to a bill of discovery denies all the material allegations of the bill, and includes a demurrer to the discovery sought, and the complainant excepts for insufficiency in not answering the interrogatories, the denials must, for the purpose of the exceptions, be taken as true. *Gorman v. Banigan*, 22 R. I. 22.

Validity of Plea Admitted by Exceptions. — Exceptions to an answer in support of a plea operate as an admission of the validity of the plea. If the complainant questions the sufficiency of the plea he should set it for argument and determine that point before taking exceptions to the answer supporting the plea. *Hatch v. Bancroft-Thompson Co.*, 67 Fed. Rep. 802.

896. 3. Inconsistent Defenses. — Where the defendants, after answering, file a cross-bill alleging that the contracts upon which their answer was based were null and void, the exceptions to the answer will be sustained. *Savings, etc., Co. v. Bear Valley Irrigation Co.*, 112 Fed. Rep. 693.

897. 2. Randall v. Reynolds, 61 N. J. Eq. 335; *Kelley v. Ryder*, 18 R. I. 455.

898. 6. Whittemore v. Patten, 84 Fed. Rep. 51, *citing* 1 ENCYC. OF PL. AND PR. 898.

Where Defense Is Set Forth in Different Aspects. — It is not ground for exception to an answer that it contains allegations setting forth the defense in different aspects. *Von Schroder v. Brittan*, 98 Fed. Rep. 169.

The Question of the Legal Sufficiency of a Substantive Defense set forth in the answer must be determined by a hearing on bill and answer, and cannot be raised by exceptions. *Barrett v. Twin City Power Co.*, 111 Fed. Rep. 45; *Stokes v. Farnsworth*, 99 Fed. Rep. 836.

Failure to Answer Details of Evidence Not Ground for Exception. — If the bill contains recitals of matters which in fact are details of the evidence upon which the complainant relies and not necessary to be averred as a matter of sufficient pleading, and the answer thereto, by way of admission, denial, or both, fairly meets the general facts properly pleaded in the bill, it will not be insufficient because it does not fully admit or deny every matter alleged in the bill. *Field v. Hastings, etc., Co.*, 65 Fed. Rep. 279.

900. 1. Pearson v. Treadwell, 179 Mass. 462, *citing* 1 ENCYC. OF PL. AND PR. 900, in which case the court also held that in *Massachusetts* exceptions for insufficiency will not lie in any case except where discovery is sought. See also *Dudley v. Eastman*, 70 N. H. 418.

2. Where Bill Waives Answer under Oath. — *Barrett v. Twin City Power, etc., Co.*, 111 Fed. Rep. 45. *Contra*, *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 83 Fed. Rep. 26 (where, however, the answer was by a corporation), *citing* *Gamewell Fire-Alarm Co. v. Mayor, etc.*, 31 Fed. Rep. 212; *Reed v. Insurance Co.*, 36 N. J. Eq. 393; *Colgate v. Compagnie Francaise*, 23 Fed. Rep. 82, and *Whittemore v. Patten*, 81 Fed. Rep. 527.

In *Illinois* and *Rhode Island*, under statutes regulating equity practice, exceptions may be taken to an answer, although the oath is waived. *James T. Hair Co. v. Daily*, 161 Ill. 379; *McTwiggin v. Hunter*, 19 R. I. 68.

902. 6. Bennett v. Pierce, 45 W. Va. 654.

903. 3. Jackson v. Kraft, 186 Ill. 623 [*citing* 1 ENCYC. OF PL. AND PR. 903, in support of the proposition that exceptions should state the charge in the bill and the interrogatory applicable thereto as well as the terms of the answer]; *Schultz v. Phenix Ins. Co.*, 77 Fed. Rep. 375; *Bennett v. Pierce*, 45 W. Va. 654.

General Objection. — When the answer

905. 5 Proceedings — Setting Down for Hearing. — See note 4.

910. XIV. ANSWERS AS EVIDENCE — 1. Responsive Answers —

a. IN GENERAL. — See note 4.

914. c. ANSWER CONCLUSIVE. — See note 2.

taken as a whole presents no bar in law, a general objection may be available. *Ward v. Ward*, 50 W. Va. 517.

Necessity to Set Forth Allegations of Bill. — An exception which amounts to no more than a criticism of the answer, without setting forth any allegation of the bill and charging that as to it the answer is insufficient, will be disallowed. *Sandusky v. Faris*, 49 W. Va. 150.

905. 4. Hartman v. Evans, 38 W. Va. 669, holding that if the plaintiff does not at once set exceptions down for argument, nor file a general replication to the answer, the exceptions will be treated as abandoned.

910. 4. Kruger v. Spachek, 22 Tex. Civ. App. 307 [*citing 1 ENCYC. OF PL. AND PR.* 910]; *Goggins v. Risley*, 13 Pa. Super. Ct. 316; *Bussier v. Weekey*, 11 Pa. Super. Ct. 463.

Where No Discovery Is Called For. — In *Virginia*, if no discovery is called for the answer is not evidence against the complainant. *Flynn v. Jackson*, 93 Va. 341; *Ward v. Cornett*, 91 Va. 676.

In *Maryland* the rule has been changed by statute (Pub. Gen. Laws Md., art. 16, §§ 146, 147). Whereas formerly the answer, when responsive, was always evidence, now, under section 146, when required by the bill to be under oath it will be evidence against the plaintiff only if read by him at the hearing; while under section 147, though not required to be under oath, it will, if under oath, be evidence for the defendant when the case is heard on bill and answer only. *Davis v. Crockett*, 88 Md. 249.

Rules of Evidence. — Except as to the effect of a responsive answer in equity, the burden of proof and the rules of evidence are the same at law as in equity. *Bussier v. Weekey*, 11 Pa. Super. Ct. 463.

Complainant Cannot Read Part Only of Answer. — If the whole answer is responsive, the complainant cannot use a part as evidence and reject other parts. *Boudinot v. Winter*, 190 Ill. 394.

Transactions with Person Since Deceased. — Where the plaintiff's answer

to interrogatories filed by the defendants is responsive to the question, it becomes competent evidence even though it relates to transactions with a person since deceased, having been called for by the opposite party. *Tenny v. Porter*, 61 Ark. 329.

Where Several Defendants Answer. — Where several defendants are required to answer under oath, such answers, as far as they are responsive to the allegations of the bill, are evidence for the respective defendants. *McCartney v. Fletcher*, 10 App. Cas. (D. C.) 572.

914. 2. Hannaman v. Wallace, 97 Ill. App. 46, holding that where the complainant calls for an answer under oath, he gives to the defendant the advantage of a sworn answer, which requires more than the evidence of one witness to overcome; *Boyd v. Brown*, 74 Ill. App. 205; *Neldon v. Roof*, 55 N. J. Eq. 608; *Mason v. Smith*, 200 Pa. St. 270; *Galbraith v. Galbraith*, 190 Pa. St. 225; *Corbin v. Patton*, (Va. 1896) 26 S. E. Rep. 410; *Coldiron v. Asheville Shoe Co.*, 93 Va. 364; *Wilt v. Huffman*, 46 W. Va. 475.

Answer Must Be Direct and Positive. — The answer, to have the effect of being conclusive unless overcome by the testimony of two witnesses, or of one corroborated witness, must be direct and positive. *Kellogg v. Singer Mfg. Co.*, 35 Fla. 99.

Where One Defendant Prays Discovery from Another. — Where, in answer to a petition for interpleader, brought against two defendants, one of them prays for discovery from the other, the response by the latter to such answer may be admitted in evidence in his favor, and two witnesses, or one witness and corroborating circumstances, are required to overcome such response, when it is responsive to the interrogatories. *Perkins v. Morgan*, 107 Ga. 835.

Oath Waived. — *Bickerdike v. Allen*, 157 Ill. 95; *Field v. Hastings, etc., Co.*, 65 Fed. Rep. 279.

If the plaintiff waives the answer of the defendant under oath, such waiver deprives the answer of its effect as evidence, and dispenses with the necessity which would otherwise exist of dis-

916. *a.* WHAT IS RESPONSIVE. — See note 1.

920. 2. Answer Containing New Matter. — See note 4.

924. 3. Hearing on Bill and Answer. — See note 4.

926. 4. Hearing on Bill, Answer, and Replication. — See note 3.

927. 5. Admissions in Answer — *a.* IN GENERAL — Conclusive. —

See note 1.

proving it by testimony equivalent to that of two witnesses. Still, such answer, if it negatives the equities of the bill, must be taken as true upon motion to dissolve. *Ingles v. Straus*, 91 Va. 209.

In *Delaware* where no interrogatories were annexed to or accompanied the bill, and the answer of the defendant was not required to be under oath, if the answer is in fact made under oath, it cannot under the rules of court be used as evidence for the defendant. If it contains any admission of facts, they may be used against the party admitting them. *Cummins v. Jerman*, 6 Del. Ch. 122.

If the Bill neither Demands nor Waives a Sworn Answer, and the answer is under oath, it may be used as evidence in favor of the defendant. *Dewey Hotel Co. v. U. S. Electric Lighting Co.*, 17 App. Cas. (D. C.) 356.

916. 1. *Bussier v. Weekey*, 11 Pa. Super. Ct. 463; *Prentiss Tool, etc., Co. v. Godchaux*, (C. C. A.) 66 Fed. Rep. 234.

920. 4. *Marmion v. McClellan* 11 App. Cas. (D. C.) 467; *Dexter v. Gordon*, 11 App. Cas. (D. C.) 60; *Davis v. Crockett*, 88 Md. 249.

924. 4. *Roach v. Glos*, 181 Ill. 440 [*citing* 1 ENCYC. OF PL. AND PR. 924]; *Independent Medical College v. Zeigler*, 86 Ill. App. 360; *Barton v. International Fraternal Alliance*, 85 Md. 14; *Fields v. Colby*, 102 Mich. 449; *Beale v. Bucher*, 13 Pa. Super. Ct. 474; *Corbin v. Ashhurst*, 4 Pa. Dist. 347; *Martin v. Reese*, (Tenn. Ch. 1899) 57 S. W. Rep. 419; *Bryant v. Groves*, 42 W. Va. 10.

Conclusions of Law Insufficient. — Upon a hearing on bill and answer, the responsive allegations of material facts in the answer must be taken as true, but conclusions of law are insufficient. *Stockham v. Stockham*, 185 Pa. St. 337.

Matters of Record. — When a cause is set down for hearing on bill and answer, the practice is that the answer is read and must be admitted to be true in all points, and no other evidence is admitted unless it is matter of record

to which the answer refers, and which is provable by the record. *Milligan v. Wissman*, (Tenn. Ch. 1897) 42 S. W. Rep. 811.

Where Demurrer to Part of Bill Is Sustained. — Where a defendant demurs to part of a bill and answers, raising questions of fact, as to the balance, if the demurrer is sustained and the complainants elect to abide by the bill, the case should not be dismissed, but should be set down for hearing upon the questions raised by the answer. *Brewster v. Cahill*, 81 Ill. App. 626.

926. 3. Truth of Answer on Personal Knowledge. — When a cause is heard upon bill, answer, and replication, without proofs, the responsive answer must be taken as true only in relation to facts which are within the personal knowledge of the defendant. *Corporation for Relief of Poor Children v. Eden*, 62 N. J. Eq. 542.

927. 1. *Tait v. American Freehold Land Mortg. Co.*, (Ala. 1902) 31 So. Rep. 623; *Hoffman v. Gallatin County*, 18 Mont. 224.

Admissions as Affecting Sufficiency of Bill. — Admissions which are responsive to the allegations in the bill may be considered in determining the sufficiency of the bill. *Minzesheimer v. Doolittle*, 56 N. J. Eq. 206; *Paddock v. Jackson*, 16 Tex. Civ. App. 655; *Richardson v. Green*, (C. C. A.) 61 Fed. Rep. 423. See also *Hargreaves v. Tennis*, (Neb. 1901) 88 N. W. Rep. 486.

Jurisdictional Averments Not Supplied. — The allegations of an answer can never supply jurisdictional averments omitted from the bill. They can never inject equity into a bill which has none on its allegations. Neither statements in an answer nor proof of necessary facts can warrant relief unless such facts are averred in the bill. *Tait v. American Freehold Land Mortg. Co.*, (Ala. 1902) 31 So. Rep. 623.

New Matter in an Answer Not Responsive to the Bill will not be treated as admissions, and such matters must be proved. *Mayo v. Washington*, 122 N. Car. 5.

930. *b.* FAILURE TO ANSWER FULLY. — See note 5.

932. Qualification of Rule. — See note 1.

6. Overcoming Answers — *a.* BY WITNESSES AND CIRCUMSTANCES. — See note 3.

942. *b.* BY CIRCUMSTANCES ALONE — Cases of Fraud. — See note 1.

d. IMPEACHING CREDIBILITY OF DEFENDANT. — See note 4.

943. 7. Answer Not Direct and Positive — *a.* IN GENERAL. — See note 2.

944. *b.* EVASIVE ANSWERS. — See note 1.

945. *c.* ANSWERS ON INFORMATION AND BELIEF. — See note 1.

947. Answer Showing Lack of Personal Knowledge. — See note 2.

d. ANSWERS ON HEARSAY. — See note 4.

948. 8. Unsworn Answer. — See note 1.

949. 9. Answer Where Oath Is Waived. — See note 3.

930. 5. *Smith v. Turner*, (Tenn. Ch. 1898) 48 S. W. Rep. 396; *Milligan v. Wissman*, (Tenn. Ch. 1897) 42 S. W. Rep. 811.

Where there is No Direct Response to a Material Allegation of the bill, and no exception is filed to the answer, such allegations cannot be taken as admitted, but must be proved. *Stackpole v. Hancock*, 40 Fla. 362, *citing* 1 ENCYC. OF PL. AND PR. 930.

When a Material Averment in a Bill is neither Admitted nor Denied by the answer, it must be supported by proof. *Wilson v. Augur*, 176 Ill. 561.

932. 1. *Tate v. Field*, 56 N. J. Eq. 35.

Facts Which Are Res Judicata. — Where the facts averred in the bill have been established in an action to which the defendants were a party, they are affected with knowledge thereof, and unless they undertake to deny the averment of these facts, the allegations of the bill are to be taken to be true as averred. *Enyard v. Enyard*, 9 Pa. Dist. 293.

3. *Day v. Jones*, 40 Fla. 443; *Salsbury v. Ware*, 183 Ill. 505; *Delaney v. Thompson*, 187 Pa. St. 343; *Bailie v. Bailie*, 166 Pa. St. 472.

942. 1. *Hauk v. Van Ingen*, 196 Ill. 20, *citing* 1 ENCYC. OF PL. AND PR. 942.

4. *Shackelford v. Brown*, 72 Miss. 380.

943. 2. *Purvis v. Woodward*, 78 Miss. 922, *citing* 1 ENCYC. OF PL. AND PR. 943-946.

944. 1. When Not Considered Evasive. — Where the answers to interrogatories on facts and articles, all taken together, present a complete answer to all interrogatories taken together, the court will not order that one of the interrogatories be taken for confessed for the reason that the answer to that particular interrogatory appears evasive. *Wright-Blodgett Co. v. Elms*, 106 La. 150.

945. 1. *Savings, etc., Soc. v. Davidson*, (C. C. A.) 97 Fed. Rep. 696.

947. 2. *Savings, etc., Soc. v. Davidson*, (C. C. A.) 97 Fed. Rep. 696 [*citing* 1 ENCYC. OF PL. AND PR. 947]; *Chapman v. Chapman*, 91 Va. 397.

Positive Denial Not Made on Personal Knowledge. — Where it appears from the nature of the matters alleged in an answer that the averments are not within the defendant's knowledge, even though the answer is in terms a positive and direct denial of a material and specific charge in the bill, it will have only the legal effect of a denial on information. *Shackelford v. Brown*, 72 Miss. 380, *overruling* *M'Gehee v. White*, 31 Miss. 41.

4. Corporation for Relief of Poor Children *v.* Eden, 62 N. J. Eq. 542; *Gantt v. Cox, etc., Co.*, 199 Pa. St. 208.

948. 1. *National Bank of Republic v. Louisville, etc., R. Co.*, 72 Miss. 447; *Craft v. Schlag*, 61 N. J. Eq. 567.

949. 3. *Hentz v. Delta Bank*, 76 Miss. 429, *citing* 1 ENCYC. OF PL. AND PR. 949.

951. 10. Answer of Codefendant — a. AS EVIDENCE AGAINST CODEFENDANT. — See note 2.

955. 11. Answer of Infants. — See note 2.

956. 12. Answer of Corporation Aggregate. — See note 3.

951. 2. Stackpole v. Hancock, 40 Fla. 362; *Lockman v. Miller*, (Miss. 1897) 22 So. Rep. 822; *Sawyers v. Sawyers*, 106 Tenn. 597.

Answer of Copartner. — The general rule in chancery is that the answer of one defendant cannot be read against his codefendant. One exception to this rule is that the answer of one partner may be read against his copartner, but this must be understood of living partners. If one of the partners is deceased, the rule against reading the answer applies with redoubled force. *Earle v. Art Library Pub. Co.*, 95 Fed. Rep. 544.

Where there Is a Unity of Interest, an answer and successful defense on the part of one defendant inures to the benefit of the other, but such is not the case when the interests of the defendants are distinct. *Driver v. White*, (Tenn. Ch. 1898) 51 S. W. Rep. 994.

955. 2. Sawyers v. Sawyers, 106 Tenn. 597, *citing* 1 ENCYC. OF PL. AND PR. 955.

956. 3. Where Oath of Office Is Attached. — It has been held that when to the answer of a corporation, under seal, is added the oath of an officer on his own knowledge, the whole becomes the corporate act, with all the advantages to the plaintiff of compulsory disclosure of the truth which he would have had in a suit against an individual, and such an answer is entitled to the benefit of the equity rule that a responsive answer can be overcome only by the testimony of two witnesses, or of one with corroborating circumstances. *Kane v. Schuylkill F. Ins. Co.*, 199 Pa. St. 198. See also *Gantt v. Cox, etc., Co.*, 199 Pa. St. 208, emphasizing the fact that the answer of a corporation, to be entitled to the benefit of this rule, must be verified by an officer upon his personal knowledge.

APPEAL BONDS AND UNDERTAKINGS.

965. II. PURELY STATUTORY. — See notes 1, 2, 3.

966. III. STATUTORY REQUIREMENTS MANDATORY. — See notes

2, 3

967. — See note 2.

IV. ORDERS OF COURT. — See note 3.

965. 1. Harrison v. Stebbins, 104 Iowa 462.

2. Monroe County v. Strong, 78 Miss 582 [citing 1 ENCYC. OF PL. AND PR. 965]; *Matter of Kasson*, 135 Cal. 1; *Harrison v. Nelson*, 96 Ill. App. 397; *Western Plaster Works v. Lonergan*, 85 Ill. App. 530; *Harrison v. Stebbins*, 104 Iowa 462; *Quigg v. International Shirt, etc., Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 39; *Karnes County v. Nichols*, (Tex. Civ. App. 1899) 54 S. W. Rep. 656.

3. Forsee v. Gates, 89 Mo. App. 577; *Houston, etc., R. Co. v. Red Cross Stock Farm*, 91 Tex. 628; *American Cotton-Bale Imp. Co. v. Forsgard*, (Tex. Civ. App. 1898) 47 S. W. Rep. 475.

In *Texas*, under Rev. Stat. Tex., art. 1670, on an appeal from a justice's court, one who recovers a judgment for less than the amount prayed for in his complaint and for costs need not give an appeal bond. *Edwards v. Morton*, 92 Tex. 152.

Wards Are Exempted in Maine by Rev. Stat., c 63, § 24, which expressly provides that "in case of controversy between a person under guardianship and his guardian," no appeal bond need be given. *Witham, Appellant*, 85 Me. 360, in which case it was held that a ward may appeal from the account of his guardian or an order of the court affecting his estate or person without giving a bond on appeal.

966. 2. Pierce v. Willeby, 20 Wash. 129 [citing 1 ENCYC. OF PL. AND PR. 965]; *Griswold v. Thornton*, 129 Ala. 454; *Hennessey v. Reed*, 15 Colo. App. 59; *Getty v. Miller*, 10 Colo. App. 331; *John F. Alles Plumbing Co. v. Alles*, 67 Ill. App. 252; *Kuhn v. Haley*, 11 Ohio Cir. Dec. 105; *Vowell v. Taylor*, 8 Okla. 625; *Vaill v. New Shoreham*,

18 R. I. 405; *Bonnell v. Van Cise*, 8 S. Dak. 592; *Hazeltine v. Browne*, 9 S. Dak. 351; *Beezley v. Sessions*, 22 Wash. 125; *Galloway v. Tjossem*, 22 Wash. 103; *Van Dusen v. Kelleher*, 20 Wash. 716; *Smithson v. Woodin*, 13 Wash. 709.

Application of Statute in Interlocutory Decrees. — The statute is applicable as well to appeals from interlocutory decrees as to appeals from final decrees. *Hartzell v. Warren*, 77 Ill. App. 274.

3. Fuller v. Fuller, 7 Colo. App. 555; *John F. Alles Plumbing Co. v. Alles*, 67 Ill. App. 252; *Curtiss v. Morrison*, 93 Me. 245; *Brown v. Wallace*, 12 Ohio Cir. Dec. 1; *Rudolph v. Herman*, 4 S. Dak. 430; *Pierce v. Willeby*, 20 Wash. 129; *Tyson v. Tyson*, 94 Wis. 225.

967. 2. Sanger v. Burke, (Tex. Civ. App. 1898) 44 S. W. Rep. 871; *Van Dusen v. Kelleher*, 20 Wash. 716.

3. Partridge v. Morganthau, 157 Ill. 395; *Tedrich v. Wells*, 152 Ill. 214; *Heyer Storage Battery Co. v. Hanson, etc., Co.*, 92 Ill. App. 226; *Broden v. Thorpe Block Sav., etc., Assoc.*, 20 Ind. App. 684; *Thibodeaux v. Thibodeaux*, 45 La. Ann. 1126; *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, (C. C. A.) 73 Fed. Rep. 314.

Provision in Judgments. — In rendering a judgment a court has no right to anticipate that there will be an appeal, and incorporate in the judgment a provision for an appeal bond where no appeal has been prayed for or allowed. *Atwood v. Kownlson*, 91 Ill. App. 265.

To What Court Application Made to Fix Amount. — In *New York* it has been held, upon a consideration of Code Civ. Pro. N. Y., §§ 1312, 1327, 1330, 1331, that where an appeal is sought from a judgment of the Supreme Court, General Term, to the Court of Appeals, and there is a dispute as to

967. V. BY WHOM GIVEN. — See note 4.

968. See notes 1, 2.

Official Capacity. — See note 6.

VI. APPELLANTS EXEMPTED. — See notes 7, 8.

the character of the judgment, an application to fix the amount of the undertaking should be made to the General Term and not to the Special Term. *Matter of Blair*, (Supm. Ct. Spec. T.) 24 Civ. Pro. (N. Y.) 304.

967. 4. *Adams v. Lancaster Paper Mills Co.*, 10 Pa. Dist. 266.

A Beneficial Party who is sued cannot give an appeal bond in his own name after an order allowing an appeal in the name of his representative has been made. *Gates v. Thede*, 91 Ill. App. 603.

Where a Separate Appeal Is Allowed to One Defendant, it is not necessary that the codefendant in appealing should join in the bond. *Campbell v. Equitable Securities Co.*, 12 Colo. App. 544.

968. 1. *Ellison v. Hammond*, 189 Ill. 470; *Blood v. Harvey*, 81 Ill. App. 187; *Robeson v. Lagow*, 73 Ill. App. 665; *Howe v. Forman*, 68 Ill. App. 398; *Hopkins v. Satsop R. Co.*, 18 Wash. 679.

2. A Cross-appellant need not give an appeal bond in the absence of a statute or rule of court requiring him to do so. *Wilson v. Jourdan*, 79 Miss. 133.

3. Where There Is a Personal Judgment Against an Officer, as for a trespass, even though he is described in the judgment by his official title, an appeal bond executed in his individual capacity is sufficient. *Morris v. Morgan*, (Tex. Civ. App. 1898) 46 S. W. Rep. 667.

7. In the case of *Adams v. Kuhn*, 72 Miss. 276, it was held that under Code Miss. § 4194, the state revenue agent could appeal without giving bonds from an order disapproving a back assessment made under Acts Miss. 1894, c. 34, § 3.

8. *Maricopa County v. Osborn*, (Ariz. 1895) 40 Pac. Rep. 313.

Officials — Private Relator. — Although a public officer is allowed by statute in some instances to appeal without filing a bond, where an action is brought in the name of a public officer for the benefit of a private relator, the official must give a bond on an appeal. *State v. Milwaukee*, 102 Wis. 509.

Sufficiency of Official Bond. — The offi-

cial bond of an administrator or an administratrix operates as an appeal bond and a bond for a stay of proceedings under the *California* Code of Civil Procedure. *Ex p. Orford*, 102 Cal. 656.

An Assignee of an Insolvent Estate having a personal claim against such estate for services cannot appeal from a judgment refusing to guarantee such personal claims, after giving bonds on appeal. *Biddle v. Phipps*, 1 Ohio Cir. Dec. 363.

Trustees. — When the appointment of an administrator is void he cannot appeal without giving the statutory bond, although he would be exempt by law from so doing if his appointment was valid. *Mallroy v. Burlington, etc., R. Co.*, 53 Kan. 557; *Cox v. Paschal*, (Tex. Civ. App. 1900) 54 S. W. Rep. 774; *In re Somervail*, 104 Wis. 72.

Where Exempt and Nonexempt Parties Are Appellants. — Where a city which is exempt from giving appeal bonds and a private corporation which is not exempt unite in an appeal and no bond is given, the appeal will be dismissed as to the private corporation. *Meyer v. San Diego*, 130 Cal. 60.

Judgment Rendered Against Administrator After Discharge. — Where a judgment is rendered against an administrator after his discharge for moneys due to the estate, he cannot appeal without giving bond. *Fuller v. Fuller*, 7 Colo. App. 555; *Case v. Nelson*, 22 Ind. App. 22.

If there is no valid judgment or order appointing the appellant administrator or executor of an estate, one claiming to be such executor or administrator will be required to give a bond on appeal. *Cox v. Paschal*, (Tex. Civ. App. 1900) 54 S. W. Rep. 774; *In re Somervail*, 104 Wis. 72.

The commissioners of a drainage district are exempt, in *Illinois*, from giving bonds on appeal, by virtue of the Practice Act, § 71 (Hurd's Rev. Stat. 1899, 1214). *Union Drainage Dist. Com'rs v. Highway Com'rs*, 87 Ill. App. 93.

In *Ohio*, under Rev. Stat., § 5228, an assignee for the benefit of creditors may appeal without giving bond.

969. Construction of Exemptions. — See note 1.

970. VII. To WHOM PAYABLE. — See note 1.

Kennedy v. Thompson, 2 Ohio Cir. Dec. 254.

Under Rev. Stat. Ohio, § 6408, an administrator who has given an official bond within the state is exempt from giving bonds on appeal. *Hance v. Chappell*, 11 Ohio Cir. Dec. 139.

It was held in *Texas* that where a city had been incorporated under Rev. Stat. Tex., art. 499 (Rev. Stat. 1895, art. 570), such a municipality would be exempt from giving an appeal bond. *Vernon v. Montgomery*, (Tex. Civ. App. 1895) 33 S. W. Rep. 606; *Victoria v. Jessel*, 7 Tex. Civ. App. 520.

A temporary administrator appointed by virtue of Rev. Stat. Tex., art. 1935, may appeal without giving bonds. *Erwin v. Erwin*, (Tex. Civ. App. 1901) 61 S. W. Rep. 159; *Anglin v. Barlow*, (Tex. Civ. App. 1898) 45 S. W. Rep. 827.

A public officer need not give a bond on appeal when he is sued in his official capacity, and the public corporation of which he is an officer is the real party in interest. *Townsend Gas, etc., Co. v. Hill*, 24 Wash. 471, citing 1 ENCYC. OF PL. AND PR. 968.

969. 1. *Harrison v. Stebbins*, 104 Iowa 462 [citing 1 ENCYC. OF PL. AND PR. 968]; *State v. Edwards*, (Ind. App. 1894) 37 N. E. Rep. 1059; *School Dist. No. 6 v. Traver*, 43 Neb. 524; *State v. Delaware County*, 8 Ohio Cir. Dec. 244, 14 Ohio Cir. Ct. 660; *Collins v. Millen*, 57 Ohio St. 289; *Harned v. Smiley*, 8 Ohio Cir. Dec. 117, 15 Ohio Cir. Ct. 40; *Townsend Gas, etc., Co. v. Hill*, 24 Wash. 469.

Statutes Exempting Administrator Applicable to Guardians ad Litem. — Rev. Stat. Tex., art. 1408, providing that "executors, administrators, and guardians appointed by the courts of this state shall not be required to give bond on any appeal or writ of error taken by them in their fiduciary capacity," is broad enough to cover guardians *ad litem*. *Unknown Heirs v. Morgan*, 18 Tex. Civ. App. 627.

Exemption of Ward. — A statute allowing a ward to appeal from an order settling a guardian's account without giving bonds will not be construed so as to exempt a ward from giving such an appeal bond after attaining majority. *Curtiss v. Morrison*, 93 Me. 245.

In *South Carolina*, under Act S. Car. 1894, p. 823 (Civ. Code S. Car. 1902, § 2423), authorizing appeals without bonds in summary proceedings, a tenant who gives a bond to reimburse a landowner for damages sustained by him, through loss of rent or stay of execution pending a final determination of the case, is exempt from giving an appeal bond. *Carlisle v. Prior*, 48 S. Car. 183.

Exemption Dependent upon Court to Which Appeal Taken. — The *Texas* statute which exempts administrators and guardians from giving bond on appeal relates exclusively to writs of error and appeals to the Court of Civil Appeals, and does not apply to appeals from the Court of Civil Appeals to the Supreme Court of that state. *Daniel v. Mason*, 90 Tex. 162.

A statute exempting administrators from giving appeal bonds does not apply where the record fails to show that the administrator appeals in his fiduciary capacity. *Thomas v. Moore*, 52 Ohio St. 200.

Where a statute provides that an administrator need not give bonds on appeal because his bond as administrator is considered sufficient, he will not be allowed to appeal without giving bonds when sureties on his official bond as administrator have been discharged. *Wells v. Kelly*, 11 Utah 421.

970. 1. *Sims v. Walton*, 111 Ga. 866; *White v. Moerlidge*, 4 Ohio Cir. Dec. 629, 7 Ohio Cir. Ct. 348; *Houston Ice, etc., Co. v. Edgewood Distilling Co.*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1075; *Peckenius v. Petri*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1095; *Cockrill v. Eason*, (Tex. Civ. App. 1894) 26 S. W. Rep. 464; *Carter v. Forbes Lithograph Mfg. Co.*, 22 Tex. Civ. App. 373; *Seattle Trust Co. v. Pitner*, 17 Wash. 365.

Where the interests of two defendants against whom a judgment is rendered are adverse, and an appeal is taken by one of the defendants, the bond must be made payable to both the plaintiff and the codefendant. It is to the interest of such an appealing defendant to have the judgment affirmed. *Snow v. Eastham*, (Tex. Civ. App. 1898) 46 S. W. Rep. 866; *Kosminsky v. Hamburger*, 20 Tex. Civ. App. 291; *Grant v. Collins*, 5 Tex. Civ. App. 45.

971. Joint Obligees. — See note 1.

972. VIII. ON SEPARATE APPEALS. — See notes 1, 2.

A Garnishee is not such an "adverse party" as will entitle him to be made obligee to an appeal bond. *Bauer v. Adkins*, (Tex. Civ. App. 1895) 28 S. W. Rep. 1009; *Seattle Trust Co. v. Pitner*, 17 Wash. 365.

An appeal bond must be made payable to the adverse party, even when such adverse party is codefendant. *Snow v. Eastham*, (Tex. Civ. App. 1898) 46 S. W. Rep. 866; *Kosminsky v. Hamburger*, 20 Tex. Civ. App. 291; *Grant v. Collins*, 5 Tex. Civ. App. 45.

Obligee Designated as "Defendant." — When the plaintiff is appellant it is intimated that the appeal bond designates the obligee as the "defendant" without naming him. *Masterson v. Young*, (Tex. Civ. App. 1899) 48 S. W. Rep. 1109.

Bond Payable to State Where City Is Appellee. — Where a judgment was recovered against a city and the appeal bond was made payable to the state, the appeal was dismissed on the ground that the state was not an adverse party. *Buchanan v. Whitesboro*, 37 Tex. Crim. 121.

Bond Payable to Parties Other than Appellee. — Where the defendant appeals he may make the bond payable to the plaintiff and also to a defendant as to whom there has been a dismissal and to another defendant against whom judgment was rendered but who does not appeal. *Stafford v. Blum*, 7 Tex. Civ. App. 283.

Failure to Name Official Obligor Immaterial. — In *Louisiana* a bond made payable to the clerk of the court and his successors, without giving the name of the clerk, is sufficient. *Gaudet v. Dumoulin*, 49 La. Ann. 984.

Where a bond is made payable "to A, or to A and B should it be held that the said B is still a party to the suit," it is valid. *Welge v. Jackson*, (Tex. Civ. App. 1895) 32 S. W. Rep. 371.

971. 1. *Snow v. Eastham*, (Tex. Civ. App. 1898) 46 S. W. Rep. 866.

Assignment of Judgment. — If a judgment is transferred to a third person before an appeal is taken, an appeal bond payable to the original plaintiff is sufficient. *Wells-Fargo Express Co. v. Holliday*, (Tex. Civ. App. 1893) 23 S. W. Rep. 91.

972. 1. *Hibernia Sav., etc., Soc. v. Freese*, 127 Cal. 70; *Centerville, etc.,*

Irrigation Ditch Co. v. Bachtold, 109 Cal. 111; *Matter of Kasson*, 135 Cal. 1.

2. Objection Expressly Covering All Appeals — Statutory Provisions. — Where by statute one bond is intended to cover both an appeal from a judgment and an order denying a new trial made in pursuance of a statute authorizing such procedure, the appeal will not be dismissed when the sureties, by express stipulation in the bond, become liable for all the costs and damages which might be sustained by the appellees in both appeals. *Rhoads v. Gray*, (Cal. 1897) 48 Pac. Rep. 971; *Kelly v. Leachman*, (Idaho 1897) 51 Pac. Rep. 407; *Hoskins v. Wooden*, (Idaho 1895) 38 Pac. Rep. 933; *Nolan v. Montana Cent. R. Co.*, 24 Mont. 327; *Hurley v. O'Neill*, 24 Mont. 293.

Bond Sufficient for One Appeal Only. — In *Clarke v. Mohr*, 125 Cal. 540, the court held that where one bond is given to cover an appeal from a judgment, and also an appeal from an order denying a motion for a new trial, although the bond is insufficient to sustain an appeal from the order denying a new trial it is valid as to the appeal from the judgment; and the court dismissed the appeal from the order denying a new trial, but refused to dismiss the appeal from the judgment. This doctrine was also announced in *Dodge v. Kimple*, 121 Cal. 580; *Duncan v. Times-Mirror Co.*, 109 Cal. 602; *Ramsey v. Burns*, 24 Mont. 234.

If one appeal bond is given to cover two appeals in a jurisdiction where such procedure obtains, and the bond is insufficient as to one of the appeals and valid as to the other, the appeal as to which it is valid will not be dismissed. *Young v. Tiner*, (Idaho 1894) 38 Pac. Rep. 697; *Robinson v. Kind*, 25 Nev. 261.

Bond Given for More than One Appeal.

— Specific reference to the fact that the bond is given to cover more than one appeal must be made in the body of the bond; and unless it is clearly stated that the bond is conditioned to pay all the costs and damages in all the appeals, the appeal will be dismissed. *Carter v. Butte Creek Gold Min., etc., Co.*, 131 Cal. 350; *Hibernia Sav., etc., Soc. v. Freese*, 127 Cal. 70; *Field v. Andrada*, (Cal. 1894) 37 Pac. Rep. 180; *Baker v. Oregon R., etc., Co.*, (Idaho

973. IX. EXECUTION OF BOND. — 2. Signature. — See note 6.

974. See note 1.

Joint Appellants. — See note 2.

Signature of Sureties. — See note 3.

976. 3. Execution by Agent. — See note 1.

977. X. DELIVERY. — See note 3.

XI. CONTENTS AND SUFFICIENCY — 1. Amount — Statutory

Directions. — See note 4.

978. See note 1.

1901) 66 Pac. Rep. 806; *Weil v. Sutter*, (Idaho 1896) 44 Pac. Rep. 555; *Grage v. Paulson*, 23 Mont. 337; *Washoe Copper Co. v. Hickey*, 23 Mont. 319; *Creek v. Bozeman Water Works Co.*, 22 Mont. 327.

973. 6. *Spokane, etc., Lumber Co. v. Loy*, 21 Wash. 501 [quoting with approval 1 ENCYC. OF PL. AND PR. 973]; *Chase v. Omaha L. & T. Co.*, 56 Neb. 358.

974. 1. *Galveston, etc., R. Co. v. Geyer*, (Tex. Civ. App. 1898) 49 S. W. Rep. 251.

In *Louisiana* it is not necessary to prove the signature of the principal. *Holmes v. Tennessee Coal, etc., R. Co.*, 49 La. Ann. 1465.

2. Bond Good as to One Appellant. — Where a joint appeal is taken by two defendants and one of them fails to bind himself to pay such judgment as may be rendered on appeal against the two jointly, the bond is good as to the other if he does so agree. *Ayers v. Smith*, (Tex. Civ. App. 1894) 28 S. W. Rep. 835; *Missouri, etc., R. Co. v. Mosty*, 8 Tex. Civ. App. 330.

3. *Harris v. Millege*, 151 Ind. 70; *Yakima Water, etc., Co. v. Hathaway*, 18 Wash. 377.

Justification of Sureties. — The fact that the oaths of the sureties were taken before another surety who was a qualified notary public will not affect the validity of the appeal bond. *Spokane, etc., Lumber Co. v. Loy*, 21 Wash. 501.

Corporate Certificate. — In *Wisconsin*, by statute, where a foreign corporation becomes surety on an appeal bond, a certificate from the proper state officer that such foreign corporation has complied with the law in filing a certificate of its authority to do business in the state should be attached to the appeal bond. *Johnston v. Northwestern Live Stock Ins. Co.*, 107 Wis. 337.

Substitution of Sureties. — Where there has been a substitution of sureties, the

sureties substituted must execute the bond in the manner prescribed by statute, by justification or otherwise, or the bond is void. *Bennett v. Superior Ct.*, 113 Cal. 440.

976. 1. *Holmes v. Tennessee Coal, etc., R. Co.*, 49 La. Ann. 1465; *De-Roberts v. Stiles*, 24 Wash. 611; *Hill Estate Co. v. Whittlesey*, 21 Wash. 142; *Pennsylvania Mortg. Invest. Co. v. Gilbert*, 18 Wash. 667; *Cook v. Tibbals*, 12 Wash. 207.

Beneficial Parties. — Where an action is brought in the name of one person for the use of another and an appeal taken from the judgment, the person in whose name the appeal is taken, and not the beneficiary, must execute the bond. *Tedrick v. Wells*, 152 Ill. 214.

977. 3. But see *Byers v. Gilmore*, 10 Colo. App. 79; *Paul v. Cragmaz*, 25 Nev. 293, which cases were decided under the statutes requiring the bond to be filed with the clerk.

4. *Cowen v. Bloomberg*, 15 Tex. Civ. App. 364. See also *Harris v. Higden*, (Tex. Civ. App. 1897) 41 S. W. Rep. 412.

Where a bond contains the stipulations as to the amount required by a statute, and also contains additional conditions for a stay of proceedings, it will not void the bond as an appeal bond; additional requirements will be rejected as mere surplusage. *Aultman v. Nelson*, 11 S. Dak. 338.

Discretion of Court as to Amount. — If the amount of an appeal bond is fixed by statute, the court has no discretion to impose a larger amount or to exact any condition not expressly authorized. *Mackin v. Wilds*, 106 La. 1; *State v. King*, 46 La. Ann. 490.

978. 1. *Minden Bank v. Lake Bisteneau Lumber Co.*, 47 La. Ann. 1432.

In *Massachusetts* the fact that a deposit of money was made in lieu of an appeal bond is not ground for a motion to dismiss the appeal. *Maley v. Moshier*, 160 Mass. 415.

979. Amount of Judgment. — See note 2.

981. 2. Description of Judgment. — See note 5.

983. 3. Condition of Bond. — See note 3.

985. See note 1.

XII. TIME FOR FILING SECURITY — 1. Generally. —

See note 5.

Contra. — In *Washington*, where the case requires an appeal bond only, and a bond conditioned both as an appeal and a stay of execution is given, the appeal will be dismissed. *Hewitt v. Lansdale*, 26 Wash. 615.

Deposit of Money. — *Lane v. Humbert*, 16 Daly (N. Y.) 186, 18 Civ. Pro. (N. Y.) 377.

979. 2. *Monson v. Meyer*, 190 Ill. 105.

981. 5. *Stockton School Dist. v. Goodell*, (Cal. 1899) 56 Pac. Rep. 885; *Dye v. Dye*, 12 Colo. App. 206; *Harrison v. McCabe*, 10 Kan. App. 194; *Thibodeaux v. Thibodeaux*, 45 La. Ann. 1126; *St. Louis Southwestern R. Co. v. Neal*, (Tex. Civ. App. 1901) 65 S. W. Rep. 49; *Harris v. Higden*, (Tex. Civ. App. 1897) 41 S. W. Rep. 412; *San Antonio, etc., R. Co. v. Sale*, (Tex. Civ. App. 1895) 31 S. W. Rep. 325; *Shannon v. Consolidated Tiger, etc., Min. Co.*, 24 Wash. 119.

Description of Justice's Judgment. — In *Texas* it is not necessary, in an appeal from a justice's court, to describe the judgment or the amount thereof in an appeal bond. If the cause in which it is given is sufficiently identified by number, name of cause, title of court in which it is pending, and the date of the rendition of the judgment, it is sufficient. *Perry v. Cullen*, 6 Tex. Civ. App. 478.

Sufficient Description. — Where an appeal bond recites the amount and date of the judgment, the number of the case, and the court in which it was rendered, the description is sufficient and the bond need not also mention that it foreclosed a mortgage. *Morgan v. Richardson*, (Tex. Civ. App. 1894) 25 S. W. Rep. 171.

If an appeal bond recites that the judgment was against the plaintiff for costs, it sufficiently describes the judgment, even though it does not recite the fact that the judgment further provided that the plaintiff should take nothing by his suit and fails to give the number of the cause in the court below. *Brown v. Shelton*, (Tex. Civ. App. 1893) 23 S. W. Rep. 483.

On appeal from a judgment of a justice of the peace against three defendants for different amounts and for the foreclosure of a mortgage, an appeal bond is sufficient if it correctly states the number and name of the case and designates the court which rendered the judgment, with the date, although it fails to state the amount of the recovery against one of the defendants or to mention the order of foreclosure. *Cockrill v. Eason*, (Tex. Civ. App. 1894) 26 S. W. Rep. 464.

Mere Clerical Errors or Immaterial Mistakes in describing the judgment or identifying the action will not avoid the bond. *Paul v. Cragnaz*, 25 Nev. 293; *San Antonio, etc., R. Co. v. Sale*, (Tex. Civ. App. 1895) 31 S. W. Rep. 325; *International, etc., R. Co. v. Vanden*, 7 Tex. Civ. App. 258.

983. 3. *Jarman v. Rea*, 129 Cal. 157; *Texas, etc., R. Co. v. Fields*, (Tex. Civ. App. 1901) 63 S. W. Rep. 653; *Coman v. Lincoln*, (Tex. Civ. App. 1901) 61 S. W. Rep. 443; *Lewis v. Sproles*, (Tex. Civ. App. 1894) 28 S. W. Rep. 94; *Stans v. Bailey*, 9 Wash. 115; *West v. Eau Claire*, 89 Wis. 31.

Substantial Compliance with Statute Sufficient. — When the appeal bond substantially follows the statute providing what the conditions of an appeal bond shall be, it will not be declared void because of the omission of immaterial words. *Stevenson v. Short*, 52 La. Ann. 967; *Hamblen v. Tuck*, (Tex. Civ. App. 1898) 45 S. W. Rep. 175; *Anderson v. Bigelow*, 16 Wash. 198; *Michel Brewing Co. v. Wightman*, 97 Wis. 657.

985. 1. *King Hardware Co. v. Bowden*, 113 Ga. 924; *Tolerton, etc., Co. v. Casperson*, 7 S. Dak. 206.

5. *California.* — *Hibernia Sav., etc., Soc. v. Freese*, 127 Cal. 70; *Clarke v. Mohr*, 125 Cal. 540; *Rose v. Mesmer*, 134 Cal. 459.

Idaho. — *Wilson v. Bartlett*, (Idaho 1900) 62 Pac. Rep. 415.

Illinois. — *Tedrick v. Wells*, 152 Ill. 214; *Heyer Storage Battery Co. v. Hanson, etc., Co.*, 92 Ill. App. 226; *Swafford v. Rosebloom*, 92 Ill. App.

987. See note 1.

988. Extension. — See note 2.

989. 2. Notice of Appeal. — See notes 1, 2.

106; *Blood v. Harvey*, 81 Ill. App. 187; *Traders Safe, etc., Co. v. Calow*, 77 Ill. App. 146; *John F. Alles Plumbing Co. v. Alles*, 67 Ill. App. 252; *Gorski v. Featherstone*, 55 Ill. App. 368; *Davis v. Hamilton*, 53 Ill. App. 94; *Hosher v. Hesterman*, 51 Ill. App. 75.

Indiana. — *Natcher v. Natcher*, 153 Ind. 368; *Marryman v. Diffenbaugh*, (Ind. App. 1894) 38 N. E. Rep. 72.

Montana. — *Ramsey v. Burns*, 24 Mont. 234; *Hines v. Carl*, 22 Mont. 501.

Nebraska. — *Deere v. Hodges*, 59 Neb. 288; *Hier v. Anheuser-Busch Brewing Assoc.*, 52 Neb. 144; *School Dist. No. 6 v. Traver*, 43 Neb. 524.

Nevada. — *Spafford v. White River Valley Land, etc., Co.*, 24 Nev. 184.

New Jersey. — *Delaney v. Burcklee*, 57 N. J. L. 323; *State v. Miller*, (N. J. 1901) 48 Atl. Rep. 995.

New York. — *Wick v. Ft. Plain, etc., R. Co.*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 718.

North Carolina. — *In re Snow*, 128 N. Car. 100.

Pennsylvania. — *Page v. J. C. McNaughton Co.*, 2 Pa. Super. Ct. 519.

Rhode Island. — *McCotter v. New Shoreham*, 21 R. I. 425.

South Dakota. — *McConnell v. Spicker*, 13 S. Dak. 406.

Texas. — *McMahon v. City Bank*, (Tex. Civ. App. 1901) 61 S. W. Rep. 952; *Mauldin v. Southern Pac. Co.*, 92 Tex. 267; *Uvalde County v. Uvalde*, (Tex. Civ. App. 1895) 31 S. W. Rep. 327; *Converse v. Trapp*, (Tex. Civ. App. 1895) 29 S. W. Rep. 415; *Southern Pac. Co. v. Phillipson*, (Tex. Civ. App. 1894) 28 S. W. Rep. 55; *McIver v. McIntosh*, 10 Tex. Civ. App. 581.

Vermont. — *Re Bodwell*, 66 Vt. 231.

Washington. — *Van Dusen v. Kelleher*, 20 Wash. 716; *Ramage v. Littlejohn*, 16 Wash. 702; *Savage v. Graham*, 14 Wash. 323; *Grunewald v. West Coast Grocery Co.*, 10 Wash. 691; *Asher v. Sekofsky*, 10 Wash. 379.

How Computed. — The computation of time as to when the appeal bond shall be filed is usually regulated by statute, and whether Sunday shall be excluded or included in the computation of time depends upon the statutes of the several states and their construction. *Nickles v. Kendrick*, 76

Miss. 334; *Bushong v. Graham*, 2 Ohio Cir. Dec. 464; *Lillard v. Mitchell*, (Tenn. Ch. 1896) 37 S. W. Rep. 702.

Appeal from Amended Judgment. — If a judgment is amended, the time for filing a bond on appeal therefrom depends upon the date of the amendment. *San Antonio, etc., R. Co. v. Sale*, (Tex. Civ. App. 1895) 31 S. W. Rep. 325.

Unnecessary Bond. — If the bond is unnecessary it is, of course, immaterial at what time it was filed. *Charleston Bank v. Johnston*, 105 Tenn. 521.

In the United States District Court, where the appellant failed to comply with a recently enacted statute requiring an appeal bond, on a motion to dismiss the appeal on the ground that no bond was given, the court permitted the filing of the bond *nunc pro tunc*, on the counsel for the appellant filing an affidavit that the appeal had been prosecuted in good faith and that he did not understand the statute compelling the giving of a bond at that time. *In re Certain Merchandise*, 64 Fed. Rep. 576.

987. 1. *Pardridge v. Morgenthau*, 157 Ill. 395; *Whereatt v. Ellis*, 103 Wis. 348.

Good Cause Must Be Shown for Delay. — Where the statute gives power to the court to allow a bond to be filed after the day fixed by statute, the court will refuse to do so unless some good cause is shown why the bond was not filed at the proper time. *Jones v. Asheville*, 114 N. Car. 620.

988. 2. *Poltke v. Chicago Title, etc., Co.*, 175 Ill. 234.

989. 1. **Withdrawing Notice and Giving New Notice with Bond.** — Where notice of appeal is served without bond, and such notice is afterwards withdrawn and served with an appeal bond within the statutory time, although the bond is intended as a supersedeas bond and a bond to cover cost, the appeal will not be dismissed. *State v. Seavey*, 7 Wash. 562.

Bond Filed Before Entry of Judgment and Notice of Appeal. — Where an appeal bond is filed after the judgment is granted, but before it is entered and also before notice of appeal is given, the appeal is effectual. *Laurendeau v. Fugelli*, 16 Wash. 367.

2. *State v. Alta Silver Min. Co.*, 24

989. 3. Date of Filing. — See notes 4, 5, 8.

990. 4. Official Misconduct. — See note 1.

XIII. AMENDMENT — 1. When Bond Is Void. — See notes 2, 3.

Nev. 230; Shannon v. Consolidated Tiger, etc., Min. Co., 24 Wash. 119.

989. 4. State v. Alta Silver Min. Co., 24 Nev. 230.

5. Stackpole v. Hermann, 126 Cal. 465.

8. Cambridge First Nat. Bank v. Hatfield, 20 Wash. 224.

In the United States Circuit Court the appellant may show that the bond was filed within a reasonable time after the appeal had been taken, and more especially will the court refuse to dismiss the appeal if the record does not show that the appellee has been injured by the appellant's delay. Schenck v. Diamond Match Co., (C. C. A.) 73 Fed. Rep. 22.

990. 1. Zienke v. Northern Pac. R. Co., (Idaho 1901) 65 Pac. Rep. 431.

Bond Mailed to Absent Officer. — If the appellant mails the bond to the proper officer in time enough to have it filed, but the officer whose duty it is to file such bond is absent, leaving no one to attend to the duties of his office, the appeal will not be dismissed even though the appellant knew of the officer's absence. Harvey v. Allen, 94 Ga. 454.

2. Jarman v. Rea, 129 Cal. 157; Stackpole v. Hermann, 126 Cal. 465; Centerville, etc., Irrigation Ditch Co. v. Bachtold, 109 Cal. 111; Gettely v. Miller, 10 Colo. App. 331; King Hardware Co. v. Bowden, 113 Ga. 924; Harvely v. Daly, 112 Ga. 822; Benson v. Shines, 107 Ga. 406; Ellison v. Hammond, 189 Ill. 470; Western Plaster Works v. Lonergan, 85 Ill. App. 530; Walrath v. Klock, 22 N. Y. App. Div. 220; Germania Bldg., etc., Assoc. v. Kern, 2 Ohio Cir. Dec. 405; Vaill v. New Shoreham, 18 R. I. 405; Galveston, etc., R. Co. v. Geyer, (Tex. Civ. App. 1898) 49 S. W. Rep. 251; Northern Counties Invest. Trust v. Hender, 12 Wash. 559; Swan v. Hill, 155 U. S. 394.

A Statute Allowing Appeal Bonds to Be Amended where the defects are fatal does not apply so as to allow a new bond to be filed when the original bond is executed by one of the parties to the appeal. Howe v. Forman, 68 Ill. App. 398.

If the offer to file a new bond is not
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made in a seasonable time it will be refused. Zane v. De Omativia, 135 Cal. 440; Newberg Orchard Assoc. v. Osborn, 39 Oregon 370; Cowperthwaite v. Fulton, (Tex. Civ. App. 1894) 27 S. W. Rep. 588.

Under the Washington statute providing that if a second appeal bond is found to be insufficient no new bond can be given in lieu thereof, such second bond cannot be amended by the substitution of a new surety for one who has been found to be insufficient. State v. Chapman, 17 Wash. 109.

3. Arkansas. — St. Louis, etc., R. Co. v. Neal, 66 Ark. 543.

California. — Jarman v. Rea, 129 Cal. 157; Bay City Bldg., etc., Assoc. v. Broad, 128 Cal. 670; Tompkins v. Montgomery, 116 Cal. 120.

Colorado. — Standley v. Hendrie, etc., Mfg. Co., 25 Colo. 376.

Illinois. — Dunaway v. Campbell, 59 Ill. App. 665.

Indiana. — Bennett v. Seibert, 10 Ind. App. 369.

Kansas. — St. Louis, etc., R. Co. v. Hurst, 52 Kan. 609.

Louisiana. — Bickham v. Hutchinson, 50 La. Ann. 765.

Michigan. — Cole v. Wayne Circuit Judge, 106 Mich. 692.

Mississippi. — Oxford Bank v. Lafayette County, 79 Miss. 152.

Montana. — Creek v. Bozeman Water Works Co., 22 Mont. 327.

New York. — Walrath v. Klock, 22 N. Y. App. Div. 220.

Ohio. — Seibert v. Foley, 9 Ohio Cir. Dec. 179, 16 Ohio Cir. Ct. 348; White v. Moerlidge, 4 Ohio Cir. Dec. 629, 7 Ohio Cir. Ct. 348.

Oregon. — Nottingham v. McKendrick, 38 Oregon 495; Elwert v. Norton, 34 Oregon 567.

Pennsylvania. — Steam Heat, etc., Co. v. Hutchinson, 14 Pa. Co. Ct. 491; Schuylkill County v. De Turk, 16 Pa. Co. Ct. 463.

South Dakota. — Skinner v. Holt, 9 S. Dak. 427.

Washington. — Wallace v. Oceanic Packing Co., 25 Wash. 143; Pennsylvania Mortg. Invest. Co. v. Gilbert, 18 Wash. 667.

Wisconsin. — Rockman v. Ackerman, 109 Wis. 640; Johnston v. Northwestern

991. Effect of Lack of Jurisdiction. — See note 1.

993. 3. Power to Amend. — See note 1.

994. 4. Construction of Statutes. — See note 2.

996. Right of Appellee. — See note 2.

997. 5. Motion to Amend — *b.* TIME OF MOTION. — See note 4.

Live Stock Ins. Co., 107 Wis. 337; *Stolze v. Manitowoc Terminal Co.*, 100 Wis. 208.

United States. — *Davis v. Wakelee*, 156 U. S. 680.

Dismissal of Appeal — Subsequent Amendment of Bond for Second Appeal. — Where an appeal is dismissed because of irregularity in the order of notice of appeal, and another appeal is allowed, the bond given on the first appeal must be amended to conform with the dates and facts of the second appeal. *Coburn v. Brown County*, 10 S. Dak. 552.

If there is a statute providing that the amended bond shall be offered to cure the defects in the original appeal bond, and such amended bond is not tendered within the time required by such statute, the appellate court is without power to receive it. *Duncan v. Times-Mirror Co.*, 109 Cal. 602; *Hill v. Cassidy*, 24 Mont. 108.

Amendment After Order of Dismissal Nisi. — An order requiring a new bond within a given time on pain of dismissal is interlocutory and not conclusive and final, and until an adjudication of the fact of failure to comply with its order and a final judgment dismissing the appeal, the court has a right to allow an amendment of the bond. *Nickles v. Kendrick*, 76 Miss. 334.

At What Time Amendment Allowed. — Where the bond is insufficient the court will not allow an amended bond to be filed after the time provided by law for filing a bond has expired. *Creek v. Bozeman Water Works Co.*, 22 Mont. 327; *Biggart v. Nichols*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 596; *Galloway v. Tjossem*, 22 Wash. 103.

Filing Certified Copy of New Bond. — A statute providing that a defective appeal bond may be cured by filing a new one is not complied with by filing merely a certified copy of the new bond. *Evans v. Ashburn*, (Tex. Civ. App. 1907) 64 S. W. Rep. 998.

In Texas, under the Act of 1892, p. 32, § 39, an appellant has the right to

file a new appeal bond in the appellate court, curing defects in the original bond, when a case has been transferred by the Supreme Court to the Court of Civil Appeals, as well as where the case was originally appealed to the Court of Civil Appeals. *Decatur First Nat. Bank v. Preston Nat. Bank*, 3 Tex. Civ. App. 545.

New Bond Required by Court *Suo Motu*. — When, in the opinion of the appellate court, the appeal bond is defective, the court may require the appellants to file a new bond although they have not asked to do so. *Mendenhall v. Elwert*, 36 Oregon 375.

When a Motion Is Made to Dismiss an appeal on the ground that the appeal bond is defective, it is proper practice to meet such motion with a new and valid bond. *Mills v. Wilson*, 59 Minn. 108; *Nolan v. Montana R. Co.*, 24 Mont. 327; *Coleman v. Perry*, 24 Mont. 237; *White v. Moerlidge*, 4 Ohio Cir. Dec. 629, 7 Ohio Cir. Ct. 348; *Elwert v. Norton*, 34 Oregon 567; *Van Auker v. Dammeier*, 27 Oregon 150; *Texas Mexican R. Co. v. Cahill*, (Tex. Civ. App. 1893) 23 S. W. Rep. 45; *Wadsworth v. Cardwell*, 14 Tex. Civ. App. 359; *Reid v. Norfolk City R. Co.*, (Va. 1894) 21 S. E. Rep. 27.

991. 1. *John V. Farwell Co. v. Newman*, 17 Ind. App. 649.

993. 1. *Corley v. Renz*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1130; *Johnston v. Northwestern Live Stock Ins. Co.*, 107 Wis. 337.

994. 2. *Denton v. Denton*, 77 Miss. 375 [*citing* 1 ENCYC. OF PL. AND PR. 995]; *Leavenworth v. Crittenden*, 62 Miss. 573; *Gaddis v. Palmer*, 60 Miss. 758; *Ireland v. Ireland*, 5 Ohio Cir. Dec. 277; *Spurlock v. Port Townsend Southern R. Co.*, 12 Wash. 34.

996. 2. *Northern Counties Invest. Trust v. Hender*, 12 Wash. 559.

997. 4. A motion for a rehearing showed that the appeal bond was not made payable to all the appellants and asked for a reversal of the judgment. The appellants tendered a new and sufficient bond. The court reversed the judgment entered in the first in-

998. 6. Common-law Bond. — See note 4.

999. See note 1.

1000. XV. WAIVER OF DEFECTS BY APPELLEE. — See notes 3, 5.

stance, then accepted the amended bond of the appellant, and thereupon rendered the judgment *nunc pro tunc* which it had previously made before the petition for rehearing had been filed. *Giddings v. Odom Luckett Land, etc., Co.*, (Tex. Civ. App. 1896) 34 S. W. Rep. 383.

Where an appeal bond has been filed but lost, and a judgment of reversal has been entered in the case in which such appeal bond was filed, the court will not entertain a motion to set the judgment of reversal aside when no objection was made to the absence of the bond until after such judgment was entered. *Gilbough v. Stahl Bldg. Co.*, 91 Tex. 621.

998. 4. Swofford Bros. Dry-Goods Co. v. Livingston, (Colo. App. 1901) 65 Pac. Rep. 413.

999. 1. *Contra*. — *Central Lumber, etc., Co. v. Center*, 107 Cal. 193, holding that a motion for judgment on a bond which is invalid as an appeal bond but valid as a common-law bond should be denied.

1000. 3. *Sherwood v. Illinois Trust, etc., Bank*, 195 Ill. 112 [*following* 1 ENCYC. OF PL. AND PR. 1000]; *Jones v. Henderson*, 149 Ind. 458; *Sherwood v. Ionia Circuit Judge*, 107 Mich. 136 [both cases *citing* 1 ENCYC. OF PL. AND PR. 1000]; *Gardiner v. California Guarantee Invest. Co.*, 129 Cal. 528; *Springer v. Springer*, 126 Cal. 452; *Ferni v. Yoell*, 99 Cal. 173; *Traders Safe, etc., Co. v. Calow*, 77 Ill. App. 146; *National Safe, etc., Co. v. People*, 50 Ill. App. 336; *Demaree v. Johnson*, 150 Ind. 419; *Vowell v. Taylor*, 8 Okla. 625; *Engle v. Rowan*, (Tex. Civ. App. 1898) 48 S. W. Rep. 757; *Futch v. Palmer*, 11 Tex. Civ. App. 191; *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16.

Cognisance of Waiver by Court suo Motu. — The court will take judicial notice of waiver by laches of defects in the appeal bond; and in opposition to a motion to dismiss the appeal, it is not fatal to omit to urge the facts constituting laches. *Engle v. Rowan*, (Tex. Civ. App. 1898) 48 S. W. Rep. 757.

Effect of Extending Time for Filing Other Papers. — Waiver of failure to file

bond or of defects in the appeal bond is not worked by signing a stipulation extending the time for serving briefs and abstracts. *Gardiner v. California Guarantee Invest. Co.*, 129 Cal. 528; *Hazeltine v. Browne*, 9 S. Dak. 351.

Statutory Form of Approval. — Where the code provides that the clerk's approval of an appeal bond shall be in a certain form, any variance from the prescribed mode of approval is fatally defective under the code practice. *Murphy v. Northern Pac. R. Co.*, 22 Mont. 577.

If one surety on an appeal bond becomes insolvent after the execution thereof, and the other surety, who is sufficient, moves to be released from the obligations therein but fails to prosecute his motion to a determination, it cannot be complained, when the appeal comes on for hearing, that the bond is insufficient, as the appellees have waived their right to complain by laches, and the appeal will not be dismissed. *Morgan v. Richardson*, (Tex. Civ. App. 1894) 25 S. W. Rep. 171.

Waiver of Approval. — The approval of an appeal bond may be waived, and in an action on the bond the principal or surety will not be heard to complain that the bond was not approved if he has permitted the appellee to waive such approval. *Small v. Kennedy*, 12 Ind. App. 155.

Who May Waive. — A defendant not served with a summons, and against whom no judgment is rendered, is not such an "adverse party" described in the statute as to enable him to waive the filing of an appeal bond. *Merced Bank v. Rosenthal*, 99 Cal. 39.

An appellant from a justice's court to the Circuit Court waives the right to complain that he is in the Circuit Court without due process by the filing of an appeal bond. *Olsen v. Stark*, 94 Ill. App. 556.

Waiver of Justification. — In *Washington*, where a foreign surety company signs an appeal bond as surety and it is not stated in the bond that such company is authorized to do business within the state, the court will not hear a motion to dismiss the appeal, as it is a question of justification, and

1001. What Amounts to Waiver. — See note 1.

1002. XVI. MOTION TO DISMISS. — See note 1.

XVII. THE SURETIES — 1. Qualifications — Necessary Party. — See note 2.

1003. Statutory Qualifications. — See note 1.

under Laws Wash. 1893, p. 125, § 11, the objection must be made in the trial court. *Roberts v. Shelton Southwestern R. Co.*, 21 Wash. 427.

1000. 5. In *South Dakota* a bond cannot be waived by agreement of parties on an appeal from a justice's court. *Erpenbach v. Chicago, etc.*, R. Co., 11 S. Dak. 201.

Unaccepted Offer to Waive. — An offer to waive the filing of an appeal bond, refused by the appellant, will not confer jurisdiction upon the appellate court or determine the appeal when no appeal bond has been filed. *Bonnell v. Van Cise*, 8 S. Dak. 592.

1001. 1. *Sherwood v. Illinois Trust, etc., Bank*, 195 Ill. 112 [quoting 1 ENCYC. OF PL. AND PR. 1001]; *Sherwood v. Ionia Circuit Judge*, 107 Mich. 136 [citing 1 ENCYC. OF PL. AND PR. 1001]; *Gardiner v. California Guarantee Invest. Co.*, 129 Cal. 528; *Farrell v. West Chicago Park Com'rs*, 182 Ill. 250; *Evans-Smith Drug Co. v. White*, 86 Mo. App. 540; *Saylor v. Oakes*, 36 Oregon 410; *Howth v. Shumard*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1079; *Cockrill v. Eason*, (Tex. Civ. App. 1894) 26 S. W. Rep. 464; *Hoagland v. Hoagland*, 18 Utah 304.

Objections Must Be Timely. — Laches on the part of the appellee in making a motion to dismiss will be deemed a waiver of defects in the appeal bond. *Mather v. Darst*, 11 S. Dak. 480; *Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co.*, 95 Va. 515.

1002. 1. *Street v. Street*, 113 Ala. 333; *Saylor v. Oakes*, 36 Oregon 410 [in each of which cases the court cited 1 ENCYC. OF PL. AND PR. 1002]; *Sutton v. Otterbein University*, 4 Ohio Cir. Dec. 627, 7 Ohio Cir. Ct. 343.

Necessity for Formal Motion. — An appeal will be dismissed only on a regular motion to dismiss, and a suggestion in the brief of the respondent that two appeals have been taken and but one insufficient bond given will be disregarded. *Wegmann v. Wegmann*, 52 La. Ann. 1309; *Seattle, etc.*, R. Co. v. *Johnson*, 7 Wash. 97.

Dismissal After Reversal and Remand. — After a reversal and remand of the

case to the trial court, the appellate court will not recall its remittitur and dismiss the appeal on the ground of defect in the appeal bond not previously pointed out. *Pershing v. Wolfe*, 8 Colo. App. 82.

Renewal of Motion. — A motion to dismiss an appeal on the ground that the bond is insufficient having been once denied, it may be renewed by leave of court. *King v. Pony Gold Min. Co.*, 24 Mont. 470.

Under Laws Wash. 1893, p. 129, § 18, providing that any respondent may move the Supreme Court to dismiss an appeal on the ground that the appeal bond is not in form or substance such as to render the appeal effectual, a bond which is defective in both form and substance will be stricken from the files and the appeal dismissed. *Erickson v. Erickson*, 11 Wash. 76.

2. *Osborne v. Hughes*, 93 Ga. 445; *Hudson v. Smith*, 111 Iowa 411, citing 1 ENCYC. OF PL. AND PR. 1002 *et seq.*

Where the statute requires that in addition to the appellant's signature to an appeal bond there must be the signature of sureties who are not parties to the action, an appeal will be dismissed when the bond is signed only by the parties to the action. *Griswold v. Thornton*, 129 Ala. 454; *Benson v. Shines*, 107 Ga. 406; *Smith v. Beard*, 21 Wash. 204.

1003. 1. *State v. Baker*, 45 Neb. 39.

A Surety Company which has performed all the acts prescribed by law to qualify it to do business in the state may be a surety on an appeal bond. *Small v. Lutz*, (Oregon 1902) 67 Pac. Rep. 421.

Insolvent Surety Company. — An appeal bond executed by a duly qualified surety company is sufficient although the corporation is insolvent, if the auditor has not, pursuant to law, brought an action against it to compel it to make up its deficiency in assets. *King v. Pony Gold Min. Co.*, 24 Mont. 470.

Requiring New Surety Where Surety Becomes Insolvent. — In *Williams v. Williams*, 19 Colo. 19, it was held that

1004. *Pecuniary Responsibility.* — See note 1.

Attorney as Surety. — See note 4.

1005. **4. Exception to Sureties** — Under Code Procedure. — See notes 1, 2.

1007. **XVIII. APPROVAL OF BOND** — 1. Generally. — See notes 2, 3.

the appellate court has jurisdiction to order a new bond to be filed where a surety has become insolvent after signing the bond and before the appeal is set down for hearing.

Failure of Bond to State Residence of Sureties. — In *Louisiana* it is no ground for dismissal that the bond does not set out the residence of the sureties; this is a matter for the consideration of the court granting the appeal. *Northrup v. Sullivan*, 47 La. Ann. 715.

1004. 1. **A Surety Whose Property Is Exempted** by the homestead law, and is therefore not liable to execution, cannot qualify under the statutes of *Ohio*. *Winkler v. State*, 11 Ohio Cir. Dec. 123.

Effect of Transfer of Property by Surety. — In the absence of a statute the court has no power to compel the appellants to file a new bond with sufficient sureties where a surety, after duly qualifying on appeal, disposes of all his property pending an appeal and before final adjudication of the case. *Macomber v. Conradt*, (Cal. 1894) 37 Pac. Rep. 382.

4. *Morgan v. Richardson*, (Tex. Civ. App. 1894) 25 S. W. Rep. 171.

If a practicing attorney signs an appeal bond, the appeal bond is defective for the purpose of perfecting the appeal, but the attorney may be civilly liable thereon. *Chase v. Omaha L. & T. Co.*, 56 Neb. 358; *Hudson v. Smith*, 111 Iowa 411.

1005. 1. *Murray v. Moynahan*, 27 Wash. 379; *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16; *Warburton v. Ralph*, 9 Wash. 537.

Where an attorney in active practice signs an appeal bond as surety the objection cannot be raised for the first time in the appellate court, and if there is no statute forbidding an attorney to become a surety on an appeal bond, the fact that he signs such a bond will not invalidate it. *Murray v. Moynahan*, 27 Wash. 379.

Waiver of Justification. — If, upon notice to justify, the sureties appear at the time specified in the notice, but the respondent fails to appear for the purpose of examining the sureties, justifi-

cation will be deemed waived. *Escondido Bank v. Superior Ct.*, 106 Cal. 43.

2. Where required by statute to do so, the sureties on an appeal bond must justify before the official designated in the statute, and the failure of the sureties so to justify when they have been duly excepted to will avoid the bond. *Barber v. Johnson*, 4 S. Dak. 528; *Davelin v. Post Falls Woolen Mills Co.*, (Idaho 1896) 44 Pac. Rep. 554. The justification must be in the form and manner prescribed by law. *McDonald v. Ellis*, (Ariz. 1894) 36 Pac. Rep. 37; *Barber v. Johnson*, 4 S. Dak. 528.

1007. 2. *Chapple v. Tucker*, 110 Ga. 467.

Approved by Either Clerk or Judge. — Where the statute requires the clerk or judge to approve an appeal bond, it is sufficient if the clerk approves it, and the judge has no power to review the actions of the clerk. *Boyer v. Superior Ct.*, 110 Cal. 401.

In *Illinois* where an appeal is from an interlocutory decree, an appeal bond must be approved by the clerk of the court in which an appeal is taken, as required by statute. *Schoen v. Herzog*, 66 Ill. App. 581.

Proof of Surety's Signature. — If a doubt is raised as to the genuineness of a signature on an appeal bond, either of the appellants or of the sureties, a justice to whom it is presented for approval has a right to disapprove it. In such case an opportunity to prove the signature in question must be given and can be compelled by mandamus. *U. S. v. Cox*, 14 App. Cas. (D. C.) 368.

3. **Waiver of Approval.** — *National Harrow Co. v. Hench*, 81 Fed. Rep. 926.

What Record Must Show as to Approval. — The record should make apparent the fact that the bond has been approved as required by the statute. *Monett Bank v. Moulder*, 53 Mo. App. 535; *Deere v. Hodges*, 59 Neb. 288; *Braithwaite v. Jordan*, 5 N. Dak. 244, the last two cases citing 1 ENCYC. OF PL. AND PR. 1007.

- 1008.** See notes 1, 2.
2. How Made. — See note 4.
1009. **3. How Shown.** — See note 1.
4. Effect. — See note 3.
1010. **5. Review of Approval — Objections.** — See note 1.
When Reviewable. — See note 2.

1008. 1. *Blood v. Harvey*, 81 Ill. App. 188, holding that the power to approve an appeal bond is judicial and cannot be delegated. *Contra*, *Legates v. Lingo*, 8 Houst. (Del.) 154.

When the Clerk Refuses to Approve a Bond the court may thereafter approve it upon a motion. *Irwin v. Crook*, 11 Colo. App. 172.

2. It is required by Rev. Stat. U. S., § 1000, that upon writ of error and appeals the security must be taken by the judge. He cannot delegate this power to the clerk; but if the clerk should receive and approve of a bond, and all parties have acted in good faith, the court will allow the appellants ten days within which to file a new bond to be approved by the judge, and if the appeal has been dismissed it will be reinstated. *Chicago Dollar Directory Co. v. Chicago Directory Co.*, (C. C. A.) 65 Fed. Rep. 463, following *O'Reilly v. Edrington*, 96 U. S. 724.

Approval by Clerk of His Own Bond. — When the clerk of a court is the authorized person to approve an appeal bond, he is the proper person to approve a bond executed by himself in an appeal involving his right to hold the office of clerk. *Anderson v. Likens*, (Ky. 1898) 46 S. W. Rep. 512.

4. *Vault v. Hurd*, 73 Ill. App. 107; *Roe v. Bridges*, (Tex. Civ. App. 1895) 31 S. W. Rep. 317.

Where the statute provides that a bond must be approved by the court, and by the clerk when the court is not in session, it is not necessary that the record should show affirmatively, when the approval is by the clerk, that the court was not in session at that time. *Liscomb v. Eldredge*, 20 R. I. 335.

Prerequisites of Approval. — Approval of an appeal bond cannot be compelled by mandamus where no notice of appeal has been served and where the other statutory requisites have not been complied with. *McClun v. Glasgow*, 55 Kan. 182.

Disapproval by Court Jus Motu Without Notice. — The court has no power to

disapprove the bond of its own motion without notice to the appellants and also giving to the sureties an opportunity to justify. *State v. Superior Ct.*, 12 Wash. 677.

Approval in Vacation. — A judge out of court in vacation has no power to approve an appeal bond and execute an order that it be filed *nunc pro tunc*. *Pardridge v. Morgenthau*, 157 Ill. 395.

Reconsideration of Approval. — But see *Chase v. Omaha L. & T. Co.*, 56 Neb. 358, which holds that after the county judge has approved an appeal bond he has no right to strike it from the file because it was signed by an attorney in active practice.

1009. 1. *Bingham v. Shadle*, 45 Neb. 82.

The indorsement, "Bond and surety approved. Bond filed. N. T. M., Jr., Clerx.," is a sufficient showing in the record that the bond was approved by the court, when a statute requires such approval. *Parke v. Mabee*, 176 Mass. 236.

3. The Mere Approval by a Clerk of an amended bond filed to cover defects in the original bond is not sufficient evidence of the solvency of the sureties where the certificate of solvency required by the statute is omitted, and the objection to the sufficiency can be raised for the first time in the appellate court. *Evans v. Ashburn*, (Tex. Civ. App. 1901) 64 S. W. Rep. 998.

1010. 1. **Objections by Surety.** — After a bond has been approved a surety cannot complain that the order of court providing for and specifying the conditions of an appeal bond have not been complied with. *Broden v. Thorpe Block Sav., etc., Assoc.*, 20 Ind. App. 684.

2. Farmers' L. & T. Co. v. Chicago, etc., R. Co., (C. C. A.) 73 Fed. Rep. 314.

Objection that Appellee Is Surety. — In *Voss v. Feurmann*, (Tex. Civ. App. 1893) 23 S. W. Rep. 936, it was held that after the bond had been approved it was too late to make the objection that the appellee was a surety.

1011. XIX. CONSTRUCTION OF CONTRACT — 1. Generally. —

See note 2.

1013. 2. When Liability Accrues — Final Judgment. — See

note 2.

1014. 3. Joint Bond. — See note 2.**1015. 4. Measure of Liability. — See note 1.****1016. See note 1.****1018. XX. REMEDIES OF OBLIGEE. — See note 1.****1019. XXI. ESTOPPEL OF SURETIES — See note 2.**

1011. 2. Braithwaite v. Jordan, 5 N. Dak. 243; Pierce v. Willeby, 20 Wash. 129 [both cases *citing* 1 ENCYC. OF PL. AND PR. 1011]; Barela v. Tootle, (Colo. 1901) 66 Pac. Rep. 899; Swofford Bros. Dry-Goods Co. v. Livingston, (Colo. App. 1901) 65 Pac. Rep. 413.

Effect of Dismissal for Want of Jurisdiction. — Where one of the conditions of an appeal bond is that the appeal is to be prosecuted, and the appeal is dismissed for want of jurisdiction, the failure to prosecute such an appeal through a higher court is a breach of the condition of the bond. Swofford Bros. Dry-Goods Co. v. Livingston, (Colo. App. 1901) 65 Pac. Rep. 413.

1013. 2. Steinhauer v. Colmar, 11 Colo. App. 494; Kleiner v. Fidelity, etc., Co., (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 188.

1014. 2. McFarlane v. Howell, 91 Tex. 218, *quoting* 1 ENCYC. OF PL. AND PR. 1014.

1015. 1. Cole v. Edwards, 104 Iowa 373, *citing* 1 ENCYC. OF PL. AND PR. 1015.

Costs. — A surety on an appeal bond is liable for the amount of costs which have accrued up to the time of the dismissal of an appeal. Galinger v. Engelhardt, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 49.

1016. 1. Barela v. Tootle, (Colo. 1901) 66 Pac. Rep. 899.

1018. 1. Braithwaite v. Jordan, 5 N. Dak. 222, *citing* 1 ENCYC. OF PL. AND PR. 1018.

1019. 2. Braithwaite v. Jordan, 5 N. Dak. 241 [*citing* 1 ENCYC. OF PL. AND PR. 1019]; Dye v. Dye, 12 Colo. App. 206; Barratt v. Grimes, 10 Kan. App. 181.

APPEALS.

11. I. GENERAL PRINCIPLES OF APPELLATE JURISDICTION —

1. Definition. — See note 1.

12. 2. Creation of Courts of Last Resort — *c.* INHERENT POWERS. — See note 2.

13. 3. Right of Appeal — *a.* CONSTITUTIONAL. — See note 1.

14. See note 2.

15. See notes 2, 3.

b. STATUTORY. — See ERROR, WRIT OF.

16. See notes 1, 2.

11. 1. "The Popular and Most Comprehensive Meaning of the Word 'Appeals' is: 'The removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial.'" *State v. Jacksonville Terminal Co.*, 41 Fla. 363.

Distinction Between Appeal and Error. — In *Nebraska* the office of an appeal is the review of the judgment upon the pleadings and evidence in the case. Review of rulings rejecting evidence must be by writ of error. *Battelle v. McIntosh*, 62 Neb. 647.

Distinction Between Appeal and Certiorari. — See *Hall v. Oyster*, 168 Pa. St. 399.

Effect upon Judgment where Appellate Court Is Without Jurisdiction. — In *State v. Quinn*, 96 Me. 496, in which case an appeal was taken to a court which had no jurisdiction of the appeal, the court said: "The appeal is undoubtedly void. It is not properly before the appellate court. But it was the duty of the defendant, if he desired to appeal from the judgment of the magistrate, to appeal to the proper court, and the proper term of court, and having failed to do so his attempted appeal was a nullity, and the judgment of the magistrate in the original proceeding stands against him unreversed and unaffected by his ineffectual attempt to appeal therefrom."

12. 2. Practice on Appeal. — Where there is no statute regulating matters of practice on appeal, the appellate court may provide for such matters by rules of court. *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 264.

13. 1. Imposition of Penalty upon Affirmance. — In *Nebraska* the legislature has no authority to impose a penalty of five per cent. upon affirmance of the judgment. *Coburn v. Watson*, 48 Neb. 258.

14. 2. *Lake Erie, etc.*, R. Co. *v.* *Watkins*, 157 Ind. 600, citing 2 ENCYC. OF PL. AND PR. 14.

In *Kansas* there is no constitutional restriction upon legislation with reference to the terms upon which persons convicted of a criminal offense may appeal to a higher court. *Kansas City v. Hescher*, 4 Kan. App. 794.

15. 2. *Hart v. West Chicago Park Com'rs*, 186 Ill. 464, wherein Magruder, J., quoted *obiter* 2 ENCYC. OF PL. AND PR. 15.

3. *Keokuk, etc.*, Bridge Co. *v.* *People*, 185 Ill. 279, wherein the court, in construing a statute, cited 2 ENCYC. OF PL. AND PR. 15. See also the following cases: *Jossey v. Atchison, etc.*, R. Co., 28 Colo. 248; *McCarthy v. Crump*, 28 Colo. 398; *Murto v. King*, 28 Colo. 357; *Denver First Nat. Bank v. Follett*, 27 Colo. 512; *Phillips v. Corbin*, 25 Colo. 62; *Standley v. Hendrie, etc.*, Mfg. Co., 25 Colo. 376; *Conly v. Boyvin*, 25 Colo. 498. And see *La Junta, etc.*, Canal Co. *v.* *Ft. Lyon Canal Co.*, 25 Colo. 515.

Jurisdiction Conferred by Constitution. — Where the jurisdiction is conferred by the Constitution it will be exercised in only such cases as the Constitution provides or contemplates. *Madden v. Day*, 24 Colo. 418.

16. 1. *State v. Fields*, 62 Neb. 520.
2. *Waterman v. Bailey*, 111 Mich.

16. Regulation by the Legislature. — See notes 3, 4. See also *infra*, I. 3. *f. Legislative Control of Statutory Right.*

c. STRICT COMPLIANCE REQUIRED. — See note 6.

19. *f. LEGISLATIVE CONTROL OF STATUTORY RIGHT.* — See notes 1, 2, 3. See also *supra*, I. 3. *b. Statutory — Regulation by the Legislature.*

571; *Patterson v. Ward*, 6 N. Dak. 359; *McClain v. Williams*, 10 S. Dak. 332; *Hansen v. Anderson*, 21 Utah 286; *State v. Shumate*, 48 W. Va. 359, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 16. See also the following cases: *Campbell v. State*, 123 Ala. 72; *Throne Franklin Shoe Co. v. Gunn*, 123 Ala. 640; *Karter v. Peck*, 121 Ala. 636; *Barthrop v. Kona Coffee Co.*, 10 Hawaii 398; *Ehlert v. Security Deposit Co.*, 72 Ill. App. 59; *Pittsburgh, etc., R. Co. v. Gillespie*, 158 Ind. 454; *Holton v. Bimrod*, 61 Kan. 13; *Hale v. Grogan*, 106 Ky. 311; *State v. Ward*, 95 Md. 118; *State v. Thayer*, 158 Mo. 36; *Hull v. Beard*, 80 Mo App. 200; *Uecker v. Magdanz*, 62 Neb. 618; *Hayden v. Hale*, 57 Neb. 349; *Webster v. Lincoln*, 50 Neb. 1; *Chicago, etc., R. Co. v. Headrick*, 49 Neb. 287. And see *State v. Piper*, 50 Neb. 25; *Kleiner v. Fidelity, etc., Co.*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 188; *State v. Falley*, 8 N. Dak. 90; *State v. Estes*, 34 Oregon 196; *Lafferty v. Corcoran*, 175 Pa. St. 5; *Brown v. Brown*, 12 S. Dak. 380; *Maxwell v. New Richmond Bank*, 101 Wis. 286; *Anderson v. Steger*, 173 Ill. 112; *Merkel v. William Schmidt Baking Co.*, 72 Ill. App. 239.

Exclusiveness of Cases Provided by Constitution and Practice. — Where the Constitution and statute undertake to specify the cases in which an appeal will lie, it lies in no other case. *State v. Shumate*, 48 W. Va. 359, citing 2 ENCYC. OF PL. AND PR. 16, in which case it was declared *obiter* that "where no constitution or statute does specify, the common-law writ of error or appeal lies."

Jurisdiction of Illinois Supreme Court — Construction of Statute. — In *Sauter v. Anderson*, 199 Ill. 319, it was held that if the only question presented to the trial court is the proper construction of a statute, the appellate court, and not the Supreme Court, has jurisdiction of appeal.

In *Missouri* the statute and constitutions allow an appeal by the defendant from a conviction in the Circuit Court of a misdemeanor on information.

State v. Thayer, 158 Mo. 36, *overruling State v. Brown*, 153 Mo. 578.

Right to Cross-appeal. — In *Iowa*, on an election contest, the judgment of the court having fixed the number of votes the incumbent has received, he may appeal from the holding, if not satisfied, and the appeal will bring up all rulings on the reception and rejection of the ballots affecting the total, and the incumbent may maintain a cross-appeal. *Spurrier v. McLennan*, 115 Iowa 461.

16. 3. McClain v. Williams, 10 S. Dak. 332.

Statutory Limitations. — In the absence of provisions of the Constitution to the contrary, the legislature is not prohibited from limiting appeals to a defined mass of cases and prescribing at what stage and in what court ordinary litigation shall end. Constitutional provisions that "all courts shall be open," etc., and that parties "shall have remedy by due course of law," are satisfied by a trial in a court of competent jurisdiction in which the right to trial by jury in proper cases is afforded. A provision that writs of error and appeals "may" be allowed under such regulation as may be prescribed by law is permissive only. *McClain v. Williams*, 10 S. Dak. 332, citing 2 ENCYC. OF PL. AND PR. 16.

4. *State v. Estes*, 34 Oregon 196.

6. *Fleming v. Fleming*, 40 Fla. 154; *Waterman v. Bailey*, 111 Mich. 571; *Hansen v. Anderson*, 21 Utah 286, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 16. See also *Ex p. Reese*, 112 Ala. 63; *Yandell v. Madison County*, 79 Miss. 212.

19. 1. Lake Erie, etc., R. Co. v. Watkins, 157 Ind. 600; *Brown v. Brown*, 12 S. Dak. 380, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 19. See also *Chicago, etc., R. Co. v. Headrick*, 49 Neb. 287.

Constitutionality of Statute Giving Writ of Error Only. — Where the constitution guarantees the right to a hearing in a court possessing appellate jurisdiction only, but without regulating the procedure therefor, and the statutory pro-

deprive the latter court of jurisdiction to review it if it in fact be a federal question. *Missouri, etc., R. Co. v. Elliott*, 184 U. S. 530.

Appeals from United States Circuit Courts. — The right of appeal conferred by the Circuit Court of Appeals Act (26 U. S. Stat. at L. 827, § 5) differs from that conferred by Rev. Stat. U. S., § 709, in that under the latter only the party who is denied a right, etc., claimed by him under the Federal Constitution, may appeal, while under the Circuit Court of Appeals Act the rule is that, if a claim is made in the Circuit Court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, the Supreme Court may review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant. *Loeb v. Columbia Tp.*, 179 U. S. 472. See also *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

§ 5. *Sweringen v. St. Louis*, 185 U. S. 38; *Lynde v. Lynde*, 181 U. S. 183; *Chapin v. Fye*, 179 U. S. 127; *Kizer v. Texarkana, etc., R. Co.*, 179 U. S. 199; *Arkansas v. Schlierholz*, 179 U. S. 598.

Capacity to Raise Federal Question. — *Only One Whose Rights Will Be Affected*, or who will be injured or benefited by the decision of the question sought to be raised can raise a federal question, so as to give the United States Supreme Court appellate jurisdiction. *Lampasas v. Bell*, 180 U. S. 276; *Tyler v. Judges*, 179 U. S. 405.

The Decision of a State Court that a party has the capacity to raise a federal question is binding upon the Supreme Court of the United States on appeal thereto from the final judgment of the state court; and hence the incapacity of such party to raise such question cannot be urged as grounds for dismissal of the appeal. *Board of Liquidation v. Louisiana*, 179 U. S. 622.

Time for Raising Federal Questions. — *Federal Questions Not Raised in the Trial Court* will nevertheless confer appellate jurisdiction upon the Supreme Court of the United States, if they are raised in the Supreme Court of the state on appeal from the trial court. *Rothschild v. Knight*, 184 U. S. 334.

Where the State Supreme Court on Motion for Rehearing Considers and Passes upon Federal Questions such questions will not be deemed to have

been raised too late, though raised for the first time on the motion for rehearing. *Missouri, etc., R. Co. v. Elliott*, 184 U. S. 530; *Mallett v. North Carolina*, 181 U. S. 589.

Where the State Supreme Court on Motion for Rehearing Refuses to Consider Federal Questions not previously raised such questions will be deemed to have been raised too late. *Mallett v. North Carolina*, 181 U. S. 589; *Eastern Bldg., etc., Assoc. v. Welling*, 181 U. S. 47; *Turner v. Richardson*, 180 U. S. 87.

On a Second Appeal to the State Supreme Court. — Where a state Supreme Court on a second appeal refuses to reopen questions decided on the former appeal in order to let in federal questions not raised on the first trial of the case, such questions will be deemed to have been raised too late to confer appellate jurisdiction on the Supreme Court of the United States. *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1.

On Motion in Arrest of Judgment. — Presentation of a federal question on a motion in arrest of judgment is a sufficient presentation of such question, though it was not raised on the trial of the case. *St. Louis Consol. Coal Co. v. Illinois*, 185 U. S. 203.

Federal Questions Insufficiently Raised. — *Where It Appears that the State Court Has Passed on Federal Questions* the appellate jurisdiction of the United States Supreme Court attaches, regardless of the manner in which such questions were presented in the pleadings. *Missouri, etc., R. Co. v. Elliott*, 184 U. S. 530.

Where It Does Not Appear that the State Court Passed upon Federal Questions statements in pleading purporting to raise such questions must raise them clearly and definitely; otherwise the questions will be held not to have been sufficiently presented to confer appellate jurisdiction on the United States Supreme Court. *Michigan Sugar Co. v. Michigan*, 185 U. S. 112; *Speed v. McCarthy*, 181 U. S. 269.

The Refusal of a State Supreme Court to Pass upon a Federal Question which was not properly presented in the trial court will not confer appellate jurisdiction upon the United States Supreme Court. *Erie R. Co. v. Purdy*, 185 U. S. 148.

Certificate of State Judge. — Where the record shows that a federal question was raised in the Supreme Court of a state, the certificate of a justice of such

39. See notes 1, 2, 3.

40. *b. JURISDICTIONAL QUESTIONS.* — See note 1.

(1) *Constitutional Questions.* — See note 2.

43. (3) *Where Revenue Involved.* — See note 1.

44. (5) *Questions Affecting Title.* — See note 1.

45. See note 1.

court that such question was involved in the judgment is, in the absence of an opinion from such court, sufficient to show that the question was actually passed upon by such court. *Gulf, etc., R. Co. v. Hewes*, 183 U. S. 66.

39. 1. *Capital City Dairy Co. v. Ohio*, 183 U. S. 238; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 41; *Arkansas v. Schlierholz*, 179 U. S. 598.

Certificate of State Judge. — The certificate of a justice of a state Supreme Court may be considered in determining whether the judgment of such court involved a federal question when, and only when, the record shows, independently of such opinion, that such question was involved, the opinion being considered merely for the purpose of making specific that which is too general and indefinite in the record. *Capital City Dairy Co. v. Ohio*, 183 U. S. 238; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 41.

2. *Erie R. Co. v. Purdy*, 185 U. S. 148; *Kizer v. Texarkana, etc., R. Co.*, 179 U. S. 199.

Where a Federal Question Is Decided in Favor of the Party Invoking It, there can be no appeal by the other party. The question must be decided against the party who invokes it. *Lake St. El. R. Co. v. Farmer's L. & T. Co.*, 182 U. S. 417.

3. *Speed v. McCarthy*, 181 U. S. 269; *Hale v. Lewis*, 181 U. S. 473; *Lowry v. Silver City Gold, etc., Min. Co.*, 179 U. S. 196; *New York Cent., etc., R. Co. v. New York*, 186 U. S. 269.

40. 1. *United States Judiciary Act*, March 3, 1891, § 5, provides for proceedings in error from the United States district and circuit courts directly to the Supreme Court in cases involving federal questions; § 6 provides that the Circuit Court of Appeals shall exercise appellate jurisdiction to review the final decisions of the district and circuit courts in all cases other than those provided for in § 5, unless otherwise provided for by law, and that its judgment shall be final in all cases in which the jurisdiction of the Circuit Court attaches solely by

reason of diverse citizenship. Under these sections it has been held that the Circuit Court of Appeals has jurisdiction to review the decision of the Circuit Court in any case in which the jurisdiction of the latter court has attached solely by reason of diverse citizenship, notwithstanding that after such jurisdiction attached federal questions have arisen and the case has thus been brought within § 5. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277.

2. Where Validity of Statute Is Not Material to Rights of Parties. — The validity of a statute is not involved unless it is material to the rights of the litigants and connected with the controversy out of which the litigation grew. *Morgan Park v. Knopf*, 199 Ill. 444, in which case it was held that no such question was presented as to confer jurisdiction upon the Supreme Court.

Where the Trial Court Adopts the Defendant's Construction of a Statute he cannot, in *Illinois*, if defeated, take a direct appeal to the Supreme Court upon the ground that had the trial court adopted the construction contended for by the plaintiff the statute would have been unconstitutional. *Sauter v. Anderson*, 199 Ill. 319.

43. 1. *Revenue Indirectly Involved.* — In *Illinois*, in order to give the Supreme Court jurisdiction of a direct appeal from the trial court on the ground that the case relates to the revenue, it "must relate to the revenue directly, and not merely incidentally or remotely." *People v. Hendee*, 199 Ill. 55, quoting *Wells v. Rogers*, 196 Ill. 292. These cases were decided under Practice Act Ill., § 88.

44. 1. *Illinois.* — *Helton v. Elledge*, 199 Ill. 95; *Glos v. Clark*, 199 Ill. 147, wherein it was held that the Appellate Court has no jurisdiction to entertain an appeal where a freehold is involved.

45. 1. *Suit to Remove Cloud on Title.* — A freehold is not involved in a proceeding to vacate a judgment and to remove the transcript, execution, and levy as a cloud upon complainant's

47. Meaning of Term. — See note 2.

52. II. APPEALABLE JUDGMENTS AND ORDERS — 1. Final Judgments — *a.* THE RULE STATED. — See note 4.

53. *b.* WHAT IS A FINAL JUDGMENT. — See note 1.

54. See notes 1, 2, 3, 4.

title, since, even if the judgment, execution, and levy were held valid, the loss of a freehold could be avoided by payment of the judgment or by redemption after sale on execution. *Helton v. Elledge*, 199 Ill. 95.

47. 2. *Helton v. Elledge*, 199 Ill. 95.

52. 4. *Little v. Atchison*, etc., R. Co., 2 Indian Ter. 551; *Perry v. Church*, 107 Mich. 480; *Swain v. Savage*, 55 Neb. 687; *Bland v. State*, (Tex. Civ. App. 1896) 36 S. W. Rep. 914, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 52. See also the following cases:

Alabama. — *Supreme Lodge*, etc., *v. Thomas*, 130 Ala. 275; *Throne Franklin Shoe Co. v. Gunn*, 123 Ala. 640.

Colorado. — *Standley v. Hendrie*, etc., Mfg. Co., 25 Colo. 376; *Bogert v. Adams*, 5 Colo. App. 510.

Hawaii. — *Barthrop v. Kona Coffee Co.*, 10 Hawaii 398.

Illinois. — *Glos v. Clark*, 199 Ill. 147, reversing 97 Ill. App. 609; *Pain v. Kinney*, 175 Ill. 264.

Iowa. — *Oster v. Devereaux*, 115 Iowa 724.

Kansas. — *Fry v. Rush*, 63 Kan. 429.

Missouri. — *Hull v. Beard*, 80 Mo. App. 200.

Montana. — *State v. O'Brien*, 19 Mont. 6.

Nebraska. — *Webster v. Lincoln*, 50 Neb. 1; *Hall County v. Smith*, 49 Neb. 274; *Sims v. Davis*, 48 Neb. 720; *Reynolds v. Tecumseh*, 48 Neb. 785; *Merle*, etc., *Mgf. Co. v. Wallace*, 48 Neb. 886.

Pennsylvania. — *Slinluff v. Sisler*, 193 Pa. St. 264; *Lafferty v. Corcoran*, 175 Pa. St. 5.

Rhode Island. — *Mellen v. Battey*, 22 R. I. 395.

South Dakota. — *Chamberlain v. Hedger*, 10 S. Dak. 290.

Tennessee. — *Hely v. Lee*, 108 Tenn. 715.

Texas. — *Mills v. State*, 41 Tex. Crim. 447.

West Virginia. — *Brast v. Kanawha Oil Co.*, 46 W. Va. 613.

53. 1. *Little v. Atchison*, etc., R. Co., 2 Indian Ter. 551; *Thomas v. Clark County Nat. Bank*, 103 Ky. 335;

Eastman v. Gurrey, 14 Utah 172, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 52, 53. See *Williamson v. Joyce*, 137 Cal. 151, wherein the court cited 11 ENCYC. OF PL. AND PR. 866. See also *Hendrick v. Posey*, 104 Ky. 8; *Harvey v. Sutton*, 94 Tex. 79.

Writ of Error. — *Fry v. Rush*, 63 Kan. 429.

"The Real Test to Apply is, that if the judgment pronounced is in the nature of a final one, and is such upon the question adjudicated, then it becomes such; or, otherwise stated, where the judgment pronounced is final of the rights of the parties on the questions therein involved, and settled, and separable from any other that may be rendered in the action, it is as to such questions a final judgment." *Standley v. Hendrie*, etc., Mfg. Co., 25 Colo. 376.

Determination of Finality in Federal Courts. — The question of the finality of a judgment or decree for purposes of review by writ of error or appeal in the federal courts is not affected by the procedure in the state courts, but must be governed by the rules established by federal legislation and by the decisions of the federal courts. *Menge v. Warriner*, (C. C. A.) 120 Fed. Rep. 816.

Estoppel to Deny Finality. — The finality of a judgment appealed from cannot be attacked by the respondent on account of changes and modifications of the findings made at his own instance and for his benefit, after the rendition of the judgment. *U. S. v. St. Louis*, etc., *Transp. Co.*, 184 U. S. 247.

54. 1. *Little v. Atchison*, etc., R. Co., 2 Indian Ter. 551; *Thomas v. Clark County Nat. Bank*, 103 Ky. 335, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 54.

2. *Little v. Atchison*, etc., R. Co., 2 Indian Ter. 551; *Thomas v. Clark County Nat. Bank*, 103 Ky. 335, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 53, 54.

Pending Motion for Rehearing. — While a motion for a rehearing under

55. Execution. — See notes 3, 4.

56. c. UNIVERSALITY OF THE RULE — PROBATE MATTERS.
— See note 1.

59. d. IN INSOLVENCY PROCEEDINGS. — See note 1.

60. e. STATUTORY PROVISIONS. — See note 1.

61. f. DISMISSAL OF APPEAL. — See notes 4, 6.

62. g. ENTRY OF JUDGMENTS. — See notes 1, 3, 4.

Civ. Code Ala., § 3342 *et seq.*, is pending, the judgment is not final in the sense that it is appealable. Supreme Lodge, etc., *v. Thomas*, 130 Ala. 275.

54. 3. Thomas v. Clark County Nat. Bank, 103 Ky. 335, *quoting* with approval 2 ENCYC. OF PL. AND PR. 53, 54.

4. Covington v. Covington First Nat. Bank, 185 U. S. 270.

55. 3. Little v. Atchison, etc., R. Co., 2 Indian Ter. 551.

4. Little v. Atchison, etc., R. Co., 2 Indian Ter. 551.

No Technical Form Is Required to constitute a final appealable judgment or decree. *Little v. Atchison, etc., R. Co.*, 2 Indian Ter. 551.

56. 1. Barthrop v. Kona Coffee Co., 10 Hawaii 398.

Probate Court Decrees — Denial of Petition for Distribution. — In *Nebraska* an order of the county court denying a petition for distribution of the personal estate in the hands of an executor and distributable under the terms of the will, and dismissing the petition on the ground that the petitioner is not an heir nor a devisee, is appealable. *Morton v. Morton*, 62 Neb. 420.

59. 1. Barthrop v. Kona Coffee Co., 10 Hawaii 398, *citing* 2 ENCYC. OF PL. AND PR. 57.

60. 1. Hadlock v. G. County, 5 Okla. 570, *quoting* 2 ENCYC. OF PL. AND PR. 60.

61. 4. Hely v. Lee, 108 Tenn. 715.

6. Chamberlain v. Hedger, 10 S. Dak. 290 *citing* 2 ENCYC. OF PL. AND PR. 61.

62. 1. Nunc pro Tunc. — Although as was held in the cases cited in the original work an appeal lies from a judgment rendered *nunc pro tunc* after it has been entered, the rights of the parties in respect to an appeal are determined by the date of the actual entry of the judgment, and if the appeal is taken before the entry of the judgment it is premature and is not affected by the entry of the judgment *nunc pro tunc* as of a prior date. *Martin v. Smith*, 11 S. Dak. 437.

3. Randall v. Wadsworth, 130 Ala. 633; *Alabama Midland R. Co. v. Brown*, 129 Ala. 282; *Campbell v. State*, 123 Ala. 72.

Under California Statute. — Code Civ. Pro. Cal., § 939, fixes the time for appeals from the judgment so as to run from the entry thereof; and under this provision it has been repeatedly held that an appeal from a judgment will not lie until after judgment is entered, and if taken before will be dismissed for want of jurisdiction in the appellate court. *Bell v. Staacke*, 137 Cal. 307.

4. Tutwiler Coal, etc., Co. v. Enslen, 129 Ala. 336; *Martin v. Smith*, 11 S. Dak. 437; *Chamberlin v. Hedger*, 10 S. Dak. 290; *Greenly v. Hopkins*, 7 S. Dak. 561.

After Rendition. — *Martin v. Smith*, 11 S. Dak. 437; *Chamberlin v. Hedger*, 10 S. Dak. 290; *Greenly v. Hopkins*, 7 S. Dak. 561.

Memorandum of Clerk. — *Richter v. Koopman*, 131 Ala. 399.

Memorandum of Clerk on Demurrer. — *Sloss Iron, etc., Co. v. Knowles*, 129 Ala. 410.

Insufficient Entry on Demurrer. — *Tinney v. Central of Georgia R. Co.*, 129 Ala. 523.

Ruling on Demurrer. — A mere recital in the record to the effect that "demurrer was overruled," or "sustained," is nothing more than a memorandum wholly wanting in the essential elements of a judgment and is insufficient to support an assignment of error based upon it. *Randall v. Wadsworth*, 130 Ala. 633; *McDonald v. Alabama Midland R. Co.*, 123 Ala. 227; *Holley v. Coffee*, 123 Ala. 406.

Where Original Judgment Is Amended. — In *Hayes v. Silver Creek, etc., Land, etc., Co.*, 136 Cal. 238, the original judgment was entered December 1, 1897, and the notice of appeal was filed June 2, 1898, one day over six months thereafter. The judgment was amended December 27, 1897, and it was held that the latter should be taken

- 63.** *Costs.* — See note 1.
- 64.** **2. Appeal in Equitable Causes — a. IN GENERAL.** — See note 5.
- 65.** See note 1.
- 66.** **b. DECISION ON RELIEF DEMANDED — Interlocutory Decrees.** — See note 2.
- 68.** **c. DECREES ORDERING REFERENCE.** — See note 2.
- 69.** See note 1.
- 70.** **d. DECREES ORDERING ACCOUNTING.** — See note 1.
- e. COLLATERAL DECREES.** — See note 2.
- 71.** **f. DOUBLE APPEALS.** — See note 1.
- 72.** **3. Final Orders — a. WHAT CONSTITUTE GENERALLY.** — See note 3.

as the true date of entry and that accordingly the appeal was taken in time.

Verdict. — Under a statute allowing appeals from judgments or orders no appeal lies from a mere verdict without judgment thereon. *Nordlin v. Berner*, 15 S. Dak. 611.

63. 1. *Bland v. State*, (Tex. Civ. App. 1896) 36 S. W. Rep. 914, *citing* 2 ENCYC. OF PL. AND PR., 52 *et seq.*

Failure to Insert Amount of Costs in Judgment. — Failure of the clerk of the trial court to insert in the judgment the amount of the costs granted to the successful party, does not render the judgment so incomplete as to make it unappealable. *Bailey v. Littell*, 24 Nev. 294.

64. 5. *Barthrop v. Kona Coffee Co.*, 10 Hawaii 398, *citing* 2 ENCYC. OF PL. AND PR. 64. See also *Penn Mut. L. Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659; *Brast v. Kanawha Oil Co.*, 46 W. Va. 613.

"Decision" Equivalent to "Decree." — The word "decision" used in a statute allowing an appeal is practically synonymous with the word "decree." *Barthrop v. Kona Coffee Co.*, 10 Hawaii 398.

65. 1. **Order Dissolving Injunction — Pendency of Motion for Assessment of Damages.** — Under Rev. Stat. Mo., § 5500, an appeal may be taken from an order dissolving an injunction while a motion for assessment of damages on the injunction bond is pending, the effect of the appeal being to suspend the action on the motion until the determination of the appeal. *Joplin, etc., R. Co. v. Kansas City, etc., R. Co.*, 135 Mo. 549.

66. 2. *Virginia.* — Compare *Trammell v. Ashworth*, 99 Va. 646, wherein

it was held that the decrees involved therein, though interlocutory, so far disposed of the merits of the controversy as to give the Court of Appeals jurisdiction to review them.

68. 2. *Glos v. Clark*, 199 Ill. 147, *citing* 2 ENCYC. OF PL. AND PR. 68.

69. 1. *Glos v. Clark*, 199 Ill. 147, *citing* 2 ENCYC. OF PL. AND PR. 69.

Decree Establishing Principles to Control Commissioner. — A decree which merely establishes the principles which are to control the commissioner in stating accounts which are necessary in order to enable the court to pass finally upon the rights of the parties to the suit, is interlocutory. *Trammell v. Ashworth*, 99 Va. 646.

70. 1. *Glos v. Clark*, 199 Ill. 147, *reversing* 97 Ill. App. 609.

2. *Hadlock v. G. County*, 5 Okla. 570, *citing* with approval 2 ENCYC. OF PL. AND PR. 70.

Order Affecting Receiver. — *Patterson v. Ward*, 6 N. Dak. 359, wherein 2 ENCYC. OF PL. AND PR. 70 was *cited* in support of the proposition that an appeal will lie from a judgment allowing part of the account of a receiver, where the account is full and in all respects final.

71. 1. **A Decree Canceling a Mortgage** in a suit to foreclose a mortgage is final and appealable, even though the court retains and continues the controversy between the parties in regard to a note secured by the mortgage. *France v. Bell*, 52 Neb. 57, *citing* 2 ENCYC. OF PL. AND PR. 71.

72. 3. *Ledebuhr v. Order of Druids*, 97 Wis. 341, *citing* 2 ENCYC. OF PL. AND PR. 73.

Judgment Disbarring Attorney. — A judgment, in a proceeding to disbar an attorney, that the defendant be repri-

73. See note 2.

75. *b.* ORDERS AFFECTING SUBSTANTIAL RIGHTS. — See note 1.

manded, and for costs, amounting to sixty-one dollars, is appealable. *State v. Tracy*, 115 Iowa 71.

73. 2. *Taylor v. Standard Brick Co.*, 66 Ohio St. 360; *Sutton v. Chicago*, etc., R. Co., 114 Wis. 647.

Instances of Final Orders. — *An Order Allowing the Plaintiff to Dismiss His Action* after he has already secured relief against the defendant is final and appealable so far as it involves the correctness of the decision granting such relief. *Dane v. Daniel*, 28 Wash. 155.

An Order Requiring an Answer to a Bill of Discovery is final and appealable. *Hurricane Telephone Co. v. Mohler*, 51 W. Va. 1.

An Order Refusing to Make One a Party to a Suit determines the action and prevents judgment, so far as the applicant is concerned, and hence is appealable. *Ex p. Johnson*, 63 S. Car. 205.

An Order Making New Parties Defendant over the protest of the plaintiff may be appealed by him. *Bolton v. Donovan*, 9 N. Dak. 575.

75. 1. *Smith v. Coffin*, 9 S. Dak. 502, citing 2 ENCYC. OF PL. AND PR. 75.

Orders Affecting Substantial Rights — *Order for Examination of Defendant.* — An *ex parte* order, made by a judge or court in a proceeding in aid of execution, based on §§ 534 and 538 of the Code of Civil Procedure, requiring a defendant, against whom a judgment has been rendered, to appear at a time and place specified and answer, under oath, all such questions concerning his property as may be propounded to him, is an order affecting a substantial right, made in a special proceeding, made upon a summary application in an action after judgment, and is a final order within the meaning of § 381 of the Code of Civil Procedure. *Clarke v. Nebraska Nat. Bank*, 49 Neb. 800.

Order Authorizing Improvement of Trust Estate. — An order by a chancellor authorizing an executor holding realty in trust to expend trust funds in erecting improvements upon the property, is appealable by the *cestuis que trustent* as affecting substantial equitable rights. *Matter of Miller*, 62 N. J. Eq. 764.

An Order Refusing to Make One a

Party to a Suit is appealable as affecting a substantial right. *Ex p. Johnson*, 63 S. Car. 205.

An Order Setting Aside an Execution Levy and Sale is an order made after judgment affecting a substantial right, and is therefore appealable under Ball. Annot. Codes & Stat. Wash. (1897), § 6500, subdiv. 7. *Otis v. Nash*, 26 Wash. 39.

Appealable Orders Affecting the Merits. — *An Order Involves the Merits* of the action, or some part thereof, within the meaning of the statute, when and only when it determines the strict legal rights of the parties, as contradistinguished from mere questions of practice which every court regulates for itself, and for all matters which depend upon the discretion or favor of the court. *Plano Mfg. Co. v. Kaufert*, 86 Minn. 13.

Order Denying Motion to Set Aside Service. — An order denying the motion of the defendant, appearing specially for that purpose, to set aside the service of the summons upon him, is appealable. *Plano Mfg. Co. v. Kaufert*, 86 Minn. 13, in which case the court said: "An order which denies the motion of a defendant, appearing specially for that purpose, to set aside the service of the summons upon him, if his contention be correct, determines his positive legal rights, and compels him to take upon himself the burden of defending the action on the merits when the court has no jurisdiction over him. This court has repeatedly assumed, and able counsel conceded, that such an order is appealable."

An Order Allowing a Voluntary Dismissal, where the plaintiff has already secured relief against the defendant which will not be affected by the dismissal, is appealable as affecting the merits in so far as the granting of such relief is concerned. *Dane v. Daniel*, 28 Wash. 155.

An Order Refusing to Dismiss an Appeal from a Justice Court is one involving the merits of the action, and is appealable. *Smith v. Coffin*, 9 S. Dak. 502.

An Order Bringing In a New Party Defendant is appealable as being an order involving the merits. *Bolton v. Donovan*, 9 N. Dak. 575.

- 78.** *c.* SPECIAL ORDERS AFTER JUDGMENT. — See note 1.
d. IN SPECIAL PROCEEDINGS. — See note 2.
79. *c.* UNDER CODE OF NEW YORK. — See notes 2, 3.
81. 4. Interlocutory Decisions — *a.* IN GENERAL. — See note 2.
84. Other Instances. — See note 3.

Orders Unappealable as Not Affecting the Merits. — *An Order Allowing a Voluntary Dismissal* when the defendant has interposed no affirmative defense is not appealable. *Dane v. Daniel*, 28 Wash. 155.

Order Denying Motion to Affirm Order of Probate Court. — An order of the District Court denying a motion to affirm an order of the Probate Court allowing the account of an executor is not appealable. *McGinty v. Kelley*, 85 Minn. 117.

78. 1. An Order Striking Out a Statement on a Motion for a New Trial is appealable under a statute (Code Civ. Pro. Mont., § 1722, subd. 2) authorizing appeals from special orders made after final judgment. *Beach v. Spokane Ranch, etc., Co.*, 25 Mont. 367.

Order Extending Time for Filing Bill of Exceptions. — An order made after judgment, which extends the time for filing a bill of exceptions, is an appealable order, under Code Civ. Pro. Mont., § 1722 which authorizes an appeal from any special order made after final judgment. *Beach v. Spokane Ranch, etc., Co.*, 25 Mont. 7.

2. An Order Confirming the Report of a Referee appointed after the dismissal of an action to ascertain damages sustained by reason of an injunction is a final order affecting a substantial right made in a special proceeding. *Wisconsin M. & F. Ins. Co. Bank v. Durner*, 114 Wis. 369.

An Order Directing a Receiver to Surrender Property to a Trustee in Bankruptcy is appealable as a final order made in a special proceeding. *State v. German Exch. Bank*, 114 Wis. 436.

79. 2. Jung v. Keuffel, 144 N. Y. 381, *distinguishing* *Wheeler v. Sweet*, 137 N. Y. 435.

3. Matter of Thurber, 162 N. Y. 244. See also *Matter of Killan*, 172 N. Y. 574.

A General Order of Affirmance, not stating the grounds upon which the lower court proceeded, will not be reviewed by the court of appeals on the ground that the lower court refused to consider the facts of the case for want of power. In order to raise the point in the court

of appeals, the order itself must show by a proper statement that the court refused to review the facts for want of power. *Koehler v. Hughes*, 148 N. Y. 510; *Dibble v. Dimick*, 143 N. Y. 549.

81. 2. Natcher v. Natcher, 153 Ind. 368; *Ray v. Moore*, 19 Ind. App. 690 [in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 81]; *Gilleylen v. Martin*, 73 Miss. 695 [citing 2 ENCYC. OF PL. AND PR. 144]. See also the following cases:

Colorado. — *Bogert v. Adams*, 5 Colo. App. 510.

New Mexico. — *Territory v. Hubbell*, 9 N. Mex. 560.

Ohio. — *Taylor v. Standard Brick Co.*, 66 Ohio St. 360.

Pennsylvania. — *Moore's Appeal*, 203 Pa. St. 376; *Slingluff v. Sisler*, 193 Pa. St. 264; *Lafferty v. Corcoran*, 175 Pa. St. 5.

Rhode Island. — *Mellen v. Battey*, 22 R. I. 395; *Taylor v. Loomis*, 21 R. I. 277.

Strict Construction of Statute. — A statute expressly providing for appeals from interlocutory orders must be strictly construed. *Natcher v. Natcher*, 153 Ind. 368.

Order in Proceedings to Establish Boundaries. — Under Code Iowa, § 4237, providing that in proceedings to establish boundaries no appeal shall be taken except from a final judgment, an appeal will not lie from an order appointing a commissioner to locate a corner at a certain point, and taxing the costs to date; the order being an interlocutory order. *Oster v. Devereaux*, 115 Iowa 724.

84. 3. Unappealable Orders. — *Orders of Consolidation* of causes are interlocutory and unappealable. *Taylor v. Standard Brick Co.*, 66 Ohio St. 360; *Brigel v. Creed*, 65 Ohio St. 40.

Refusal to Extend the Time for Bringing a Cause to Trial is not appealable, since it does not prevent judgment. *Sutton v. Chicago, etc., R. Co.*, 114 Wis. 647.

An Order Refusing to Strike Off an Appeal from a Report of County Auditors adjusting the accounts of county com-

88. b. MATTERS OF PRACTICE — Other Instances — INSTRUCTIONS. — See note 5.

c. IN EQUITY CASES. — See note 6.

89. d. CONSTRUCTION OF STATUTES. — See note 1.

91. e. REVIEW ON APPEAL FROM FINAL DECISIONS — In General. — See note 1.

92. f. DECISIONS RESTING IN DISCRETION — (1) In General. — See note 2.

93. Rehearing. — See note 2.

Disagreement of Jury. — See note 5.

96. 5. Motions to Vacate Appealable Orders. — See note 1.

7. Appeal from Ex Parte Orders. — See notes 7, 8.

8. Appeal from Portion of Decision. — See note 9.

missioners is not appealable. *Moore's Appeal*, 203 Pa. St. 376.

An Order Dismissing a Case not brought to trial in proper time is not appealable, since it does not prevent judgment. *Sutton v. Chicago, etc., R. Co.*, 114 Wis. 647.

88. 5. Party. — An order admitting a party is not appealable. *Ray v. Moore*, 19 Ind. App. 690.

6. Decree Denying Application to Remove Cause to Federal Court. — In *Mississippi* a decree of a chancery court, denying an application to remove the cause to a federal court, is not appealable to the state Supreme Court until after final decree. Such an appeal is not within Annot. Code Miss., § 34, authorizing appeals from interlocutory decrees in certain cases. *Vicksburg Waterworks Co. v. Vicksburg*, 79 Miss. 510.

Judgment Overruling Motion with Reference to Receivership. — In a proceeding under Comp. Stat. Neb., c. 8, to wind up an insolvent bank, a judgment overruling the bank's motion to discharge an order requiring the receiver to sue stockholders for their unpaid subscriptions is appealable. *State v. German Sav. Bank*, 50 Neb. 734.

89. 1. Vicksburg Waterworks Co. v. Vicksburg, 79 Miss. 510.

91. 1. Expiration of Time to Appeal. — *Bliss v. Grayson*, 25 Nev. 329.

92. 2. Nevada. — *Matter of Powning*, 25 Nev. 428.

93. 2. See also *U. S. v. Rio Grande Dam, etc., Co.*, 184 U. S. 416.

5. Dossett v. St. Paul, etc., Lumber Co., 28 Wash. 618, wherein it was held that an order discharging a jury for failure to agree, and referring the case

back for notice on the assignment list for a retrial thereof, is not a granting of a new trial and hence not appealable under Ball. Annot. Codes & Stat. Wash. (1897), § 6500, authorizing appeals from orders granting new trials.

96. 1. State v. Boyce, 25 Wash. 422, quoting with approval 2 ENCYC. OF PL. AND PR. 95.

7. Board of Education v. Ward, 50 W. Va. 443; *Brast v. Kanawha Oil Co.*, 46 W. Va. 613, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 96.

8. Board of Education v. Ward, 50 W. Va. 443; *Brast v. Kanawha Oil Co.*, 46 W. Va. 613, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 96.

9. Rose v. Hale, 185 Ill. 378, citing with approval 2 ENCYC. OF PL. AND PR. 96.

From Part of a Judgment. — In *Missouri* the defendant in attachment must appeal from the whole case if at all. *Hull v. Beard*, 80 Mo. App. 200, which case was decided under Sess. Laws Mo. 1891, p. 45.

Effect of Limiting Appeal to Portion of Decree. — Where an appeal was taken by an executor from a decree of distribution, and the notice stated that he appealed from the whole of the decree "except so much of said decree as settles the account of said executor, from which last named portion he does not appeal," it was held that in so far as the decree settled the executor's account it was not before the appellate court, and that whatever errors were committed by the probate court as to that much of the decree could not be interfered with. *Matter of Burdick*, 112 Cal. 387.

97. See notes 1, 2.

98. 10. Judgments Reversing and Remanding Causes. — See notes 3, 4.

99. U. S. Courts. — See note 2.

103. 12. Void Judgments. — See note 2. See also *infra*, VI. 5. *For Want of Jurisdiction*.

97. 1. Appeal from So Much of Judgment as Declares Lien. — In *Davidson v. Jennings*, 27 Colo. 187, it was held that where a personal judgment is rendered in the County Court against the lessees of a mining claim which is declared to be a lien against the mine, the owners of the mine can appeal to the District Court from that part of the judgment declaring the lien, without appealing from the entire judgment and without making the defendants, against whom personal judgment is rendered, parties to the appeal.

A Party May Be Estopped from appealing from a portion of the judgment which is not in his favor by accepting so much of it as is favorable to him. *Male v. Harlan*, 12 S. Dak. 627. See also *infra*, III. 2. c. *Acceptance of Benefits*.

2. *New Zealand Ins. Co. v. Smith*, 41 Oregon 466.

A Decree of Interpleader is not severable so as to allow an appeal by one of the defendants from that portion thereof discharging the plaintiff in the interpleader proceedings from liability, no appeal being taken from the decision as to the distribution of the funds forming the subject-matter of the proceedings. *New Zealand Ins. Co. v. Smith*, 41 Oregon 466.

98. 3. *Kenaday v. Sinnott*, 179 U. S. 606.

When Appealable. — *Chesapeake, etc., Telephone Co. v. Manning*, 186 U. S. 238.

Where the Reversal Is for Errors of Law Only, the judgment is appealable. *Gamble v. Akron, etc., R. Co.*, 63 Ohio St. 352.

A Judgment Reversing a Decision for Insufficiency of Evidence to sustain it is appealable if the order of remand expresses or impliedly requires the lower court to direct a verdict for the appellee unless the appellant adduces additional evidence to sustain his case, and it appears that he will not be able to do so. But if the lower court is not required to direct a verdict, the judgment of reversal and remand is not appealable, though it appear that the

appellant will not be able to adduce any additional evidence. *Dawson v. St. Louis Expanded Metal Fireproofing Co.*, 94 Tex. 424.

Reversal for Refusal to Grant Change of Venue. — Where on appeal to the Supreme Court of a state the only error assigned is the refusal of the lower court to grant a change of venue, the decision of the state Supreme Court reversing the judgment of the lower court and remanding the case with directions to grant the change of venue is not a final judgment, and hence is not appealable to the United States Supreme Court. *Cincinnati St. R. Co. v. Snell*, 179 U. S. 395.

4. Further Proceedings in Conformity with the Appellate Court. — A judgment of reversal, remanding the case for further proceedings to be had in conformity with the opinion of the Appellate Court, is not final, and hence is unappealable. *Haseltine v. Central Bank*, 183 U. S. 130.

Reversal on Cross Writ of Error. — Where a judgment which has been affirmed on proceedings in error is afterwards reversed and the cause is remanded on a cross writ of error, neither the judgment of affirmance nor of reversal is appealable. *Montana Min. Co. v. St. Louis Min., etc., Co.*, 186 U. S. 24.

99. 2. **Reversal for Refusal to Remand.** — An order of the Circuit Court of Appeals reversing a decision of the Circuit Court which refused to remand a case to a state court, and remanding the case to the Circuit Court with direction to remand to the state court, is not a final judgment, and hence is not appealable to the Supreme Court. *German Nat. Bank v. Speckert*, 131 U. S. 405.

103. 2. *Randall v. Wadsworth*, 130 Ala. 633; *Adams v. Wright*, 129 Ala. 305.

Where Intermediate Appellate Court Renders Judgment Without Jurisdiction. — In *Colorado* it has been held that the Supreme Court cannot acquire jurisdiction by an appeal from the Court of Appeals in a case in which the latter

103. 13. Judgments and Orders of Dismissal — a. GENERALLY.
— See note 4.

104. See notes 3, 4.

105. c. IN EQUITY. — See note 3.

e. REFUSAL TO DISMISS. — See notes 6, 7.

106. 14. Judgments of Nonsuit — Voluntary Nonsuits. — See note 2.

107. 15. Decisions Vacating Judgments and Decrees — a. GENERALLY. — See note 4.

court had no jurisdiction. *Mercer v. Mercer*, 27 Colo. 216.

103. 4. Georgia. — *Johnson v. Porter*, 115 Ga. 401; *Holland v. Saul*, 115 Ga. 511; *Kollock v. Webb*, 113 Ga. 762. *Nebraska.* — *Swain v. Savage*, 55 Neb. 687.

Dismissal on Ground that Action Has Abated. — In *Massachusetts* an appeal lies from an order allowing a motion to dismiss on the ground that the action has abated because of the death of one of the defendants. *Brown v. Kellogg*, (Mass. 1902) 65 N. E. Rep. 378.

104. 3. Menge v. Warriner, (C. C. A.) 120 Fed. Rep. 816.

Contra. — In *Kollock v. Webb*, 113 Ga. 762, it was held that a judgment of dismissal as to some of the parties, rendered upon demurrer, is final. The court quoted from *McGaughey v. Latham*, 63 Ga. 67, in which latter case *Bleckley, J.*, said: "The action brought was a joint action against two, and no such action is now pending in that court, the court having dismissed it as to one of the defendants on the demurrer which we have just discussed. The judgment of dismissal was final in its nature, and while it stood no further proceedings could be had below except against the other defendant."

4. An Order of Dismissal Which Retains the Cause as to One Party Defendant is not within the exception that appeals will be entertained in cases where to deny them would result in a denial of justice or in great hardship. *Pain v. Kinney*, 175 Ill. 264.

105. 3. Contra in Alabama by Statute. — *Bickley v. Bickley*, 129 Ala. 403, which case was decided under Civ. Code Ala., § 427. See also to the same effect *Throne Franklin Shoe Co. v. Gunn*, 123 Ala. 640.

6. Roberts v. Malloy, 100 Iowa 372, citing with approval 2 ENCYC. OF PL. AND PR. 105. See also *Meekins v. Nor-*

folk, etc., R. Co., 131 N. Car. 1; *Jester v. Steam Packet Co.*, 131 N. Car. 54.

An Order Refusing to Enter a Default is not appealable. *Roberts v. Malloy*, 100 Iowa 372.

Where Appeal Is Taken from Final Decree for Petitioner. — A motion to dismiss a petition to vacate a tax decree cannot be regarded as a demurrer, and an order denying it is not reviewable on appeal from a decree granting the petition. *Aztec Copper Co. v. Auditor-Gen.*, 128 Mich. 615, in which case the court said: "The motion to dismiss was in no sense a demurrer; and we do not think in this proceeding we can consider the *ex parte* affidavits which were filed with the judge at the time of the settling of the decree."

7. Contra. — *Brown v. Brown*, 12 S. Dak. 380, decided under Comp. Laws S. Dak., § 5236, subd. 4, and following *Smith v. Coffin*, 9 S. Dak. 502.

106. 3. Boyd v. Kimball, 21 Tex. Civ. App. 6, wherein 2 ENCYC. OF PL. AND PR. 106 is quoted as stating the rule which prevails where it has not been modified by statute.

In Texas, by statute, the rule has been modified so as to permit an appeal from an order refusing to set aside such judgment of nonsuit in cases where the plaintiff was surprised by the rejection of legitimate evidence offered in support of his action. *Boyd v. Kimball*, 21 Tex. Civ. App. 6.

107. 4. Brazel v. New South Coal Co., 131 Ala. 416, holding that a judgment granting a motion in arrest of judgment is not appealable. *Merle, etc., Mfg. Co. v. Wallace*, 48 Neb. 886.

Statute Authorizing Appeal When New Trial Is Granted. — An appeal from a judgment on a motion in arrest of judgment is not authorized by a statute which allows an appeal whenever a motion for a new trial shall be granted or refused. *Brazel v. New South Coal Co.*, 131 Ala. 416.

108. See notes 1, 2.

109. *c.* IN NEW SUITS TO VACATE. — See note 4.

110. *d.* SETTING ASIDE JUDICIAL SALES. — See note 1.

Order of District Court Setting Aside Judgment of County Court — Appeal to Supreme Court. — In *Nebraska* an order of a District Court setting aside the judgment of a County Court as erroneous may be reviewed in the Supreme Court before the final disposition of the original case in the District Court. *Dane County Bank v. Garrett*, 48 Neb. 916.

Appeal from Order Refusing to Set Aside Judgment. — In *De La Montanya v. De La Montanya*, 112 Cal. 101, it was insisted that no appeal lies from an order refusing to set aside a judgment. Temple, J., said: "No doubt it has been held, and I think correctly, that when a motion is made to vacate an order under such circumstances that it merely calls upon the court to repeat or overrule the former ruling on the same facts, the last order is not appealable, not because the last order is not within the terms of § 963 of the Code allowing appeals, for it may be; but because it would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing contrary to the intent of the statute. Nor will such practice be allowed merely to permit a litigant to take an exception, or get a bill of exceptions, which he has neglected to do at the proper time. But I see no reason why this appeal should not be entertained. It is plainly within the terms of the statute allowing appeals, and no other method is suggested in which the right of the appellant to the relief sought could be considered here. An appeal upon the judgment-roll would not present all the facts upon which the motion is based — even if one may have a bill of exceptions when he has not been in court, and has taken no exceptions. Besides, it is a case in which it was eminently proper, if not necessary, that relief should first be asked from the trial court. Its action could not have been asked in any other mode. The defendant was not in court, and had no opportunity to be heard." See also *Birch v. Cooper*, 136 Cal. 636, wherein it was held that an appeal will not lie from an order refusing to set aside a judgment.

Washington. — An Order Denying an Application to Set Aside a Judgment is a final one from which an appeal may be prosecuted. *Wilson v. Seattle Dry Dock, etc., Co.*, 26 Wash. 297.

An Order Denying a judgment is not appealable under any of the provisions of Ball. Annot. Codes & Stat. Wash. (1897), § 6500. *Nelson v. Denny*, 26 Wash. 327.

108. 1. *Merle, etc., Mfg. Co. v. Wallace*, 48 Neb. 886; *Smith v. Livezey*, 67 N. J. L. 269; *Freeman v. Ambrose*, 12 Wash. 1.

2. *State v. Ellsworth*, 131 N. Car. 773, wherein it was held that an order setting aside a verdict in favor of the defendant in a criminal case, upon the trial of the issue made by an interlocutory plea of former conviction, is not appealable, since there remains not only the new trial upon the interlocutory plea, but the trial upon the plea of not guilty.

An Order Setting Aside a Verdict as a Matter of Law, without reference to the weight of the evidence, is appealable. *Wood v. Atlantic, etc., R. Co.*, 131 N. Car. 48.

Ruling Based on Discretion. — Where the trial court in setting aside a verdict bases its ruling upon its discretion and not upon definite legal principles, the order is not appealable. *Bird v. Bradburn*, 131 N. Car. 488.

109. 4. *Gilleylen v. Martin*, 73 Miss 695, citing 2 ENCYC. OF PL. AND PR. 109.

A Decree Sustaining a Bill of Review upon a hearing after answer is appealable. *Gilleylen v. Martin*, 73 Miss. 695, citing 2 ENCYC. OF PL. AND PR. 109.

110. 1. *Contra.* — *Penn Mut. L. Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659, wherein it was held that an order setting aside a judicial sale is appealable by the purchaser of the property sold. See also *Otis v. Nash*, 26 Wash. 39, decided under Ball. Annot. Codes & Stat. Wash. (1897), § 6500, subd. 7, and holding that an order setting aside an execution sale is an order made after judgment affecting a substantial right, and hence is appealable.

111. 16. Decisions Affecting Pleadings—*a. AMENDMENT OF PLEADINGS*—In General.—See note 1.

114. c. JUDGMENTS ON PLEADINGS.—See notes 1, 2.

f. ORDERS AFFECTING DEMURRERS.—See note 3.

115. See note 1.

116. See note 1.

117. Dismissal.—See note 2.

118. 17. Provisional Remedies—*a. JUDGMENTS IN ATTACHMENT PROCEEDINGS*—(1) *Generally.*—See notes 1, 2.

119. Plea in Abatement.—See note 1.

111. 1. North Carolina.—*Ayers v. Makely*, 131 N. Car. 60.

114. 1. Duffy v. Meadows, 131 N. Car. 31.

2. New York.—An order granting a motion for judgment on a pleading as frivolous is appealable. *Halliday v. Barber*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 116.

3. Barthrop v. Kona Coffee Co., 10 Hawaii 398 [citing 2 ENCYC. OF PL. AND PR. 115, 116]; *Gillespie v. Coleman*, 98 Va. 276 [citing 2 ENCYC. OF PL. AND PR. 114]. See also *Padley v. Gregg*, 26 Wash. 322.

A Decree Sustaining a Demurrer to a Cross-bill and dismissing the same on motion for want of equity is not appealable under Civ. Code Ala., § 427. *Bickley v. Bickley*, 129 Ala. 403; *Throne Franklin Shoe Co. v. Gunn*, 123 Ala. 640.

Wisconsin Statute.—An order sustaining a demurrer is expressly made appealable by Stat. Wis. (1898), § 3069. *Quayle v. Bayfield County*, 114 Wis. 108.

115. 1. Barthrop v. Kona Coffee Co., 10 Hawaii 398 [citing 2 ENCYC. OF PL. AND PR. 115]; *Gillespie v. Coleman*, 98 Va. 276 [citing 2 ENCYC. OF PL. AND PR. 114 *et seq.*]; *Williamson v. Joyce*, 137 Cal. 151; *Johnson v. Porter*, 115 Ga. 401; *Holland v. Saul*, 115 Ga. 511.

116. 1. Barthrop v. Kona Coffee Co., 10 Hawaii 398 [citing 2 ENCYC. OF PL. AND PR. 116]; *Gillespie v. Coleman*, 98 Va. 276 [citing 2 ENCYC. OF PL. AND PR. 114 *et seq.*].

Judgment for Defendant upon Plaintiff's Failure to Reply.—Under Burns's Annot. Stat. Ind. (1894), § 348, it has been held that a judgment that the plaintiff take nothing by his complaint and that the defendant recover his costs, on overruling a demurrer to one paragraph of the answer, to which

paragraph the plaintiff has failed to reply, is a final judgment, and appealable, although a reply was made to another paragraph. *Kern v. Saul*, 14 Ind. App. 72.

117. 2. See *Johnson v. Porter*, 115 Ga. 401; *Holland v. Saul*, 115 Ga. 511.

Complaint.—*Peters v. Lewis*, 28 Wash. 366.

118. 1. New Mexico.—*Lyndonville Nat. Bank v. Folsom*, 10 N. Mex. 306; *Schofield v. American Valley Co.*, 9 N. Mex. 485. But see Laws 1899, c. 75, §§ 8, 9.

2. Schofield v. American Valley Co., 9 N. Mex. 485.

Foreign Attachment.—*Bellah v. Poole*, 202 Pa. St. 71.

After the Voluntary Dismissal of the Main Action error cannot be assigned to a previous order dissolving an attachment issued in such action, since there is no appealable final judgment to support an appeal from the order dissolving the attachment. *Schofield v. American Valley Co.*, 9 N. Mex. 485.

119. 1. Missouri.—In *Hull v. Beard*, 80 Mo. App. 200, in which case an attachment suit was instituted in a justice court under Rev. Stat. Mo., § 6384, and an appeal was taken to the Circuit Court where the judgment was affirmed, it was said, on appeal from such judgment of affirmance: "The judgment on the issue in abatement is no more than an interlocutory judgment. It is not a final judgment within the meaning of the Act of 1891." See also *Laun v. Pfister*, 69 Mo. App. 620.

Discharging Attachment.—In *Colorado* an order dissolving an attachment is interlocutory and no appeal lies from such an order. *Bogert v. Adams*, 5 Colo. App. 510.

In *Kentucky* the Court of Appeals has jurisdiction of an appeal from an order discharging an attachment but giving

119. (2) *Affecting a Substantial Right.* — See note 3.

121. *c. ORDERS AFFECTING RECEIVERSHIPS—(1) Generally.* — See note 2. See also RECEIVERS.

122. (2) *When Appealable.* — See note 4.

123. *d. DECISIONS AFFECTING INJUNCTIONS — (1) Generally — Discretionary.* — See note 1.

125. (4) *Statutory Construction.* — See note 5.

128. 18. *Decisions Affecting Habeas Corpus — When Appealable.* — See note 2. See also HABEAS CORPUS.

129. 19. *Decisions in Cases of Contempt — Generally.* — See note 1. See also CONTEMPT.

132. 22. *Decisions Affecting Quo Warranto.* — See note 2.

133. 24. *Decisions Affecting Costs — a. GENERALLY.* See note 3. See also COSTS.

judgment for the debt sued for where the amount is sufficient to authorize an appeal. *Schnabel v. Jacobs*, 105 Ky. 774. See also *Cabell v. Patterson*, 98 Ky. 520.

In *Pennsylvania* an order dissolving or refusing to dissolve an attachment under the Act of 1869 is but an interlocutory order from which no appeal lies. *Slingluff v. Sisler*, 193 Pa. St. 264; *Lafferty v. Corcoran*, 175 Pa. St. 5.

In *Washington* an order discharging an attachment is not appealable under the statutes. *Spokane Dry Goods Co. v. Fritz*, 26 Wash. 433; *Jensen v. Hughes*, 12 Wash. 661.

119. 3. *Minnesota — Order Refusing to Dissolve Attachment.* — An appeal from an order refusing to dissolve an attachment cannot be prosecuted after the attachment has been released by executing and filing the statutory bond for that purpose. *Thomas v. Craig*, 60 Minn. 501.

121. 2. *Principles of Review.* — The appointment of a receiver is a matter resting within the trial court's discretion, which will not be reviewed except for gross abuse. *Briggs v. Neal*, (C. C. A.) 120 Fed. Rep. 224.

122. 4. *An Order Directing Persons Not Parties to the Proceedings to Pay Over Money or to turn over property to the receiver is final as to such persons, and hence is by them appealable.* *State v. O'Day*, 41 Oregon 495.

An Order Refusing to Settle a Receiver's Account, and dismissing his petition for a judgment for a deficiency in his costs and expenses, after the confirmation of the sale of the receivership property, is final, and appealable by the receiver.

Chapman v. Atlantic Trust Co., (C. C. A.) 119 Fed. Rep. 257.

123. 1. *Principles of Review.* — *Chickering v. Chickering*, (C. C. A.) 120 Fed. Rep. 69.

Injunction Bond. — Whether an injunction bond ought to have been required will not be considered on appeal. *Briggs v. Neal*, (C. C. A.) 120 Fed. Rep. 224.

125. 5. *Washington.* — *An Order Granting a Temporary Injunction* is appealable. See Ball, Annot. Codes & Stat. Wash. (1897), § 6500, *State v. Superior Ct.*, 28 Wash. 403.

An Order Refusing a Temporary Injunction is not appealable unless there is a finding that respondent is insolvent. *Peters v. Lewis*, 28 Wash. 366.

Where the Injunction Is Denied upon a Demurrer to the Complaint such denial is merely incidental to the rules upon the sufficiency of the complaint, and hence the order sustaining the demurrer and denying the injunction is appealable although it does not appear that the defendant is insolvent. *Peters v. Lewis*, 28 Wash. 366.

Wisconsin. — *An Order Refusing a Temporary Injunction* is expressly made appealable by Stat. Wis., § 3069. *Quayle v. Bayfield County*, 114 Wis. 108.

128. 2. *United States Courts.* — *Rice v. Ames*, 180 U. S. 371.

129. 1. *Kentucky.* — *Nienaber v. Tarvin*, 104 Ky. 149.

North Dakota. — *State v. Massey*, 10 N. Dak. 154.

132. 2. *Watkins v. Venable*, 99 Va. 440.

133. 3. *Murray v. Northern Pac. R. Co.*, 26 Mont. 268.

135. *b.* FINAL ORDERS — Readjustment of Costs. — See note 6.

136. *d.* TEMPORARY ALIMONY. — See note 2.

25. Decisions in Condemnation Proceedings — Generally. — See note 3.

137. **26.** Decisions on Motions for New Trial — *a.* GENERALLY. — See note 2.

b. ORDERS GRANTING NEW TRIAL. — See note 3.

140. **27.** Decisions Affecting Reference — *a.* GENERALLY. — See note 1. See also *supra*, II. 2. *c.* Decrees Ordering Reference.

143. **29.** Decisions Affecting Executions. — See note 2.

144. **31.** Decisions in Actions of Partition. — See note 6.

146. **33.** Appeals in Criminal Cases — *b.* UNDER MODERN PRACTICE. — See note 2.

148. Where an Appeal May Be Taken. — See note 1.

Decree Imposing Lien for Costs. — A decree making the fees of a master and of an attorney a lien upon property, and ordering a sale of the property in the event of failure to pay such costs, is final and appealable. *Neher v. Crawford*, 10 N. Mex. 725.

Security for Costs. — In *Maryland* an appeal lies from an order refusing to require a nonresident plaintiff to give security for costs. *Watson v. Glassie*, 95 Md. 658, in which case the court said: "The order appealed from denies and forever denies to the defendants, if it should be allowed to stand, a most valuable statutory right. And while it is true, as contended by the appellee, that costs are within the discretion of the court, and, therefore, no appeal will be allowed from an order allowing or denying them, yet the order appealed from in this case is not such an order. By it costs are not dealt with, but the defendant is deprived of his statutory right to secure himself against loss in case of certain contingencies." See also SECURITY FOR COSTS.

In *Wisconsin* orders requiring or refusing to require security for costs, not being enumerated under Stat. Wis., § 3069, which enumerates appealable orders, are not appealable. *Cullen v. Hanisch*, 114 Wis. 24.

135. **6.** Order Denying Motion to Retax Costs. — An appeal does not lie directly from an order denying a motion to retax costs; the appeal should be from the judgment. *State v. Millis*, 19 Mont. 444.

Commissioners' Costs. — An order denying a motion for the retaxation of a commissioner's costs is appealable. See Code Civ. Pro. N. Y., § 1356.

Matter of Collis, 78 N. Y. App. Div. 495.

136. **2.** *New York.* — *Davis v. Davis*, 78 N. Y. App. Div. 500.

3. *Mackinaw City v. U. S.*, (C. C. A.) 120 Fed. Rep. 252.

137. **2.** *Siraley v. Payne*, 43 W. Va. 185, citing with approval 2 ENCYC. OF PL. AND PR. 137.

3. *Kentucky.* — *Mergenthal v. South Covington, etc.*, St. R. Co., 104 Ky. 424.

Order Denying Motion to Amend Findings and Conclusions of Law. — An order denying a motion to amend the findings and conclusions of law is not appealable. *Lamprey v. St. Paul, etc.*, R. Co., 86 Minn. 509.

140. **1.** *Interlocutory Decree.* — *Shankle v. Whitley*, 131 N. Car. 168.

143. **2.** *Orders Confirming Execution Sale* are final and appealable. *Dakota Invest. Co. v. Sullivan*, 9 N. Dak. 303. See also *supra*, II. 15. *d.* *Setting Aside Judicial Sales.*

144. **6.** *Gilleylen v. Martin*, 73 Miss. 695, citing with approval 2 ENCYC. OF PL. AND PR. 144.

146. **2.** *State v. Morris*, 22 Mont. 1 [citing 2 ENCYC. OF PL. AND PR. 146]; *Campbell v. State*, 123 Ala. 72. See also *State v. O'Brien*, 19 Mont. 6.

Judgment by Confession Without Entry of Judgment. — In *Campbell v. State*, 123 Ala. 72, the record recited a judgment by confession for the fine and costs, but there was no judgment pronounced, and it was held that the defendant was not entitled to an appeal. *Following Ayers v. State*, 71 Ala. 11, and *Nichols v. State*, 100 Ala. 23.

148. **1.** *Appeal from Reversal of Conviction.* — Where a Circuit Court reverses a judgment of conviction in a

148. Demurrer. — See notes 2, 3.

Order after Conviction. — See note 7.

151. **III. PARTIES TO APPELLATE PROCEEDINGS — 1. Who May Appeal — a. IN GENERAL.** — See notes 1, 2.

154. **c. INTERVENORS — Necessary Prerequisites.** — See note 2. And see generally INTERVENTION.

155. See note 1.

157. **e. BY NONRESIDENT DEFENDANTS.** — See note 2.

f. BY SUCCESSFUL PARTY. — See notes 5, 6.

lower court, error lies on the part of the state from the Supreme Court to review the judgment of reversal. See Bates's Annot. Stat. Ohio (1897), § 7306a. *State v. Budd*, 65 Ohio St. 1.

148. 2. Demurrer to Indictment. — In *Montana* an appeal may be taken by the state from a judgment for the defendant on a demurrer to the indictment or information. See *State v. O'Brien*, 19 Mont. 6.

3. Demurrer Sustained to Complaint. — Where a demurrer is sustained to a criminal complaint filed in a justice's court, the state has no right of appeal under a statute which allows an appeal from a judgment "for the defendant on a demurrer to the indictment or information." *State v. Morris*, 22 Mont. 1.

7. "Order Made after Judgment" — Order Sustaining Plea of Former Acquittal. — In *Montana*, under a statute providing that an appeal may be taken by the state "from an order made after judgment affecting the substantial rights of the state," it has been held that the state is not entitled to an appeal from an order to the effect that the defendant's plea of former acquittal is valid. *State v. O'Brien*, 19 Mont. 6.

151. 1. *Kidd v. Morris*, 127 Ala. 393; *Ladd v. Kuhn*, 154 Ind. 313, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 151. See also the following cases:

Alabama. — *Roden v. Jasper Town*, etc., 122 Ala. 374.

Illinois. — *Anderson v. Steger*, 173 Ill. 112, per Cartwright, J.

Maryland. — *Grabill v. Plummer*, 95 Md. 56.

2. *Alabama*. — *Kidd v. Morris*, 127 Ala. 393.

Garnishment Proceedings. — *Santa Fe Pac. R. Co. v. Bossut*, 10 N. Mex. 322.

As Creditor — Appeal from Order Appointing Receiver. — In *Roden v. Jasper Town*, etc., 122 Ala. 374, it was held

that where in a proceeding instituted in a chancery court to dissolve a corporation under the statute (Civ. Code Ala., § 1291), a receiver is appointed, a creditor of the corporation, after the decree of dissolution, who files a petition in the cause for an order requiring the payment of his debts, but who does not make himself a party to the record, cannot appeal from the order of the court appointing the receiver.

154. 2. Other Parties Must Consent to Intervention. — One not a party to the record will not be permitted without notice to or consent of the parties to intervene. *Louisville, etc., R. Co. v. Com.*, 104 Ky. 226.

155. 1. See *Louisville, etc., R. Co. v. Com.*, 104 Ky. 226.

Persons Interested May Be Heard. — *Miller v. Socorro*, 9 N. Mex. 416.

Taxpayer. — Compare *Miller v. Socorro*, 9 N. Mex. 416.

157. 2. Manhard Hardware Co. v. Rothschild, 121 Mich. 657, citing 2 ENCYC. OF PL. AND PR. 157.

5. *Karter v. Peck*, 121 Ala. 636; *Gray v. Jones*, 178 Ill. 169, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 157. See also *Cottingham v. Greely*, 123 Ala. 479; *Watson v. Jones*, 121 Ala. 579.

Appeal by Demurrant Where Demurrer Is Sustained. — Where there are several grounds of demurrer and the demurrer is sustained on one ground, the demurrant is not entitled to appeal for the purpose of testing the questions involved in the other grounds of demurrer. *Cottingham v. Greely*, 123 Ala. 479; *Watson v. Jones*, 121 Ala. 579.

Appeal by Successful Defendant. — A defendant who has not sought any affirmative relief cannot appeal from a judgment dismissing the complainant's bill, though the order of dismissal was placed upon one of several grounds urged by the defendant, which was not the one that the defendant espe-

157. [Likewise a defendant against whom no liability has been adjudged cannot appeal. See note 6a.]

g. PARTIES FAILING TO APPEAL. — See notes 7, 8.

158. See note 1.

h. APPEALS BY REPRESENTATIVE PARTIES — (1) *Generally*. — See note 2.

159. (2) *Next Friend*. — See note 3.

160. *j.* ACTUAL CONTROVERSY MUST EXIST — *The Rule Stated*. — See note 2.

k. APPEALABLE INTEREST — (1) *Generally*. — See note 7.

161. *Definition*. — See note 1.

cially desired to have adjudicated. *Codlin v. Kohlhausen*, 181 U. S. 151.

Where Interlocutory Judgment Is for One Party and Final Judgment Is for Another. — Where an order is made dissolving an attachment, but final judgment is rendered for the plaintiff, the latter cannot appeal from the order dissolving the attachment. *Bogert v. Adams*, 5 Colo. App. 510.

Where Defendant in Criminal Prosecution Is Acquitted and Sentenced to Lunatic Asylum. — In *Mississippi* an appeal does not lie from an acquittal of murder on the ground of insanity, although defendant be sentenced to the lunatic asylum. *Caffey v. State*, 78 Miss. 645.

157. 6. *Gray v. Jones*, 178 Ill. 169, quoting with approval 2 ENCYC. OF PL. AND PR. 157.

6a. *Witt v. Baars*, 36 Fla. 119.

7. See also *McCallum v. Culpepper*, 41 Fla. 107; *McNamara v. Schwaniger*, 106 Ky. 1.

8. *Rose v. Hale*, 185 Ill. 378, citing with approval 2 ENCYC. OF PL. AND PR. 157.

Necessity for Cross-appeal. — In *Dressman v. Simonin*, 104 Ky. 693, it was held that the appellee unless he prosecutes a cross-appeal cannot question the validity of the ordinance under which the appellant asserts title.

158. 1. Review at Instance of Appellee. — Where the plaintiff alleges a partnership which the defendant denies, and the finding of the trial court is against the plaintiff, he cannot, on defendant's appeal, have such finding reviewed. *Mack v. Wurmser*, 135 Mo. 58.

2. *Shepherd v. Snodgrass*, 47 W. Va. 79, citing 2 ENCYC. OF PL. AND PR. 158.

Appeal by Residuary Devisee from Judgment of Partition. — A residuary devisee may, it would seem, appeal from a

judgment partitioning the lands of his testator without joining the personal representative. *King v. Middlesborough Town, etc., Co.*, 106 Ky. 73.

Committee of Non Compos. — Where an action is brought by the committee of a *non compos*, the committee rather than the *non compos* is the proper party appellant. *Shepherd v. Snodgrass*, 47 W. Va. 79.

Substitution of Assignee. — Where the record shows that after the judgment is rendered it is assigned to the plaintiff's attorneys, the contention that therefore such assignees should be substituted as the real parties in interest, instead of plaintiff, in the appellate court, is without merit; such substitution being neither required nor authorized by Code Iowa, § 3476, providing that no action shall abate by the transfer of any interest therein, nor by any other statute. *Emerson v. Miller*, 115 Iowa 315.

159. 3. Guardian ad Litem. — *Griswold v. Thornton*, 129 Ala. 454.

160. 2. *Wirth v. Wirth*, 181 Mass. 541.

7. *Ladd v. Kuhn*, 154 Ind. 313, citing with approval 2 ENCYC. OF PL. AND PR. 160.

Wisconsin. — *In re Aldrich*, 114 Wis. 308.

161. 1. *Ladd v. Kuhn*, 154 Ind. 313; *Penn Mut. L. Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659; *Shepherd v. Snodgrass*, 47 W. Va. 79, in each of which cases the court cited with approval 2 ENCYC. OF PL. AND PR. 161.

The Interest of a Citizen in the General Public Welfare is insufficient to sustain an appeal by him from a decision in a case in which he has no interest except as a citizen of the community which is primarily concerned in the decision of the case. *In re Aldrich*, 114 Wis. 308.

167. 1. SUBSEQUENT CONVEYANCE OF INTEREST. — See note 2.

m. APPEALS BY "PARTY OR PERSON AGGRIEVED" —

(1) *Generally.* — See note 4.

169. (2) *Construction of Statutes.* — See note 1.

170. See note 1.

(3) *Appeals from Probate.* — See note 3.

173. 2. Waiver of Right of Appeal — *a.* IN GENERAL. — See note 3.

b. BY STIPULATION. — See note 4.

167. 3. *Ward v. Ward*, 50 W. Va. 517, *citing* with approval 2 ENCYC. OF PL. AND PR. 167.

4. *Cunningham v. Porchet*, 23 Tex. Civ. App. 80, *citing* 2 ENCYC. OF PL. AND PR. 167.

By Stockholder. — A stockholder cannot appeal from an order appointing a receiver. *McFarland v. Pierce*, 151 Ind. 546.

Appeal from Order Settling Administrator's Account. — An administrator cannot as such appeal from an order, entered on the settlement of his account, disallowing a personal claim filed by him against the estate, since as administrator he is not aggrieved by such order. *In re Barker*, 26 Mont. 279.

Trustee Claiming Funds in Hands of Executor. — Where a trustee claims funds in the hands of an executor, but does not present such claim, he is not a party aggrieved by a decree distributing such funds. *Matter of Burdick*, 112 Cal. 387.

169. 1. *Shaw v. Humphrey*, 96 Me. 397.

170. 1. *McFarland v. Pierce*, 151 Ind. 546, *citing* 2 ENCYC. OF PL. AND PR. 170.

Meaning of Word "Aggrieved." — *Miller v. Fiss*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 66, *citing* 2 ENCYC. OF PL. AND PR. 170.

3. Appeal by Surety upon Probate Bond Given by Trustee. — The surety on a trustee's probate bond is not a party so directly interested that he can be considered as "aggrieved" by a decree of the court respecting the settlement of his principal's account. A surety upon such a bond has no right of appeal from a decree of a judge of probate allowing or disallowing the account filed by the principal on the bond, or by the principal's legal repre-

sentative. *Shaw v. Humphrey*, 96 Me. 397, in which case the court said: "The liability of a surety upon such a probate bond is only contingent upon the failure of his principal to pay the amount with which he may stand charged. The surety is not a party so directly interested that he can be considered as 'aggrieved' by a decree of the court respecting the settlement of his principal's account. It has accordingly been repeatedly held by this court that a surety upon such a bond has no right of appeal from a decree of a judge of probate allowing or disallowing the account filed by the principal on the bond, or by the principal's legal representative." *Citing Probate Judge v. Quimby*, 89 Me. 574; *Tuxbury's Appeal*, 67 Me. 267; *Woodbury v. Hammond*, 54 Me. 332.

173. 3. **Effect of Electing to Bring Error.** — In *Thomas v. Churchill*, 48 Neb. 266, a petition in error was filed in the Supreme Court on behalf of the unsuccessful party in the trial court for the purpose of having the proceedings in that court reviewed, but the parties entitled the case as being in the Supreme Court on appeal and treated it as such in the briefs filed. The court said: "It has been held that where the party bringing a case to this court files a petition in error, he will be presumed to have elected to proceed by error and not by appeal." *Citing Monroe v. Reid*, 46 Neb. 316; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900; *Woodard v. Baird*, 43 Neb. 310.

4. *Lundon v. Waddick*, 98 Iowa 478, *citing* with approval 2 ENCYC. OF PL. AND PR. 173.

Release of Errors. — *Ward v. Ward*, 50 W. Va. 517, wherein the court *quotes* with approval 2 ENCYC. OF PL. AND PR. 174, note under this catch line.

175. *c.* ACCEPTANCE OF BENEFITS — (1) *Payment of or on the judgment.* — See note 1.

Payment. — See note 2.

177. (3) *Tendering Back the Money Paid.* — See note 6.

178. (5) *By Execution of Judgment.* — (a) *Generally.* — See note 3.

179. *d.* INCONSISTENT POSITION. — See note 3.

180. See note 1.

181. *g.* PAYMENT OF JUDGMENT BY APPELLANT. — See note 3.

175. 1. *Manlove v. State*, 153 Ind. 80; *McGrew v. Grayston*, 144 Ind. 165; *Lundon v. Waddick*, 98 Iowa 478; *Dunham v. Randall, etc., Co.*, 11 Tex. Civ. App. 265, in each of which cases the court cited with approval 2 ENCYC. OF PL. AND PR. 174. See also *Glassburn v. Deer*, 143 Ind. 174; *Male v. Harlan*, 12 S. Dak. 627.

Acquiescence — Compliance with Terms of Writ of Mandamus. — *Jacksonville School Dist. v. Crowell*, 33 Oregon 11.

Presumption as to Truth of Answer in Bar. — Where the appellee files a verified answer in bar alleging that the appellant has voluntarily accepted the benefits of the judgment appealed from, and the appellant allows three months to elapse without denying its truth or questioning its legal sufficiency, it will be presumed that the facts stated in the answer are true and the appeal will be dismissed. *McGrew v. Grayston*, 144 Ind. 165; *Glassburn v. Deer*, 143 Ind. 174.

Where the Judgment Is Severable, so that an appeal as to one portion thereof will not affect the other portion, an acceptance of benefits under one portion will not estop the party so accepting from appealing as to the other portion. *Wishek v. Hammond*, 10 N. Dak. 72. See also *supra*, II. 8. *Appeal from Portion of Decision.*

2. *Smith v. Patton*, 128 Ala. 611, citing 2 ENCYC. OF PL. AND PR. 175.

Georgia. — *Owens v. Read Phosphate Co.*, 115 Ga. 768.

Where Judgment Is for Insufficient Amount and Party Is Ignorant of Mistake. — In *Jackson v. Brockton*, (Mass. 1902) 64 N. E. Rep. 418, the judgment was reversed because apparent of record that it was for a less amount than the plaintiff was entitled to, although he had accepted payment. The court said: "When a party has taken under a judgment only benefits to which he equally would be entitled

if the judgment were reformed, we see no reason why his acceptance of them, especially while ignorant of the mistake, should stand in the way of his getting his additional rights."

177. 6. *Dunham v. Randall, etc., Co.*, 11 Tex. Civ. App. 265, in which case the court followed *Paine v. Woolley*, 80 Ky. 581, and declared that *Murphy v. Murphy*, 45 Ala. 123, and *McCreeliss v. Hinkle*, 17 Ala. 459, do not support the contrary doctrine. The court also quoted with approval 2 ENCYC. OF PL. AND PR. 174-176.

178. 3. *Male v. Harlan*, 12 S. Dak. 627, citing 2 ENCYC. OF PL. AND PR. 178.

A Sale under a Decree of Foreclosure will prevent the plaintiff from appealing from so much of the decree as excepts a lien in favor of a defendant other than the mortgagee. *Male v. Harlan*, 12 S. Dak. 627.

179. 3. *Field v. Great Western Elevator Co.*, 6 N. Dak. 424 [citing 2 ENCYC. OF PL. AND PR. 179]; *Wheelock v. Myers*, 64 Kan. 47; *Male v. Harlan*, 12 S. Dak. 627.

In Criminal Cases — Effect of Acceptance of Pardon. — Where a defendant who has been convicted of seduction marries the girl and accepts a pardon, he is not entitled to appeal even though a fine and costs have been assessed against him, because his liability for the fine and costs cannot be reached except by overturning the judgment as a whole. *Manlove v. State*, 153 Ind. 80.

180. 1. *Effect of Appeal to Another Court.* — Where a party has a right to appeal to the District Court or to the Supreme Court, an appeal to the former will prevent him from appealing to the latter. *Field v. Great Western Elevator Co.*, 6 N. Dak. 424, citing 2 ENCYC. OF PL. AND PR. 180.

181. 3. *Springer v. Merchants' Nat. Bank*, 67 Ill. App. 317, citing 2 ENCYC. OF PL. AND PR. 181.

182. 3. Joint Parties — a. THE GENERAL RULE. — See note 5.

188. d. WHEN ONE JOINT PARTY MAY APPEAL ALONE. — See notes 1, 2.

189. e. PARTIES NOT UNITED IN INTEREST. — See notes 1, 2.

f. WHEN SEPARATE INTERESTS MAY APPEAL JOINTLY. — See notes 4, 5.

Contra. — *Cowell v. Gregory*, 130 N. Car. 80, Douglas, J., *dissenting* and declaring that the rule is well stated in 2 ENCYC. OF PL. AND PR. 181.

189. 8. French v. Peters, 177 Mass. 568, wherein the court in stating the general rule cited 2 ENCYC. OF PL. AND PR. 182. See also the following cases:

Florida. — *McCallum v. Culpepper*, 41 Fla. 107; *National Bank v. Newheart*, 41 Fla. 470.

Indiana. — *Mellott v. Messmore*, 158 Ind. 297.

Time. — *National Bank v. Newheart*, 41 Fla. 470.

When Appeal Will Be Dismissed. — It is a ground for dismissal that a joint party to the decree below has not been made a party to the appeal and is not brought in within the time allowed for taking an appeal. *National Bank v. Newheart*, 41 Fla. 470.

Fundamental Rule of Appellate Procedure. — In *Mellott v. Messmore*, 158 Ind. 297, the court said: "It is a fundamental rule in jurisprudence that before any court will proceed to adjudicate upon the subject-matter, it must first acquire jurisdiction over all the parties whose rights or interests will be necessarily affected by its judgment. Not having the power, under the facts, to decide this cause as an entirety, unless all of the necessary parties are brought into court as required by law, therefore we will not violate the well-settled rule which forbids the decision of a cause in fragments, by asserting authority to make a partial decision in this case, which must be regarded as an entire and indivisible cause, but may, and properly should, dismiss the appeal on our own motion." *Quoting Abshire v. Williamson*, 149 Ind. 248.

Vacation Appeal. — In *Indiana* the rule is that to give the Supreme Court jurisdiction of an appeal where the same is a vacation and not a term appeal, the appellants should make all their coparties to the judgment appealed from co-appellants and serve notice of the appeal upon them as re-

quired by Burns's Stat. Ind. 1901, § 647. *Brown v. Sullivan*, 158 Ind. 224.

In *Massachusetts* from a very early time independent parties joined in an action have had the right without joining their codefendants to have reversed so much of the erroneous judgment as affected themselves. *French v. Peters*, 177 Mass. 568, *citing Whiting v. Cochran*, 9 Mass. 532, and *Shirley v. Lunenburg*, 11 Mass. 379.

188. 1. South Portland Land Co. v. Munger, 36 Oregon 457, *citing* with approval 2 ENCYC. OF PL. AND PR. 188.

2. South Portland Land Co. v. Munger, 36 Oregon 457, *citing* with approval 2 ENCYC. OF PL. AND PR. 188.

Objection Waived by Failure to Move for Dismissal. — Even though several parties are entitled to an appeal if it is taken by one of them only, the objection that the others should have been made parties appellant will be deemed to have been waived unless the appellee makes a motion to dismiss on this ground. *Halpern v. Clarendon Hardwood Lumber Co.*, 64 Ark. 132, which case was decided under Sand. & H. Dig. Stat. Ark., §§ 1031, 1032.

189. 1. South Portland Land Co. v. Munger, 36 Oregon 457.

2. Nonappealing Defendants need not be made parties to an appeal by a defendant where, owing to the distinct and several interests of the appealing defendant, the judgment may be reversed without disturbing the interests of the nonappealing defendants. *South Portland Land Co. v. Munger*, 36 Oregon 457, which was an appeal by a tenant in common from a decree against tenants in common.

4. Frank v. Zeigler, 46 W. Va. 614, *quoting* with approval 2 ENCYC. OF PL. AND PR. 189.

5. Frank v. Zeigler, 46 W. Va. 614, *quoting* with approval 2 ENCYC. OF PL. AND PR. 189.

Joinder of Parties to Creditor's Bill. — Creditors may join in an appeal from a decree in a suit to set aside a fraudulent conveyance. *Frank v. Zeigler*, 46 W. Va. 614.

- 190.** *h.* WHO ARE STATUTORY COPARTIES. — See note 4.
192. *j.* WHO MUST BE JOINED AS APPELLEES. — See note 1.
 1. See also *supra*, III. 3. *e. Parties Not United in Interest.*
k. JOINDER OF NECESSARY PARTIES JURISDICTIONAL. — See note 2.
195. *m.* VOLUNTARY APPEARANCE. — See note 1.
196. *q.* APPEAL FROM JUSTICE'S COURT. — See note 2.
4. Substituted Parties — *a.* APPEAL IN BEHALF OF DECEASED PARTY — (1) *In General.* — See note 5.
197. *In Name of Deceased Party.* — See note 2.
General Appearance No Waiver. — See note 3.
 (2) *By Whom Properly Taken.* — See note 5.
199. (4) *After Assignment of Error.* — See note 2.
b. DEATH OF JOINT APPELLANT. — See note 4.
200. *c.* DEATH OF SOLE APPELLEE — *After Appeal Is Taken.* — See note 4.

190. 4. Who Are Statutory Adverse Parties. — See *Power v. Murphy*, 26 Mont. 387, wherein it was held that on an appeal from a judgment of foreclosure and for any deficiency after sale of the mortgaged property, by creditors of the mortgagor claiming liens on the mortgaged property, the mortgagor is a necessary party defendant.

192. 1. *Hopkins v. Satsop R. Co.*, 18 Wash. 679, *citing* 2 ENCYC. OF PL. AND PR. 192. See also *King v. Middlesborough Town, etc., Co.*, 106 Ky. 73; *Field v. Wolf, etc., Dry-Goods Co.*, (C. C. A.) 120 Fed. Rep. 815.

Judgment Against Some but in Favor of Other Defendants. — Where judgment is rendered against some of the defendants and in favor of others, only those in whose favor judgment is rendered are required to be joined as co-appellees on an appeal by the plaintiff from the judgment against him. *Kaufman v. Preston*, 158 Ind. 361.

2. *Kaufman v. Preston*, 158 Ind. 361; *Hays v. Pugh*, 158 Ind. 500; *Field v. Wolf, etc., Dry Goods Co.*, (C. C. A.) 120 Fed. Rep. 815.

195. 1. *King v. Middlesborough Town, etc., Co.*, 106 Ky. 73, wherein it was held that any possible error in the omission of a party was cured by his coming in and moving to be made a party and joining in the prosecution of the appeal. See also *U. S. Blowpipe Co. v. Spencer*, 46 W. Va. 590. See APPEARANCES.

196. 2. *Ravenal v. Ingram*, 131 N. Car. 549. See also JUSTICES OF THE PEACE.

5. *Booth v. Dotson*, 93 Va. 233,

quoting with approval 2 ENCYC. OF PL. AND PR. 196.

Alabama. — See also *Griswold v. Thornton*, 129 Ala. 454.

197. 2. *Booth v. Dotson*, 93 Va. 233, *quoting* with approval 2 ENCYC. OF PL. AND PR. 197.

3. *Booth v. Dotson*, 93 Va. 233, *quoting* with approval 2 ENCYC. OF PL. AND PR. 197.

5. A Personal Representative of a Receiver may be substituted to continue an appeal taken by the receiver prior to his death. *State v. German Exch. Bank*, 114 Wis. 436.

199. 2. *Iowa Statute.* — Under Code Iowa, § 4150, providing that the death of a party does not cause the proceedings in an action to abate, the court may determine an appeal after a party has died and before a substitution has been made. *Williams v. Williams*, 115 Iowa 521.

4. Death of One of Joint Parties — Amendment. — Where an appeal is sued out in the name of all of the parties cast, and it appears that after the rendition of the judgment one of the parties in whose name the appeal was taken had died, an amendment will be allowed so as to show that an appeal was taken in the name of all the surviving parties cast. *Griswold v. Thornton*, 129 Ala. 454.

200. 4. *McCowan v. Brooks*, 113 Ga. 386, *citing* 2 ENCYC. OF PL. AND PR. 200.

Rule Nisi Directed to Legal Representative. — Where the death of the sole defendant in error is suggested the court will either promulgate a rule to cover

200. Process. — See notes 5, 6.

201. *d.* DEATH OF JOINT APPELLEE. — See note 1.

203. 6. What the Record Must Show. — See notes 2, 3.

IV. FORMAL REQUISITES TO TRANSFER OF CAUSE — 1.

Prayer for Appeal — *a.* GENERALLY — Orders Granting Appeal. — See note 5.

204. See notes 1, 3.

such case or will in the particular case by order direct that a rule *nisi*, calling upon the legal representative to show cause why he should not be made a party, be served upon him in such manner as will be most effective in giving notice of the application to have him made a party. *McCowan v. Brooks*, 113 Ga. 384.

200. 5. *McCowan v. Brooks*, 113 Ga. 386.

6. Rule of Court Defining Practice. — If there is no statute prescribing the manner in which such representative shall be made a party and how notice of the fact that he is to be made a party shall be served upon him, the court may, by the promulgation of a general rule or the passage of an order in the particular case, direct the method to be adopted in making the representative a party, and declare what shall be sufficient notice to him of that fact. *McCowan v. Brooks*, 113 Ga. 386.

201. 1. Dismissal upon Death of Appellee. — In *Indiana* it has been held that a vacation appeal is dismissed, where one of the appellees, who appears in the court below in the capacity of trustee for creditors, dies after transcript is filed and before he is served with notice of appeal, and his successor is not made an appellee. *Hays v. Pugh*, 158 Ind. 500, in which case the court said: "It has been uniformly held by this court that the parties to a judgment appealed from, adverse to appellant, must be made appellees; that in vacation appeals this court only acquires jurisdiction over the parties to a judgment adverse to appellant who are named as appellees in the assignment of errors and who appear or are properly served with notice."

203. 2. Designation of Parties — *Et Al.* — All parties, both appellants and appellees, to an appeal should be individually named, either in the caption to or in the body of the entry of appeal. Those who are attempted to be included therein by the use of the abbreviation *et al.* cannot be considered

as parties to the appeal. *Continental Nat. Bldg., etc., Assoc. v. Miller*, 41 Fla. 418. See also *National Bank v. Newheart*, 41 Fla. 470.

3. *Farr v. Farr*, 113 Ga. 577.

5. *Bailey v. State*, 95 Tenn. 391 [*citing* 2 ENCYC. OF PL. AND PR. 203]; *Young v. State*, 41 Tex. Crim. 247.

Affidavit for Appeal from Justice's Court — *Arkansas Statute*. — In *Rust Land, etc., Co. v. Isom*, 70 Ark. 99, it was held under *Sand. & H. Dig. Stat. Ark.*, § 4438, providing that no appeal from a justice's court shall be dismissed for want of jurisdiction "because of any defect in the affidavit," that it is immaterial that the affidavit was made shortly before the rendition of the judgment.

Disqualification of Judge to Allow Appeal. — A justice of the peace who is personally interested in the judgment is disqualified to allow an appeal, as the allowance of an appeal is not a mere formal act but an exercise of discretion. *Gray v. Jones*, 178 Ill. 169.

204. 1. *Bailey v. State*, 95 Tenn. 391, *citing* 2 ENCYC. OF PL. AND PR. 204.

Failure of Record to Show Allowance of Appeal. — A transcript showing that "the defendant excepts and prays an appeal," etc., without showing additionally that the prayer for appeal was granted, is fatally defective. *Bailey v. State*, 95 Tenn. 391.

3. Certificate of Appeal Construed. — Where an action against two defendants results in a judgment in favor of one of them and against the other, and a motion for a new trial is made, and afterwards such motion is granted, and the certificate recites that the appeal is taken from "the judgment of the Circuit Court rendered against the plaintiff," the appeal will be regarded as having been made from the judgment on the trial rather than from the decision on the motion for a new trial. *Henry v. Couch*, 132 Ala. 570.

Amendment Which Amounts to Making New Order. — The court will not allow such an amendment of the order granting an appeal as will amount to a

205. *b.* IN OPEN COURT. — See note 1.

207. *h.* WHEN APPEAL TAKEN. — See note 1.

209. **3.** Appellate Process — *a.* IN GENERAL. — See note 3.

210. *c.* SERVICE JURISDICTIONAL. — See note 2.

212. *d.* CITATION — (1) *Definition and Formal Requisites* — By Whom Signed. — See note 1.

(2) *Return.* — See notes 4, 6.

213. *e.* STATUTORY NOTICE OF APPEAL — (1) *Strict Compliance with Statute.* — See notes 1, 2.

different order from that actually made. *Town v. Howieson*, 175 Ill. 85.

Amendment Allowing One Party Separate Appeal. — Where several parties are allowed an appeal the court should not make an amendment allowing one of the parties to appeal separately. *Town v. Howieson*, 175 Ill. 85.

Minute Showing Nature of Order Allowing Amendment. — At a subsequent term an amendment of the order allowing an appeal can be made only from some minute or memorial paper from which can be determined the precise nature of the order made by the court. *Town v. Howieson*, 175 Ill. 85.

205. **1.** In Texas, under Code Crim. Pro., art. 883, notice may be given in open court. *Young v. State*, 41 Tex. Crim. 247.

207. **1.** Jurisdiction to Revoke Order of Allowance. — After the expiration of the term the court has no jurisdiction to make an order vacating an order allowing an appeal. *Springer v. Merchants' Nat. Bank*, 67 Ill. App. 317.

209. **3.** Florida Statute. — In Florida by Statute it is provided that the record of the entry of an appeal in the chancery order book shall take the place of and be a substitute for the former procedure of either giving oral notice of the appeal if taken in open court, or, if taken in vacation, of the issuance and service upon the appellee of the citation on appeal. It has been held that the record of the entry of appeal in the chancery order book is the notice, and the only notice, prescribed by the statute to the appellee of the taking and pendency of the appeal in the Supreme Court and of the transfer of the cause to that court for re-examination. Hence such record of the entry of appeal is essentially necessary to give the Supreme Court jurisdiction over the person of the appellee, and if the clerk fails to record the entry of appeal the Supreme Court will not, on a motion to dismiss, make an order requiring

the clerk to record such entry *nunc pro tunc*. *Chamberlain v. Finley*, 40 Fla. 91.

210. **2.** Oregon. — *Taylor v. Lapham*, 41 Oregon 479.

212. **1.** *Keneval v. State*, 107 Tenn. 581.

4. In Florida, if an appeal is taken within a period less than thirty days from the first day of the succeeding term of the appellate court, it must be made returnable to a day in such term more than thirty and not more than fifty days from the date of such appeal. If in such cases the appeal be made returnable to the first day of the term it is entered in direct violation of law and confers no jurisdiction upon this court. *Garrison v. Parsons*, 41 Fla. 143.

6. Florida Statute. — *Whitfield v. Leonard*, 38 Fla. 1, was a case decided under Rev. Stat. Fla., §§ 1273, 1461, which required, where an appeal was taken in vacation, that the clerk should issue a citation to the appellee, which should be returnable with the appeal and should be served twenty-five days before the return day. It was held that service made only twenty-three days before the return day of the citation was not sufficient to give the court jurisdiction to appear and determine the appeal.

213. **1.** *Duryea v. Sibley*, 76 Minn. 55, citing 2 ENCVC. OF PL. AND PR. 213. See also the following cases:

Indiana. — *Hays v. Pugh*, 158 Ind. 500.

Iowa. — *Clayton v. Sievertsen*, 115 Iowa 687.

Montana. — *Threlkeld v. O'Neal*, 26 Mont. 209.

Ohio. — *Browne v. Wallace*, 66 Ohio St. 57.

Oregon. — *Taylor v. Lapham*, 41 Oregon 479.

Notice of Appeal Need Not Be Incorporated in Bill of Exceptions. — *White v. White*, 112 Cal. 577, wherein it was

- 214.** (2) *General Requisites — To Whom Addressed.* — See note 1.
What It Must Specify. — See note 2.
 (3) *Signature — By Whom Signed.* — See note 3.
- 215.** See note 1.
- 216.** (4) *Construction of Notice — Construction Liberal.* — See notes 5, 6.
- 217.** (5) *Description of Judgment.* — See note 2.
- 221.** (8) *By Whom Service May Be Made — Statutory Person.* — See note 1.

held that such notice is a matter which appears in the record proper.

When Service Complete. — Under Civ. Prac. Act Nev., §§ 497, 498 (Comp. Laws Nev., §§ 3592, 3593), providing that service of notice of appeal may be made by mail, and that in case of such service the time of service shall be extended one day for every twenty-five miles distance between the place of deposit and place of address, it has been held that where the appellee is not required to act upon the notice in any particular time, the service is complete upon the deposit of the notice in the post-office. *Simon v. Matson*, 25 Nev. 405.

213. 2. *Duryea v. Sibley*, 76 Minn. 55, citing 2 ENCYC. OF PL. AND PR. 213.

The Giving of a Bond Is Not Sufficient, as the bond does not perform the office of the notice of appeal. *Duryea v. Sibley*, 76 Minn. 55.

Waiver of Notice. — In *Nevada* the statutory notice of appeal cannot be waived. *Marx v. Lewis*, 24 Nev. 306.

In Florida by Statute it is required that the entry of an appeal in a chancery cause shall be recorded in the chancery order book, the record of such entry taking the place of notice of appeal. *Chamberlain v. Finley*, 40 Fla. 91.

214. 1. *Who Is an "Adverse Party."* — The grantor in a conveyance of property claimed to be fraudulent as to creditors is not a necessary party to a suit to set aside such conveyance, and, as his interests cannot be affected by the result, he is not an "adverse party," and the notice of appeal need not be served on him. *Bennett v. Minott*, 28 Oregon 339.

Defendants Who Have Been Dismissed need not be served with notice. *Bliss v. Grayson*, 24 Nev. 422, wherein the appeal was by a defendant.

Notice to State in Proceedings in Behalf of State. — In *State v. Estes*, 34 Oregon

196, it was held that where proceedings are instituted by the state on the relation of certain persons to revoke a physician's license, the notice of appeal may be served on the state and need not be served on the relators, because the proceeding is *quasi* criminal in its nature.

2. No Specific Form of Notice Is Required where none is designated by the statute. *Bliss v. Grayson*, 24 Nev. 422.

Form of Notice. — In *Bliss v. Grayson*, 24 Nev. 422, will be found set forth in full a notice which was held to be sufficient although it contained a clerical error.

Specification of Grounds of Appeal. — Where the statute requires a statement of the grounds of appeal substantial compliance with such requirement is sufficient. *State v. Estes*, 34 Oregon 196.

3. Hogueland v. Arts, 113 Iowa 634, citing 2 ENCYC. OF PL. AND PR. 214. See also *State v. Estes*, 34 Oregon 196.

215. 1. *Waiver of Objection to Signature.* — Where the respondent's counsel repeatedly recognize as the appellant's attorneys the attorneys who signed the notice of appeal, the respondent cannot thereafter object that the notice was signed without authority. *State v. Donovan*, 10 N. Dak. 610.

216. 5. *Bliss v. Grayson*, 24 Nev. 422, citing 2 ENCYC. OF PL. AND PR. 216.

6. Bliss v. Grayson, 24 Nev. 422, citing 2 ENCYC. OF PL. AND PR. 216.

217. 2. *Mistake in Date of Judgment.* — *Paul v. Cragnaz*, 25 Nev. 293.

Clerical Errors are immaterial. *Bliss v. Grayson*, 24 Nev. 422, wherein the appeal was taken from an order denying a motion for a new trial and the word "denying" was omitted.

Reasonable Certainty in Describing the Judgment is sufficient. *State v. Estes*, 34 Oregon 196.

221. 1. *Neuberger v. Boyce*, 29 Oregon 458.

221. (g) *How Service May Be Made* — (a) *Personal Service* — *How Personal Service Made.* — See note 3.

222. (b) *On Adverse Party.* — See note 1.

(c) *On Attorney of Record.* — See note 4.

223. *Where More than One Attorney.* — See note 5.

226. (f) *Service by Publication* — *When Substituted Service May Be Made.* — See note 7.

227. (10) *Proof of Service* — *By Acknowledgment.* — See note 2.

229. *Amendment of Return.* — See note 3.

(11) *Filing.* — See note 4.

When to Be Filed. — See note 5.

221. 3. *Service by Mail.* — In *Nevada* service may be made by mail. See Civil Prac. Act Nev., §§ 497, 498 (Gen. Stat. Nev., §§ 3592, 3593). *Simon v. Matson*, 25 Nev. 405.

To What Post-office Mailed. — *Fisk v. Hunt*, 33 Oregon 424, in which case it was decided, under Hill's Annot. Laws Oregon, §§ 528, 529, that the notice must be addressed and mailed to the appellee's post-office.

222. 1. *Who Are Adverse Parties.* — Codefendants as to whom the case is dismissed before judgment are not adverse parties upon whom motion of an appeal by the other defendants must be served. *Bliss v. Grayson*, 25 Nev. 329.

Service upon Party Who Has Resident Attorney. — Service may be made upon a party even though his attorney resides in the county, under Hill's Annot. Laws Oregon, § 531. *Neuberger v. Boyce*, 29 Oregon 458, *citing* *Butler v. Smith*, 20 Oregon 129.

Under California Statute. — Code Civ. Pro. Cal., § 940, requires the notice to be served on the adverse party, "that is to say, upon all whose rights may be affected by a reversal of the judgment." *Bullock v. Taylor*, 112 Cal. 147, which was an action brought for breach of contract, the plaintiff alleging that the contract was executed by the defendants as copartners. A verdict was returned in favor of the plaintiff against one of the defendants who appealed, but his notice of appeal was served on the plaintiff only. It was held that the defendants against whom no judgment was rendered should have been served with notice of appeal, as they would be affected by a reversal of the judgment.

4. *Neuberger v. Boyce*, 29 Oregon 458, *citing* with approval 2 ENCYC. OF PL. AND PR. 222.

Service upon Nonresident Attorney. — Service upon a nonresident attorney,

if made in the county where the trial was had, is good. *Neuberger v. Boyce*, 29 Oregon 458.

223. 5. *On Attorney Representing Different Appellees* — *Under Washington Statute.* — Under Ball. Annot. Codes & Stat. Wash. (1897), § 6503, which provides that notice of appeal may be served on the prevailing party or his attorney, and under § 6518, which provides that "no appeal shall be dismissed for any informality or defect in the notice of appeal or the service thereof, if from the notice or other parts of the record on appeal it appears that the adverse party has had sufficient notice of the appeal," a notice served upon the attorney for all the prevailing parties, but addressed to him as attorney for but one of them, is sufficient. *Matter of Murphy*, 26 Wash. 222.

226. 7. *Fisk v. Hunt*, 33 Oregon 424, *quoting* 2 ENCYC. OF PL. AND PR. 226.

227. 2. *Presumption as to Regularity of Acknowledgment.* — Where nothing appears in the record to show the residence of respondent's attorney it will be presumed that he resides in the county where the trial was had, and that his admission of service of a notice of appeal was there made. *Bennett v. Minott*, 28 Oregon 339, *following* *Roy v. Horsley*, 6 Oregon 270.

229. 3. *Discretion of Court.* — In *Fisk v. Hunt*, 33 Oregon 424, it was held that leave to amend is in the discretion of the court.

4. *Threlkeld v. O'Neal*, 26 Mont. 209.

What Constitutes Filing. — In order to constitute a filing, the notice must be actually delivered to the clerk and be properly indorsed by him. *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 264.

5. *Nevada.* — *Spafford v. White River Valley Land, etc., Co.*, 24 Nev. 184.

230. See note 1.

(12) *What Record Must Show.* — See note 3.

231. By Evidence Outside Record. — See note 1.

(13) *Amendment of Notice.* — See note 2.

234. 4. Affidavit on Appeal — In General. — See note 4.

238. 5. Time for Taking Appeal — *c.* PERFECTION OF APPEAL. — See note 7.

239. *d.* STATUTES OF LIMITATION JURISDICTIONAL — (1) Generally. — See note 1.

230. 1. *Spafford v. White River Valley Land, etc., Co.*, 24 Nev. 184.

3. Recitals in Abstract of Record. — An abstract of record reciting that "plaintiff served, due, legal, and timely notice of appeal" sufficiently shows that service of notice was made on all of the defendants and persons required to be served. *Oxford State Bank v. Holscher*, 115 Iowa 196.

Recital of Notice in the Sentence is insufficient. *Young v. State*, 41 Tex. Crim. 247.

Recital of Notice in the Bill of Exceptions is insufficient. *Young v. State*, 41 Tex. Crim. 247.

231. 1. *Cochran v. Baker*, 34 Oregon 555, wherein 2 ENCYC. OF PL. AND PR. 231 was cited *obiter*, merely as showing that respectable authorities can be cited in support of the doctrine that the record may be corrected.

2. *Keneval v. State*, 107 Tenn. 581.

234. 4. See also *Abernathy v. Mitchell*, 113 Ga. 127.

Verification of Statement by Counsel. — Under Mills's Annot. Stat. Colo. (1891), § 2427, which directs that the statement of appeal be verified but is silent as to who may verify it, it has been held that verification by the appellant's counsel is sufficient. *Daum v. Conley*, 27 Colo. 56, in which case the court said: "The statement is verified by two counsel for appellants, who state that the allegations therein are true of their own knowledge, and that they make the verification on behalf of their respective clients, because they are more familiar with the facts than they are. This showing is sufficient."

238. 7. *Reg. v. Joseph*, 11 Quebec K. B. 211, 4 Can. Crim. Cas. 126, citing 2 ENCYC. OF PL. AND PR. 238.

Failure to Give Notice — Dereliction of Officers. — In *Alabama* the giving of an appeal bond makes effective the taking of an appeal; and when executed within a year after the rendition of

judgment, delay in giving notice of the appeal, if not shown to have been caused by reason of the appellant's fault or to have been caused otherwise than by the failure of the officers of the court to perform the duties required by the statute, does not constitute a ground for dismissing the appeal or striking the assignments of error. *Martin Mach. Works v. Miller*, 132 Ala. 629.

239. 1. *Stierlen v. Stierlen*, 8 N. Dak. 297, citing with approval 2 ENCYC. OF PL. AND PR. 239. See also the following cases:

Alabama. — *Lide v. Park*, 132 Ala. 222; *State v. Baine*, 131 Ala. 176; *Elrod v. Smith*, 130 Ala. 212; *Central of Georgia R. Co. v. Alabama, etc., R. Co.*, 130 Ala. 559; *Lusk v. Capehart*, 129 Ala. 599.

California. — *Hatton v. Hatton*, 136 Cal. 353.

Kansas. — See *Weaver v. Lock*, 4 Kan. App. 335.

Montana. — *Warren v. Humble*, 26 Mont. 495.

Nebraska. — *Omaha L. & T. Co. Sav. Bank v. Knight*, 50 Neb. 342.

Statute Prospective. — In accordance with the general rule of construction a statute limiting the time within which an appeal may be taken will be construed to be prospective in its operation unless it is manifest that it was intended to operate retrospectively. *Rankin v. Schofield*, 70 Ark. 83.

Appeal from Order Discharging Attachment. — In *Kansas*, when an order discharging an attachment is made in any case, and the party who obtains such attachment excepts to such order for the purpose of having the same reviewed in an appellate court, the petition in error, to obtain such review, must be filed within thirty days from the discharge of the attachment, or the action of the trial court becomes final. *Weaver v. Lock*, 4 Kan. App. 335.

240. See note 1.

243. See note 1.

244. Waiver. — See note 1.

(2) *Extension of Time.* — See note 3.

246. (3) *Neglect of Officials.* — See note 5.

247. (4) *Statutory Power to Extend Time.* — See notes 1, 2.

240. 1. *Stierlen v. Stierlen*, 8 N. Dak. 297, citing with approval 2 ENCYC. OF PL. AND PR. 239 *et seq.* See also the following cases:

Alabama. — *State v. Baine*, 131 Ala. 176.

California. — *Matter of Calkins*, 112 Cal. 296.

Illinois. — *Ehlert v. Security Deposit Co.*, 72 Ill. App. 59.

Kentucky. — *Board of Councilmen v. Farmers' Bank*, 105 Ky. 811.

Louisiana. — *Hake v. Lee*, 104 La. 123.

Massachusetts. — *Weiner v. Wentworth*, 181 Mass. 15.

Montana. — *Charles Schatzlein Paint Co. v. Passmore*, 26 Mont. 500; *Morris v. McLaughlin*, 25 Mont. 151.

Nebraska. — *Renard v. Thomas*, 50 Neb. 398.

Oregon. — *Henrichsen v. Smith*, 29 Oregon 475.

An Evasion of the Statute by an Amendment Will Not Be Permitted. — Leave to file an amended certificate of appeal does not extend to the right of enlarging the appeal so as to defeat the statute limiting the time within which appeals must be taken. *Elrod v. Smith*, 130 Ala. 212.

After Mittimus Has Been Issued in Criminal Case. — In *Massachusetts* an appeal to the Superior Court by a person convicted of an offense and sentenced to imprisonment by a district or police court, including the Municipal Court of the City of Boston, taken after the *mittimus* has been issued and the prisoner has been removed from the court, is taken too late. *Weiner v. Wentworth*, 181 Mass. 15.

243. 1. *Stierlen v. Stierlen*, 8 N. Dak. 297, citing with approval 2 ENCYC. OF PL. AND PR. 239 *et seq.* See also the following cases: *Central of Georgia R. Co. v. Alabama*, etc., R. Co., 130 Ala. 559; *Lusk v. Capehart*, 129 Ala. 599; *Matter of Calkins*, 112 Cal. 296; *In re Reilly*, 26 Mont. 358; *Renard v. Thomas*, 50 Neb. 398.

Where Some of Several Appellants Are Barred. — *Vordermark v. Wilkinson*, 147 Ind. 56.

244. 1. *Reg. v. Joseph*, 11 Quebec K. B. 211, 4 Can. Crim. Cas. 126 [*citing* 2 ENCYC. OF PL. AND PR. 238]; *Lusk v. Capehart*, 129 Ala. 599.

3. Amendment of Judgment after Entry. — In *Hayes v. Silver Creek*, etc., Land, etc., Co., 136 Cal. 238, it was held that an amendment of the judgment operated to extend the time, and that the time within which the notice of appeal should be filed was to be calculated from the date of the amendment.

246. 5. **Omission of Clerk to Examine Box Containing Papers.** — In *Virginia* it has been held that the omission of the clerk to examine a box containing the papers, or, if he examines it, his mistake as to its contents, or failure to discover the papers, cannot change the law. Whatever may be the remedy of the party injured against the clerk, the statute of limitations begins to run from the actual receipt of the petition and record by the clerk. *Bull v. Evans*, 96 Va. 1.

247. 1. **Time Not Extended by Motion to Dismiss.** — Where a motion to dismiss is made on the ground that the appellant has not perfected the appeal within the time allowed by law and subsequently another motion to dismiss is made, the pendency of such prior motion will not excuse the appellant's laches. *Headstrom v. Hellieson*, 136 Cal. 498, in which case the ground of the motion to dismiss was the insufficiency of the appeal bond, and the appellant sought to excuse himself because the motion to dismiss was still pending and he did not know whether it would be granted or not. The court quoted as follows from *White v. White*, 112 Cal. 577, where the motion was based upon the failure of the appellant to file his transcript in time: "The fact that a previous motion to dismiss the appeal was pending did not of itself extend the time within which the appellant might file the transcript. Whether the pending of such motion would have been deemed by the court a sufficient ground for extending the time for fil-

248. *c.* WHEN STATUTE BEGINS TO RUN — (1) *From Entry of Judgment.* — See note 1.

249. See note 1.

(2) *From Rendition of Judgment.* — See note 3.

250. (5) *Notice of Entry under Code Procedure.* — See note 5.

251. *Construction of Statutes.* — See notes 1, 2, 3.

252. See note 1.

(6) *Final Judgment* — (c) *Motion for New Trial.* — See note 4.

ing the transcript need not be considered. The appellant made no application for such extension, and the respondent is entitled to enforce the rights conferred upon him by the rule."

247. 2. *Mistake of Law* — *Vermont Statute.* — Stat. Vt., § 1667, giving the county court discretionary power to allow a party to enter his appeal when he has been prevented from doing so by fraud, accident, or mistake, applies to a mistake of law as well as to one of fact, *c. g.*, where the appellant fails to enter his appeal through ignorance of a change in the law governing the time within which appeals must be entered. *Perry v. Wright*, 70 Vt. 615.

248. 1. *Martin v. Smith*, 11 S. Dak. 437 [citing 2 ENCYC. OF PL. AND PR. 248]. See also *Chamberlain v. Hedger*, 10 S. Dak. 290.

249. 1. *Elko-Tuscarora Mercantile Co. v. Wines*, 24 Nev. 305 [citing 2 ENCYC. OF PL. AND PR. 248]; *Bell v. Staacke*, 137 Cal. 307; *Duke v. Story*, 113 Ga. 112.

Premature Notice of Appeal. — *State v. Landes*, 26 Wash. 325.

3. *Decree Sustaining Demurrer to Bill* — *Effect of Permission to Amend.* — An appeal from a decree sustaining a demurrer to a bill in equity taken after the lapse of thirty days from the rendition of the decree will be dismissed on motion, although taken within thirty days after the expiration of the time allowed by the decree for amending the bill. *Lide v. Park*, 132 Ala. 222, which case was decided under Civ. Code Ala., § 427.

250. 5. *U. S. Mortgage Co. v. Marquam*, 41 Oregon 391.

Service of Copy of Order Sufficient. — The service upon the appellant's counsel of a copy of an appealable order is alone sufficient to set the statute of limitations to running. This, however, is not the exclusive method of service, which, it seems, may also be made by written notice without the

service of the order itself. *Keogh v. Snow*, 9 N. Dak. 458.

Where Appellant Has Actual Knowledge of Entry. — Under Ball. Annot. Codes & Stat. Wash. (1897), § 6502, which provides that an appeal from any order, other than a final order, must be taken "within fifteen days after the service of a copy of such order, with written notice of the entry thereof, upon the party appealing," the fifteen days' limitation does not begin to run until compliance with the statutory requirement of service of such written notice, irrespective of the fact that the appellant had actual knowledge of the entry of the order. *Otis v. Nash*, 26 Wash. 39.

251. 1. *Somers v. Ditmar*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 511 [quoting with approval 2 ENCYC. OF PL. AND PR. 251]; *Gabay v. Doane*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 661.

2. *Sommers v. Ditmar*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 511 [quoting with approval 2 ENCYC. OF PL. AND PR. 251]; *Gabay v. Doane*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 661.

3. *Sommers v. Ditmar*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 511, quoting with approval 2 ENCYC. OF PL. AND PR. 251.

252. 1. *Sommers v. Ditmar*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 511, quoting with approval 2 ENCYC. OF PL. AND PR. 251.

4. *Effect of Motion for New Trial.* — In *Walter v. Scofield*, 167 Mo. 537, it was said that the true date of the rendition of the judgment appealed from, where a motion for a new trial is overruled, is the date upon which such motion is overruled rather than the date on which the final judgment was rendered. The court said: "The defendants rely upon the case of *Ham v. St. Louis Public Schools*, 34 Mo. 182, where *Bates, J.*, said: 'We think that the time within which the writ of error may be brought should date from the day of the rendering of the judgment,

- 254.** (f) What Constitutes Final Decree. — See note 2.
255. (g) *Second Appeal*. — See note 10.
 (h) *Party under Disability*. — See note 11.
256. f. COMPUTATION OF TIME — Sunday. — See note 4.
258. g. WHAT RECORD MUST SHOW. — See note 1.
 6. Transcript on Appeal. — See BILLS OF EXCEPTIONS.
 a. IN GENERAL. — See note 2.
 b. WHAT TRANSCRIPT IS. — See note 7.
 Original Papers. — See note 8.
259. See note 1.
 c. WHAT TRANSCRIPT INCLUDES. — See note 2.

without regard to the motion for a new trial.' Bay, J., concurred, in this view, and Dryden, J., dissented. The St. Louis Court of Appeals followed this ruling in *Guardian Sav. Bank v. Reilly*, 8 Mo. App. 544. But this view did not long remain the law of this state, for in *Riddlesbarger v. McDaniel*, 38 Mo. 139, the court, speaking through Wagner, J., held that if a motion for a new trial was filed, the whole matter remained in the breast of the court so long as the motion for new trial was pending, and carried the whole case over from term to term until the motion for new trial was acted upon, and that 'until that result is reached, it cannot be said that the cause is finally determined.' See also *Eaves v. State*, 113 Ga. 749; *Duke v. Story*, 113 Ga. 112.

254. 2. *Galentine v. Brubaker*, 147 Ind. 458, citing 2 ENCYC. OF PL. AND PR. 254.

255. 10. *Vordermark v. Wilkinson*, 147 Ind. 56.

11. A Statutory Extension to Persons under Disability does not operate to extend the time for appeal as to those not under disability. *Vordermark v. Wilkinson*, 147 Ind. 56.

256. 4. *American Tobacco Co. v. Strickling*, 88 Md. 500, citing 2 ENCYC. OF PL. AND PR. 256.

258. 1. *Lee v. Hammond*, 114 Wis. 550.

2. Necessity for Transcript. — It is the duty of the appellant to file a transcript of the record, otherwise the appellate court cannot review the case and will be under the necessity of dismissing the appeal. *American Contract, etc., Co. v. Perrine*, 40 Fla. 412.

7. A Certified Copy of Docket Entries does not constitute a full transcript, within the meaning of a statute re-

quiring a "full transcript." *State v. Wells*, 73 Vt. 265.

Where No Transcript Is Sent Up. — In the absence of a certified transcript the Supreme Court does not acquire jurisdiction to review the judgment below. *Peck v. Nebraska L. & T. Co.*, 50 Neb. 227; *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590.

Necessity for Order of Court. — In *Kansas* it has been held that it is not necessary that a transcript should be prepared pursuant to an order of the trial court, and that it is sufficient if it is duly prepared and certified by the clerk. *Hornaday v. State*, 62 Kan. 822.

8. *Peck v. Nebraska L. & T. Co.*, 50 Neb. 227, holding that the parties cannot by stipulation bring into the Supreme Court the original pleadings certified as such by the clerk of the District Court. See also *State v. Wells*, 73 Vt. 265.

In *Montana* original written exhibits constitute a part of the transcript, where they are attached thereto and are duly authenticated by the certificate of the trial judge; but not otherwise. *Stevens v. Ravalli County*, 25 Mont. 306.

In *Nevada*, by statute, the appellant has a right, upon an appeal from an order made on a motion for a new trial, to file the original papers. *Bliss v. Grayson*, 24 Nev. 422.

259. 1. *Alabama*. — *Bodine v. State*, 129 Ala. 106, wherein it was held that the original papers upon which a plea in abatement was heard should if necessary have been brought up under the rules.

2. *Black v. Pate*, 130 Ala. 514; *Irby v. Southern Bldg., etc., Assoc.*, 67 Ark. 287.

Designation of Certain Portions of Pleadings and Evidence by Appellant. — Where

260. *d.* RECORD PROPER — (1) *Generally* — *At Law*. — See note 3.

262. *In Equity*. — See note 1.

263. (2) *Pleadings*. — See note 5.

264. See notes 1, 2, 3.

Remand for Repleader. — See note 4.

Exhibits. — See note 5.

265. (3) *Jurisdictional Facts*. — See note 1.

the certificate of the clerk shows that the transcript has been made up under specific instructions from the appellant, and, notwithstanding the protest of the appellee, contains only such matters as the appellant has directed him to include, the appeal will be dismissed. *Charter Oak Stove, etc., Co. v. Rice*, 108 La. 699.

Useless and Immaterial Matter should not be put into the transcript. *General Electric Co. v. Black*, 19 Mont. 110.

260. 3. *White v. White*, 112 Cal. 577; *Underwood v. David*, 9 Wyo. 178.

Executions and the officers' returns thereon are a part of the record. *Underwood v. David*, 9 Wyo. 178.

Decree. — In *White v. White*, 112 Cal. 577, it was held that a decree is properly shown by a transcript of the record rather than by a bill of exceptions.

262. 1. *Wheeler v. Grand Trunk R. Co.*, 70 N. H. 607.

Deed. — In *Irby v. Southern Bldg., etc., Assoc.*, 67 Ark. 287, wherein it was sought to foreclose a mortgage, the mortgage was exhibited with the cross-complaint which alleged that the mortgagor's wife joined in its execution. The chancellor so found and rendered a decree of foreclosure, but as the appellant failed to make said mortgage a part of the transcript it was held that the court on appeal was bound to conclude that the chancellor's findings were correct.

263. 5. *Mallinckrodt Chemical Works v. Nemnich*, 169 Mo. 388; *Ketchum v. Harrison*, 62 Neb. 709; *Peck v. Nebraska L. & T. Co.*, 50 Neb. 227; *Lewis Invest. Co. v. Boyd*, 48 Neb. 604.

All of the Pleadings should be included, and not merely so much of the pleadings as the appellant sees fit to bring up. *Charter Oak Stove, etc., Co. v. Rice*, 108 La. 699.

264. 1. *Where Pleading Is Amended* — *Necessity to Bring Up Original*. — On an appeal from a judgment entered

upon an amended complaint it is not necessary to include in the transcript the original complaint, the demurrer thereto, or the order made by consent sustaining the demurrer. *Butte Butchering Co. v. Clarke*, 19 Mont. 306.

2. *Rejected Amendment*. — A proposed amendment which is not allowed by the court should be incorporated in the bill of exceptions, and it is error to attempt to bring it up as a part of the record. *Turner v. Camp*, 113 Ga. 339.

3. *Demurrer*. — In *Missouri*, where a demurrer is sustained and judgment entered thereon, a bill of exceptions for the purpose of preserving the demurrer is unnecessary. *Mallinckrodt Chemical Works v. Nemnich*, 169 Mo. 388.

Plea Stricken Out. — An alleged error of the trial court in striking a plea from the files cannot be considered on appeal, where the abstract of record, instead of setting forth the plea, contains only a statement of counsel that the plea was to the effect that another suit was pending at the time of the commencement of this suit, etc. *Chamberlin v. Cary*, 169 Ill. 34.

4. *Affirmance Where Transcript Does Not Contain Pleading*. — Where no transcript of the pleading is presented and the court is therefore unable to determine whether the judgment complained of was within the issues the judgment will be affirmed. *Ketchum v. Harrison*, 62 Neb. 709.

5. *Grand Lodge, etc., v. Furman*, 6 Okla. 649 [citing 2 ENCYC. OF PL. AND PR. 264]; *Black v. Pate*, 130 Ala. 514.

265. 1. *Iowa*. — *Clayton v. Sievertsen*, 115 Iowa 687.

Sufficient Showing as to State and County in Which Case Was Tried. — A bill of exceptions which recites that "at the April term, 1901, of the city court of Bainbridge, his honor B. B. Bower, judge of said court, presiding," a designated case came on to be tried and was tried, and which is duly certified by the judge named, sufficiently

266. See notes 1, 2.

267. (4) *On Appeals from Orders.* — See note 1.

(5) *Copies of Verdict and Judgment.* — See notes 2, 3.

268. *c.* MATTERS PROPERLY INCLUDED IN BILL OF EXCEPTIONS. — See note 1.

(2) *Instructions and Evidence* — *Instructions.* — See note 2.

269. *Evidence.* — See note 3.

270. (4) *Record of Other Cases.* — See note 1.

(5) *Affidavits.* — See note 2.

shows that the case was tried in the city court of Bainbridge in the state of Georgia. *Perry v. State*, 113 Ga. 936.

266. 1. *Missouri.* — *Hull v. Beard*, 80 Mo. App. 200.

2. *St. Louis Southwestern R. Co. v. Russell*, 64 Ark. 236.

267. 1. *Effect of Failure to Include Papers.* — Where the transcript does not contain the papers upon which the lower court acted in making the order from which the appeal is taken the appeal will be dismissed. *Schomberg Hardwood Lumber Co. v. Engel*, 114 Wis. 273.

Order Confirming Foreclosure Sale — Nebraska. — In *Ketchum v. Harrison*, 62 Neb. 709, at the time of a confirmation of a sale in a mortgage foreclosure proceeding, an order was entered giving to a party the right to cultivate, harvest, and remove the crops raised by him on the premises sold, from which the plaintiff, being the purchaser, appealed. No transcript of the pleadings forming the issues in the case or of the findings and decree at the time of the rendition of the decree of foreclosure being preserved in the record presented, it was held that the court could not determine whether the order complained of was within the issues tried and determined, and accordingly such order was affirmed.

2. *Randall v. Wadsworth*, 130 Ala. 633. See also *Rooney v. Farrell*, 62 Neb. 611.

Findings of Fact and Conclusions of Law made upon the hearing of an application for a supplemental and final decree cannot properly be included in a bill of exceptions, but are matters of record. *White v. White*, 112 Cal. 577.

Where Judgment Is Set Forth in Additional Abstract. — Though the appellant's abstract does not show an entry of a final judgment, yet if the respondent sets out such judgment in his additional abstract it is sufficient. *Kelly-*

Goodfellow Shoe Co. v. Vail, 84 Mo. App. 94.

3. *Ketchum v. Harrison* 62 Neb. 709.

268. 1. *Necessity for Bill of Exceptions to Show Notice of Appeal.* — In *White v. White*, 112 Cal. 577, it was held that the notice of appeal cannot be properly included in a bill of exceptions as it is a matter of record.

2. *Montana.* — *Sanderson v. Billings Water Power Co.*, 19 Mont. 236.

Nevada. — *State v. Simas*, 25 Nev. 432.

269. 3. *Menten v. Shuttee*, 11 Okla. 381.

In *Louisiana* it would seem that the evidence is brought up in the transcript of the record. *Charter Oak Stove, etc., Co. v. Rice*, 108 La. 699, in which case the appeal was dismissed because the transcript was made up under instructions from the counsel for the appellant, and failed to include portions of the evidence necessary to the proper consideration and disposition of the case.

In Criminal Cases — Transcript of Testimony Disregarded. — On error the court cannot legally look into a so-called transcript of testimony, unless it be embraced in the bill of exceptions, or otherwise authenticated by the trial court. *State v. Ackerman*, 62 N. J. L. 456.

270. 1. *Underwood v. David*, 9 Wyo. 178.

2. *Farrell v. Oregon Gold Co.*, 31 Oregon 474 [*citing* with approval 2 ENCYC. OF PL. AND PR. 270]; *People v. Louie Foo*, 112 Cal. 17; *U. S. v. Lesnet*, 9 N. Mex. 271.

Proceedings After Judgment. — It is immaterial that it is sought to review proceedings which took place after the rendition of judgment, the rule being the same as to affidavits used in such proceedings. *Farrell v. Oregon Gold Co.*, 31 Oregon 474.

271. See note 1.

272. (6) *Opinion* — **Generally.** — See note 1.

273. (7) *Motions and Rulings.* — See note 5.

274. See note 1.

276. *f.* TIME FOR FILING TRANSCRIPT — (1) *In General.* — See notes 7, 8.

271. 1. *Browning v. State*, 41 Fla. 271; *Farrell v. Oregon Gold Co.*, 31 Oregon 474, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 270. See also the following cases:

Colorado. — *Daum v. Conley*, 27 Colo. 56.

New Mexico. — *U. S. v. Lesnet*, 9 N. Mex. 271.

Oklahoma. — *Menten v. Shuttee*, 11 Okla. 381.

Texas. — *Watkins v. Cates*, 24 Tex. Civ. App. 384.

272. 1. *California.* — *Dundon v. McDonald*, 137 Cal. 1; *Belger v. Sanchez*, 137 Cal. 614, in which latter case the court said: "We must look to the judgment of the court, and not to its opinion." *Citing Keech v. Beatty*, 127 Cal. 177, and *O'Brien v. O'Brien*, 124 Cal. 422.

Illinois. — *Lawrence v. Oglesby*, 178 Ill. 122; *Alford v. Dannenberg*, 177 Ill. 331.

Montana. — *Cornish v. Floyd-Jones*, 26 Mont. 153.

An Opinion Submitted to the Appellate Court Without Objection may be considered as suggestive of what may be a just and lawful determination of the appeal. *Porter v. Industrial Printing Co.*, 26 Mont. 170.

The Opinion of the Illinois Appellate Court is not a record on which errors can be assigned on appeal to the Supreme Court. *Lawrence v. Oglesby*, 178 Ill. 122.

273. 5. *Instances.* — See also *Wilson v. State*, 156 Ind. 635, *per Monks, J.*

Motion for New Trial — *Indiana.* — *Wilson v. State*, 156 Ind. 635.

Motions in Arrest of Judgment. — In *Alabama* it has been held that in criminal cases motions in arrest of judgment and the rulings of the court upon them must be shown by the record proper of the orders and judgments of the court, and not incorporated in a bill of exceptions. *Taylor v. State*, 112 Ala. 69. See also **BILLS OF EXCEPTIONS.**

274. 1. *Rowland v. McGuire*, 67 Ark. 320, *quoting* 2 ENCYC. OF PL. AND PR. 273, 274. See also the following cases:

Alabama. — *Randall v. Wadsworth*, 130 Ala. 633; *Cottingham v. Greely-Barnham Grocery Co.*, 129 Ala. 200.

Illinois. — *Nester v. Carney Bros. Co.*, 98 Ill. App. 630.

Indiana. — *Fulton County v. Gibson*, 158 Ind. 471.

Missouri. — *State v. Wabash R. Co.*, 169 Mo. 563.

Oklahoma. — *Menten v. Shuttee*, 11 Okla. 381.

Instances of Collateral Motions Not Embodied in Record Proper — *Motion to Strike Out Pleadings.* — *Nester v. Carney Bros. Co.*, 98 Ill. App. 630. And see **BILLS OF EXCEPTIONS.**

Notice of Motion for New Trial. — *In re Reilly*, 26 Mont. 358.

Motion for New Trial. — Exceptions to the action of the court in overruling the motions for a new trial and in arrest are properly saved if the bill of exceptions shows such exceptions were saved, whether the record proper contains a recital concerning the saving of such exceptions or not. The bill of exceptions is the proper repository of exceptions to the overruling of the motion for a new trial. *State v. Wabash R. Co.*, 169 Mo. 563.

Motion for Reargument. — *Davis v. Nelson*, 73 Vt. 328.

Motion for Continuance. — In *Nebraska* an assignment of error for the overruling of an application for a continuance is unavailing where such application is not included in the transcript. *Russell v. State*, 62 Neb. 512.

276. 7. *State v. Simmons*, 64 Kan. 795.

Immediately. — The transcript may be filed on the day that the appeal is allowed. *Jacobs v. Oren*, 30 Oregon 593, *following* *Hughes v. Clemens*, 28 Oregon 440.

The Record Must Show the Date of the filing of the transcript, and omissions in this regard cannot be supplied by oral statements of counsel made in the trial court. *Williams v. Savage*, (C. A.) 120 Fed. Rep. 497.

8. *In re Barker*, 28 Colo. 257; *State v. Simmons*, 64 Kan. 795; *Hake v. Lee*, 104 La. 123; *State v. Wells*, 73 Vt. 265.

277. Time Jurisdictional. — See notes 1, 2.

279. See notes 1, 2.

(2) *Extension of Time* — Generally. — See notes 6, 7.

277. 1. *Indian Territory*. — Potts v. Watkins, 3 Indian Ter. 566, which case was decided under Mansf. Dig. Ind. Ter., § 1271.

Kansas. — State v. Simmons, 64 Kan. 795.

United States. — Williams v. Savage, (C. C. A.) 120 Fed. Rep. 497.

2. *Florida*. — Savannah, etc., R. Co. v. Sessoms, 40 Fla. 390.

Iowa. — Spinney v. Halliday, 115 Iowa 420.

Louisiana. — State v. Todd, 104 La. 241.

Montana. — Trotter v. Kleinschmidt, 21 Mont. 532.

Computation of Time. — The period within which the appellant is required to file a transcript of the record with the clerk of the appellate court begins with the day the appeal is granted. Daum v. Conley, 27 Colo. 56.

In *Washington*, when there is no showing of prejudice, the appeal will not be dismissed for delay in the transmission of the record to the Supreme Court. Gay v. New Whatcom, 26 Wash. 389.

279. 1. *In re Barker*, 28 Colo. 257; Wilson v. People, 25 Colo. 375; Shadville v. Barker, 26 Mont. 45. See also White v. White, 112 Cal. 577.

Where Delay Is Not Prejudicial to Appellee. — In *Alabama* it has been held that where, before the expiration of twenty days from the date of an appeal, the then pending term of the Supreme Court adjourns, delay in filing the transcript until the next term of the court is not cause for dismissal of the appeal, where such delay is shown not to have been prejudicial to the appellee. Birmingham R., etc., Co. v. Birmingham Traction Co., 122 Ala. 349.

Construction of Rules of Supreme Court of California. — Rule II. of the Supreme Court of California requires the appellant to file a transcript of the record within forty days after the appeal is perfected, and the bill of exceptions and the statement (if there be any) are settled; and by Rule V. it is provided that if the transcript be not filed within the time prescribed, the appeal may, on motion of the respondent and notice thereof to the appellant, be dismissed. It is further provided that if

there be a bill of exceptions or statement, the appellant may have forty days after the same is settled in which to file the transcript. In *White v. White*, 112 Cal. 577, it was held that if the time within which the bill of exceptions or statement may be proposed or settled has not expired, or if proceedings for its settlement are still pending before the judge and undetermined by him, the appellant is not in default for failure to comply with the rule for filing the transcript. The refusal of the judge to settle the proposed bill, or a disallowance of the same after proceedings for its settlement have been taken before him, is to be regarded, for the purposes of the rule, with the same effect as its settlement.

2. In the *District of Columbia* if the transcript be not filed in the Court of Appeals within the time prescribed by the rules of such court, the appellee may have the appeal docketed and dismissed. This rule is applicable as well to appeals which do not operate as a supersedeas as to those which do so operate. U. S. v. Alvey, 182 U. S. 456.

3. *State v. Simmons*, 64 Kan. 795.

Extension by Stipulation in Violation of Rules. — The parties have not the power by agreement to ignore the rules of court, and a stipulation by which they agree to allow the abstract to be filed after the lapse of the time fixed by the rules will not avail to prevent a dismissal. Wilson v. People, 25 Colo. 375.

Effect of Previous Motion to Dismiss Appeal. — In *White v. White*, 112 Cal. 577, it was held that the fact that a previous motion to dismiss the appeal was pending did not of itself extend the time within which the appellant might file the transcript. The court said: "Whether the pending of such motion would have been deemed by the court a sufficient ground for extending the time for filing the transcript need not be considered. The appellant made no application for such extension, and the respondent is entitled to enforce the rights conferred upon him by the rule."

Under Statute of Indian Territory. — Under Mansf. Dig. Ark., § 1271 (Sand.

280. Neglect of Clerk. — See notes 2, 3.

281. Requisites of Application. — See note 2.

282. (3) *Waiver of Objection*. — See note 3.

g. TRANSCRIPTS ON SEVERAL APPEALS. — See note 4.

283. *h.* AUTHENTICATION — (1) *Sealing*. — See notes 6, 7, 8.

284. (2) *Certificate of Clerk*. — See note 1.

& H. Dig. Stat. Ark., § 1022), the court is authorized to extend the time for filing the record in the appellate court, on appeal, although the statutory period of ninety days has already expired and motion has been made to dismiss the appeal because of such failure. *Mays v. Frieberg*, 3 Indian Ter. 774.

279. 7. *Hake v. Lee*, 104 La. 146; *McAllister v. McAllister*, 28 Wash. 613.

The Sickness and Death of Counsel who had charge of the preparation of the appellate proceedings will not entitle the appellant to an extension of time where it appears that succeeding counsel had ample time in which to prepare and file the transcript, and no reason, cause, or excuse is shown why during such time it was not attended to. *Savannah, etc., R. Co. v. Sessoms*, 40 Fla. 390.

280. 2. *State v. Estes*, 34 Oregon 196, citing 2 ENCYC. OF PL. AND PR. 280.

3. Appellee Must Show that Failure Is Not Imputable to Him. — Even where the statute imposes upon the clerk the duty of filing the transcript such requirement does not relieve the appellant from the necessity of showing that the failure of the clerk to file the transcript within the time prescribed was not imputable to him. *State v. Estes*, 34 Oregon 196.

281. 2. In Texas the appellate court may, for good cause shown, allow the filing of the transcript after the expiration of the regular ninety-day limit; but it has been held that after the expiration of more than twelve months, during which time the parties were trying to compromise, a motion for permission to file the transcript would be denied, though the appellee expressly consented to the filing. *Christensen v. Anderson*, 24 Tex. Civ. App. 345.

282. 3. By Stipulation. — Where the time of filing abstracts and motions is the subject of stipulation between the parties, neither party can complain that such abstracts or motions were not filed within the time required by the rules

of the Supreme Court. *Trott v. Chicago, etc., R. Co.*, 115 Iowa 80.

4. In Proceedings to Establish a Highway separate transcripts need not be filed by each appealing remonstrator. *Glassburn v. Deer*, 143 Ind. 174.

283. 6. No. 4 Fidelity Bldg., etc., *Union v. Byrd*, 154 Ind. 48 [citing 2 ENCYC. OF PL. AND PR. 283]; *Swortfiguer v. White*, 137 Cal. 391.

Effect of Stipulation of Parties. — An appeal will not be dismissed because the transcript is not properly authenticated, where it is stipulated in writing that the same contains correct copies of the pleadings, orders, etc. *Jett v. Sittle*, 3 Indian Ter. 671.

7. Dismissal. — That the Transcript Is Not under the Seal of the lower court is ground for dismissal of the appeal. No. 4 Fidelity Bldg., etc., *Union v. Byrd*, 154 Ind. 48.

Effect of Presenting Another Transcript Duly Authenticated. — Where a motion is made to dismiss the appeal on the ground that the appellant has not filed a properly authenticated transcript, and at the hearing of such motion he presents another copy of the transcript properly authenticated and asks leave to file the same, the objection of the respondent upon the ground that the transcript is not properly authenticated is obviated and the motion will be denied. *Swortfiguer v. White*, 137 Cal. 391.

8. Identification of Pleadings. — The pleadings are a part of the record, and when certified to the appellate court as a part of the record on appeal will be considered as such without further identification where it is not otherwise required by statute. *Bliss v. Grayson*, 24 Nev. 422, limiting *Simpson v. Ogg*, 18 Nev. 30.

284. 1. Illinois. — See *Merkel v. William Schmidt Baking Co.*, 72 Ill. App. 239.

Montana. — *State v. Millis*, 19 Mont. 444.

New Mexico. — *Territory v. Christman*, 9 N. Mex. 582.

Stipulations of Parties. — Where a statute requires the papers on appeal to be

285. By Deputy Clerk. — See note 1.

Where Not Properly Certified. — See notes 5, 6.

Sufficiency of Certificate. — See note 8.

286. Compliance with Statute. — See note 2.

290. *i.* ARRANGEMENT OF TRANSCRIPT — (1) *In General.*
— See notes 5, 6, 7, 8, 9.

certified by the trial judge, a stipulation by counsel that the papers shall be regarded as being properly certified is invalid. *April Fool Gold Min., etc., Co. v. Dula*, 24 Nev. 289.

Corrections after Certification. — Where a defective transcript, duly certified, is corrected by rewriting it, the corrected copy must itself be certified by the clerk. Detaching the certificate from the defective transcript, and attaching it to the corrected copy, without the knowledge of the clerk, will be deemed insufficient. *Shadville v. Barker*, 26 Mont. 45.

Certificate of United States Commissioner. — In *Indian Territory* it has been held that where on appeal from a United States commissioner the transcript is not signed by him until after judgment has been rendered in the appellate court, and no motion is made requiring his signature, the statute governing appeals is substantially complied with and the appellate court acquires jurisdiction. *Waitman v. Bowles*, 3 Indian Ter. 294.

Necessity for Signature of Presiding Judge. — In *Hornaday v. State*, 62 Kan. 822, it was held that a transcript of the record certified by the clerk to be such is sufficient, and that it is not necessary that the record should be signed by the presiding judge.

285. 1. *Territory v. Christman*, 9 N. Mex. 582.

5. *Reno Water, etc., Co. v. Osburn*, 25 Nev. 53; *Hoppin v. Winnemucca First Nat. Bank*, 25 Nev. 84; *Territory v. Christman*, 9 N. Mex. 582.

6. Amendment of Certificate. — A defective certificate of authentication may be amended after the time for filing the original transcript has expired, and at any time before final judgment in the appellate court. See *Rev. Stat. Ohio*, § 5114. *Bucyrus Second Nat. Bank v. Morderwell*, 59 Ohio St. 221.

8. Abbreviations. — In the certificate of the clerk the name of a corporation which is the plaintiff may be abbreviated if the abbreviation is unmistakable. *Chicago Fuel Gas Appliance Co. v. Jewett*, 66 Ill. App. 489.

Insufficient Authentication of Final Judgment. — In *Rooney v. Farrell*, 62 Neb. 611, the certificate attached to the transcript stated: "That the foregoing is a true and perfect transcript of the petition, answer, reply, instructions given and excepted to in said action, the verdict, motion for a new trial and motion to retax costs in said action, together with the appeal bond, as the same are on file and of record in my office." It was held that such certificate was insufficient because it made no mention of or in any manner authenticated the final judgment in the cause.

Objections Waived. — Any defect in the certificate of the clerk may be cured by admissions made in open court, and may be waived by a general appearance and by filing points and authorities upon the merits. *Bliss v. Grayson*, 24 Nev. 422.

286. 2. *Shadville v. Barker*, 26 Mont. 45; *State v. Millis*, 19 Mont. 444; *Becker v. Becker*, 24 Nev. 476.

290. 5. **Rule Requiring Record to Be Paged and Indexed.** — Where a rule of court requires that the plaintiff in error, or appellant, shall number the pages of the record and index the record, and such rule is not complied with, the court will not examine the record to find an alleged error in the admission of the testimony. *State v. Turner*, 63 Kan. 233.

6. Right of Legislature to Authorize Typewritten Transcript. — Under a constitutional provision (*Const. Mont.*, art. VIII., §§ 2, 3, 15), authorizing the legislature to prescribe limitations upon and regulations of appeals, the legislature has no right to supersede a rule of court requiring printed transcripts, by authorizing the use of typewritten transcripts. *Jordan v. Andrus*, 26 Mont. 37.

7. Paging of Depositions. — Where the original paging of the depositions is not preserved in the transcript, the court will not undertake to ascertain what particular evidence is relied on to support the exceptions. *Speakman v. Burleson*, 123 Ala. 678.

8. *Indiana, etc., R. Co. v. Dittu*, 158

292. *j.* DUTY OF APPELLANT IN MAKING TRANSCRIPT — (1) *In General.* — See notes 3, 4, 5.

293. See notes 1, 2.

(2) *Unnecessary Papers.* — See note 7.

294. See note 1.

(3) *Record Must Show Error.* — See notes 4, 5, 6.

295. (4) *Effect of Omissions.* — See note 1.

296. *k.* IMPEACHMENT OF RECORD — *Record Imports Verity.* — See note 1.

297. See notes 2, 3.

Ind. 669, in which case the appellant failed to comply with a rule of court. See also *State v. Lankford*, 158 Ind. 34; *Dixon v. Poe*, 158 Ind. 54; *State v. Turner*, 63 Kan. 233, which case was decided under a rule of court requiring an index.

290. 9. *Singer Mfg. Co. v. Rogers*, 70 Ark. 385.

Illegible Transcript. — In *Singer Mfg. Co. v. Rogers*, 70 Ark. 385, the appellant presented a blurred and indistinct typewritten transcript which had been blurred by the taking of other copies from it, and the court required another copy of the transcript to be filed within thirty days on pain of dismissal.

292. 3. *Florida.* — *American Contract, etc.*, Co. v. Perrine, 40 Fla. 412. *United States.* — *Williams v. Savage*, (C. C. A.) 120 Fed. Rep. 497.

4. No. 4 Fidelity Bldg., etc., *Union v. Byrd*, 154 Ind. 48 [citing 2 ENCYC. OF PL. AND PR. 292]; *American Contract, etc.*, Co. v. Perrine, 40 Fla. 412.

5. No. 4 Fidelity Bldg., etc., *Union v. Byrd*, 154 Ind. 48 [citing 2 ENCYC. OF PL. AND PR. 292]; *Williams v. Savage*, (C. C. A.) 120 Fed. Rep. 497.

Appellant Chargeable with Omission of Pleading. — Where a party desires to insist on appeal that he was entitled to a judgment or decree upon the pleadings he must see to it that such pleadings are included in the transcript. *Lewis Invest. Co. v. Boyd*, 48 Neb. 604.

293. 1. *Ely v. Coontz*, 167 Mo. 371.

2. No. 4 Fidelity Bldg., etc., *Union v. Byrd*, 154 Ind. 48, citing 2 ENCYC. OF PL. AND PR. 292, 293.

7. *Paul v. Cagnaz*, 25 Nev. 293.

294. 1. *Heinze v. Kleinschmidt*, 25 Mont. 89; *Paul v. Cagnaz*, 25 Nev. 293.

Presentation of Testimony in Irregular Manner — Incorporation of Useless Papers. — In *Chappell v. Stewart*, 95 Md. 76, the court said: "The record is a voluminous one and contains a

large amount of irrelevant and immaterial matter having no relation or bearing upon the case or to the questions submitted for our review. The testimony is presented in an irregular and improper manner and the record is encumbered by the insertion of court papers, long letters, overruled orders, and other matter absolutely unnecessary to be incorporated in the record. * * * We shall not hesitate therefore in the case now before us to so adjust the costs on this appeal that they will be borne and paid by the parties who are responsible for this encumbered record.

4. *State v. Judge*, 105 La. 758, quoting 2 ENCYC. OF PL. AND PR. 294.

5. *State v. Judge*, 105 La. 758, quoting 2 ENCYC. OF PL. AND PR. 294.

6. *State v. Judge*, 105 La. 758, quoting 2 ENCYC. OF PL. AND PR. 294.

295. 1. *Kansas.* — *Haenky v. Weishaar*, 64 Kan. 717.

Instances of Omission — Evidence. — *Haenky v. Weishaar*, 64 Kan. 717; *Atchison, etc., R. Co. v. Scaggs*, 64 Kan. 561.

Duty of Appellee Where Paper Is Omitted — Rule of Court. — In *Missouri*, where a paper is not contained in the appellant's abstract, the appellee, if he desires to supply the omission, must comply with Rule 11 by filing an additional abstract covering the omission. *Roe v. Versailles Bank*, 167 Mo. 406.

296. 1. *Memphis Land, etc., Co. v. St. Francis Levee Dist.*, 70 Ark. 409, citing 2 ENCYC. OF PL. AND PR. 296. See also the following cases:

Michigan. — *Huff v. Cole*, 127 Mich. 351; *Sartwell v. Young*, 126 Mich. 304.

Nebraska. — *Seaver v. Hall*, 50 Neb. 878.

Washington. — *Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176.

297. 2. *Objection that Bill Is Not Correctly Set Forth.* — Where, in a chancery appeal, the bill as set forth in the

298. Evidence Dehors the Record. — See notes 2, 3.

299. Where Extrinsic Evidence Admissible. — See note 3.

1. CONTRADICTION OF RECORD. — See note 6.

300. By Affidavit. — See note 7.

301. m. AMENDMENTS OF RECORD — (1) *Of Original Record.* — See note 3.

302. See note 1.

304. (2) *Of Transcript.* — See notes 2, 3.

305. (3) *By Stipulation.* — See note 3.

record states a cause of action, a contention that it did not do so originally, but has been changed since the hearing, cannot be considered, as the court is governed by the record as returned. *Sartwell v. Young*, 126 Mich. 304.

297. 3. *Arkansas.* — *Memphis Land, etc., Co. v. St. Francis Levee Dist.*, 70 Ark. 409.

Montana. — *Newell v. Whitwell*, 16 Mont. 243.

Nebraska. — *Lewis Invest. Co. v. Boyd*, 48 Neb. 604.

Virginia. — *Taylor v. Mallory*, 96 Va. 18.

Affidavits as to Improper Argument of Counsel. — In *Ryans v. Hospes*, 167 Mo. 342, the court said: "Certain remarks of one of plaintiff's counsel in the argument are assigned as ground for reversal. So far as these appear in the affidavits filed, they are not before us. We have uniformly ruled that this is not the proper way of preserving such extraneous matter."

Certificates, etc., Produced in Argument. — The court will not consider certificates or other papers produced in argument but omitted from the record. *Taylor v. Mallory*, 96 Va. 18.

298. 2. *An Affidavit of the Clerk* will not be heard for the purpose of showing matters which do not appear in the transcript. *Memphis Land, etc., Co. v. St. Francis Levee Dist.*, 70 Ark. 409.

3. See *Taylor v. Mallory*, 96 Va. 18.

299. 3. *Waiver of Defense of Statute of Limitations.* — The defense of the statute of limitations is a meritorious one, but one that may be waived; and if it is not insisted upon in some manner in the trial court it will not be considered here for the first time. *Bell v. Rice*, 50 Neb. 547. See also LIMITATIONS.

6. Conflict Between Certificate of Appeal and Appeal Bond as to Return Day. — In *Alabama*, since the statute (Civ. Code Ala., § 437) fixes the time within

which an appeal is returnable to the Supreme Court, a conflict in the recital of the certificate of appeal and of the appeal bond, as to the term of the court to which the appeal was returnable, is immaterial and does not authorize the dismissal of the appeal. *Birmingham R., etc., Co. v. Birmingham Traction Co.*, 122 Ala. 349.

300. 7. *Florida.* — *Bryan v. State*, 41 Fla. 643.

Washington. — *Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176.

One of the Basic Principles for the guidance of an appellate court in the determination of causes is that it will look to the record and will not consider affidavits contradicting matters shown by it. *Bryan v. State*, 41 Fla. 643.

301. 8. *Merriman v. Chicago, etc., R. Co.*, (C. C. A.) 120 Fed. Rep. 240.

302. 1. *Merriman v. Chicago, etc., R. Co.*, (C. C. A.) 120 Fed. Rep. 240.

304. 2. *Amendment by Filing Additional Transcript.* — Where a duly authenticated but incomplete transcript is filed within the time required by law, it may be amended at any time before final judgment in the appellate court by filing a duly authenticated transcript of the omitted record entries. See Rev. Stat. Ohio, § 5114. *Falconer v. Martin*, 66 Ohio St. 352.

Amendment of Authentication. — A material defect in the certificate of authentication may be amended after the expiration of the time for the filing of the transcript itself. See Rev. Stat. Ohio, § 5114. *Bucyrus Second Nat. Bank v. Moderwell*, 59 Ohio St. 221.

3. *Warren v. Robinson*, 21 Utah 429.

305. 3. *Missouri.* — Parties to an appeal may by stipulation correct errors in the appellate record to conform to the facts which occurred at the trial. *Camp v. Wabash R. Co.*, 94 Mo. App. 272, in which case an instruction as it appeared in the record was defective and erroneous. The parties stipulated that the record was

- 305.** *n.* CERTIORARI — (1) *In General.* — See note 4.
306. Appellant Not in Fault. — See note 2.
307. Character of Writ. — See note 1.
309. (4) *Prompt Application Required.* — See note 2.
312. (9) *Supplemental Transcript* — Leave to File. — See note 7.
313. *o.* ABSTRACT OF RECORD — (1) *In General.* — See note 3.
314. (2) *What Abstract Is.* — See note 6.
 (3) *Omissions.* — See notes 8, 9.

erroneous and that the instruction was given in another form which was correct, and it was held that such stipulation disposed of the objection.

305. 4. *Oregon.* — *Jacobs v. Oren*, 30 Oregon 593, citing 2 ENCYC. OF PL. AND PR. 305.

United States. — *Merriman v. Chicago*, etc., R. Co., (C. C. A.) 120 Fed. Rep. 240.

Omissions. — *Merriman v. Chicago*, etc., R. Co., (C. C. A.) 120 Fed. Rep. 240.

306. 2. Exhibits which have been erroneously omitted may be brought up by certiorari. *Grand Lodge, etc., v. Furman*, 6 Okla. 649, citing 2 ENCYC. OF PL. AND PR. 307.

307. 1. *The Writ Purely Auxiliary.* — A writ of certiorari to complete the record on a statutory appeal cannot of itself give the appellate court jurisdiction. Nor can it add any support to the appeal as against a motion to dismiss. The appeal must stand or fall under the statute, regardless of the writ of certiorari. *Huguley Mfg. Co. v. Gleton Cotton Mills*, 184 U. S. 290.

309. 2. *Merchants' Nat. Bank v. Grunthal*, 39 Fla. 388, citing 2 ENCYC. OF PL. AND PR. 308.

312. 7. *With the Permission of the Appellate Court* an additional transcript may be filed at any time before final judgment in such court, provided the original incomplete transcript was filed within the time required by law. *Falconer v. Martin*, 66 Ohio St. 352.

In Criminal Cases. — Where, in a criminal appeal, the indictment copied into the transcript does not contain the indorsement "a true bill," the defect may be cured by a supplemental transcript, which may be filed even after the argument of the case in the appellate court. *Low v. State*, 108 Tenn. 127.

313. 3. *Florida Rule.* — In Florida Rule 20 requires, in civil cases, the attorney for the plaintiff in error or ap-

pellant to "prepare and have clearly and legibly typewritten or printed a concise abstract or statement of the transcript showing the pleadings in the cause in the order of their filing by dates, the rulings of the court thereon, the issues on which the case was tried, and the facts on which the issues were determined, in as condensed form as is practicable, and consistent with a fair and clear presentation thereof, together with a statement of the assignments of error relied on." *Allen v. Lewis*, 38 Fla. 115, wherein the court declared that the obvious purpose of such rule is to provide an abstract or abridgment which shall fairly exhibit so much of the record as will present the questions of error, to be used as a substitute for a usually voluminous record.

Abstract of Record. — In *Missouri* the rules require the appellant to abstract the record in order to advise the court of the points in dispute in the material matters in the record, and it has been held that such expense and labor cannot be imposed upon the respondent. *Ely v. Coontz*, 167 Mo. 371.

314. 6. *Office of Abstract.* — In *Florida*, in determining the true office of the abstract and what it shall contain, it is important to keep in mind that the court will try the questions presented on the abstract alone, and unless it is questioned by the opposite party, will make no examination of the transcript. A reference in the abstract to the record will not be sufficient. *Allen v. Lewis*, 38 Fla. 115.

8. *Allen v. Lewis*, 38 Fla. 115.

9. *Allen v. Lewis*, 38 Fla. 115.

Appellant's Abstract Cured by Respondent's Abstract. — If the respondent's abstract sets out the evidence claimed to be omitted in the appellant's, the court will be enabled to consider a demurrer to the evidence. *Kelly-Goodfellow Shoe Co. v. Vail*, 84 Mo. App. 94.

315. *Matters Not in Abstract.* — See note 1.

(4) *Jurisdictional Facts.* — See note 3.

317. (8) *Presumption as to Additional Abstract.* — See note 1.

318. (10) *Amended Abstract* — *Service.* — See note 2.

(11) *Consequence of Defects Uncorrected.* — See note 5.

7. Preliminary Payment of Fees — *a. IN GENERAL* — Statutory. — See note 7.

321. **8. Docketing and Entry of Appeal.** — See note 6.

315. 1. Method of Stating Evidence. — In *Allen v. Lewis*, 38 Fla. 115, it was held that the facts must be stated so that the court can consider the evidence in all its bearings without reference to the transcript. It was further held that it is not sufficient for the abstractor to state merely the effect of the evidence or his conclusions adduced therefrom, and that the abstract must state the facts in the transcript so that the court can judge of them when called in question.

3. Gardner v. New Orleans, etc., R. Co., 78 Miss. 640.

Sufficient Showing as to Judgment. — Where the abstract on appeal discloses the findings of the trial court in full, and it is stated in substance that judgment was duly entered in accordance therewith, and such statement is not denied, the abstract is sufficient as against the objection that there is no showing of a judgment from which an appeal can be taken. *Hawkeye Ins. Co. v. Huston*, 115 Iowa 621.

Whole Record Examined to Ascertain Jurisdictional Questions. — Where the abstract is deficient in regard to jurisdictional questions, the appellate court will explore the whole record to ascertain whether it has jurisdiction to try the appeal. *Hayes v. Taylor*, 9 N. Dak. 92.

317. 1. Compare *Greenly v. Hopkins*, 7 S. Dak. 561, in which case the court cited 2 ENCYC. OF PL. AND PR. 317, as stating the rule in *Iowa*, but declared that if the recitals of the appellant's abstract should be so read as to make the denials of the respondent's additional abstract raise an issue of fact the court could, perhaps, be at liberty to go to the original papers for a settlement of such dispute.

318. 2. Abstract Stricken Out on Motion. — Where a case is continued at the January term, 1901, of the Supreme Court, to allow the appellants time to reply to the appellees' argument, recently filed, an amendment by

the appellants of their abstract, called out by the additional abstract and the argument filed by the appellees, will be stricken out on motion of the appellees, where such amendment, though filed January 19, 1901, is not served until May 25, 1901, two days before the case is submitted. *Wilcox v. Mann*, 115 Iowa 91.

5. See *Allen v. Lewis*, 38 Fla. 115, in which case a motion was made to dismiss the writ of error, and, the court holding that the abstract was insufficient, it was declared that it is within the discretion of the court to permit proper abstracts to be made. Accordingly the plaintiff in error was given leave to file and serve other abstracts in compliance with the rule within twenty days, otherwise the writ of error would be dismissed.

7. In Criminal Cases in New Mexico it is the duty of the clerk to transmit the transcript, whether the appellant pays for the same or not. See *Comp. Laws N. Mex.* 1897, §§ 3413, 3414; *Territory v. Archibeque*, 9 N. Mex. 341.

321. 6. North Carolina. — *Worth v. Wilmington*, 131 N. Car. 532.

Entry of Appeal in Trial Court — Necessity to Identify Cause. — *Garrison v. Parsons*, 41 Fla. 143, was a case decided under a statute of *Florida* which required the entry of an appeal to be recorded, the object of the statute being to substitute for the former practice of giving personal notice by citation or in open court a species of constructive notice by recording upon a public record the notice or entry of appeal. The statute did not prescribe the form of the entry, but it was held that it clearly contemplated that the record should be sufficiently full and explicit to advise the appellate court, as well as the parties entitled to notice, that an appeal had been taken by definitely named parties against definitely named persons, and that it should identify the cause wherein the decree appealed from was entered.

323. See note 1.

324. V. EFFECT OF APPEAL — 4. Construction of Statutory "Appeal" — a. GENERALLY. — See note 4.

326. b. APPEALS FROM ORDERS AFFECTING INJUNCTIONS. — See note 1.

327. 5. Trial De Novo. — See note 2. See also JUSTICES OF THE PEACE.

6. Transference of Jurisdiction by Appeal — a. IN GENERAL. — See note 5.

Authority to Enter Appeal. — While under Civ. Code Ga., § 4457, an appeal may be lawfully entered by an attorney in fact for the losing party, the authority of such attorney must be in writing and must be filed in the court in which the case is pending, either at the time the appeal is entered or at such time thereafter as the court in its discretion may expressly allow. If such authority is not filed at the time the appeal is entered or within the time allowed thereafter, the appeal must, on motion, be dismissed, unless it appear that the party has ratified in writing the unauthorized appeal. *Lovelady v. Franklin Davis Nursery Co.*, 113 Ga. 324.

323. 1. Amendment Where Entry Omits Parties Appellee. — Where all the proper parties appellant are correctly named in an entry on appeal, but proper parties appellee have been omitted therefrom, but such omitted parties appellee have appeared in the cause in the appellate court and submitted the same upon its merits by briefs, without objection to their omission from the entry on appeal, the appellate court will permit the entry of appeal, where no objection is urged, to be amended so as properly to include such omitted appellees. *Continental Nat. Bldg., etc., Assoc. v. Miller*, 41 Fla. 418.

324. 4. Jenkins v. State, 60 Neb. 205, citing with approval 2 ENCYC. OF PL. AND PR. 325.

"The Vacation of the Decree, Judgment or Order appealed from restores the cause pending the appeal to the state in which it stood before the decision was made." *Jenkins v. State*, 60 Neb. 205, quoting with approval 2 ENCYC. OF PL. AND PR. 325.

326. 1. Cole v. Edwards, 104 Iowa 373, citing 2 ENCYC. OF PL. AND PR. 326.

327. 2. Henry v. McNamara, 114 Ala. 107; *Williams v. Turner Tp.*, 15 S. Dak. 182.

5. Alabama. — *Southern R. Co. v. Birmingham, etc., R. Co.*, 131 Ala. 663; *Ex p. Montgomery*, 114 Ala. 115. *Illinois. —* *Mechanics, etc., Sav., etc., Assoc. v. People*, 72 Ill. App. 160; *Continental Invest., etc., Soc. v. McKay*, 69 Ill. App. 72.

Missouri. — *Ryans v. Boogher*, 169 Mo. 673.

New York. — *Kleiner v. Fidelity, etc., Co.*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 188.

Vacating Judgment. — See *contra*, *Sullivan v. Woods*, (Ariz. 1897) 50 Pac. Rep. 113, holding that the trial court retains power over the judgment during the term. Citing 25 Am. and Eng. Encyc. of Law (1st ed.) 120.

Power of Trial Court to Punish for Contempt — Supersedeas. — In *Florida* it has been held that where an appeal is taken from an order granting an injunction and a supersedeas is allowed, the power of the trial court to punish as contempts acts in violation of the terms of the injunction is suspended during the pendency of the appeal and the supersedeas. *Powell v. Florida Land, etc., Co.*, 41 Fla. 494.

Appellate Jurisdiction Not Affected by Orders Made by Trial Court. — After an appeal has been taken from an interlocutory order the lower court has no power to affect the jurisdiction of the appellate court by any order it may enter in the case. *Mechanics', etc., Sav., etc., Assoc. v. People*, 72 Ill. App. 160.

Failure to Move in Trial Court Does Not Constitute Laches. — In *Ryans v. Boogher*, 169 Mo. 673, it was held that a claimant who begins his suit against the executor within one year is not guilty of laches because he failed to have his judgment certified to and filed in the probate court before it is affirmed on appeal in the appellate court. The appeal operates as a supersedeas, and the appellate court alone, pending that appeal, has jurisdiction of that action.

- 330.** *b.* IN COLLATERAL PROCEEDINGS. — See note 2.
331. *c.* PROPERTY IN CONTROVERSY. — See notes 1, 2, 4.
333. 8. Irregular Appeals. — See note 1.
 9. Stay of Proceedings. — See notes 5, 6, 7.
335. VI. DISMISSAL OF APPEAL — 1. Grounds of Motion. — See note 3.

330. 2. Riverdale Cotton Mills *v.* Alabama, etc., Mfg. Co., 111 Fed. Rep. 431, *citing* 2 ENCYC. OF PL. AND PR. 330.

Alabama. — *Ex p.* Montgomery, 114 Ala. 115.

Appeal from Collateral Order — Claim Suit. — Where an attachment is sued out in a justice's court, and upon a levy being made a claim to the property is interposed, an appeal from a judgment rendered for the plaintiff does not affect the case of the plaintiff against the defendant in attachment, and, notwithstanding the appeal the attachment suit remains in the justice's court to await the determination of the claim suit in the court to which the appeal is taken. *Wheeler v. New York Steam Dye Works*, 129 Ala. 393.

331. 1. Riverdale Cotton Mills *v.* Alabama, etc., Mfg. Co., 111 Fed. Rep. 431, *citing* 2 ENCYC. OF PL. AND PR. 331.

2. Orders Respecting Property in Hands of Receiver — Supersedeas. — Where an interlocutory decree in chancery, appointing a receiver, is appealed from, and such appeal is ordered to be a supersedeas of such decree, the powers of the circuit judge in the premises over the receiver and the properties in his hands under such decree are suspended by such supersedeas; and, until the appellate court has acted in the case, he has no authority to make any further order relative to the properties in the receiver's hands under the decree superseded. And no order by the circuit judge while such supersedeas is in force will excuse the receiver for a violation of such supersedeas. *Continental Nat. Bldg., etc., Assoc. v. Scott*, 41 Fla. 421.

4. The Distribution of the Fund by the trial court pending an appeal is improper. *Continental Invest., etc., Soc. v. McKay*, 69 Ill. App. 72.

333. 1. Void Appeal. — An appeal dependent upon a void statute will not affect the jurisdiction of the trial court. *State v. Superior Ct.*, 28 Wash. 317.

5. *Maxwell v. New Richmond Bank*,

101 Wis. 286 [*citing* 2 ENCYC. OF PL. AND PR. 333]; *Ex p.* Warren, 41 Oregon 309.

6. *Maxwell v. New Richmond Bank*, 101 Wis. 286, *citing* 2 ENCYC. OF PL. AND PR. 333.

7. *Maxwell v. New Richmond Bank*, 101 Wis. 286, *citing* 2 ENCYC. OF PL. AND PR. 333.

335. 3. *Corder v. Speake*, 37 Oregon 105, *citing* 2 ENCYC. OF PL. AND PR. 335. See also the following cases:

Illinois. — *Eggleston v. Royal Trust Co.*, 192 Ill. 101.

Minnesota. — *State v. Brathovde*, 81 Minn. 501.

Montana. — *Shadville v. Barker*, 26 Mont. 45.

Nebraska. — *Renard v. Thomas*, 50 Neb. 398.

Nevada. — *Becker v. Becker*, 24 Nev. 476.

New Hampshire. — *Stevens v. Stevens*, 71 N. H. 579.

North Carolina. — *Worth v. Wilmington*, 131 N. Car. 532.

Oregon. — *Taylor v. Lapham*, 41 Oregon 479.

Vermont. — *State v. Wells*, 73 Vt. 265.

Washington. — See *Starling v. Burdette*, 28 Wash. 261.

Escape of Prisoner. — Where a prisoner escapes pending an appeal by him from a judgment of conviction the appeal should be dismissed, subject, however, to a reservation that it may be reinstated in the event that the appellant shall, within a certain time, surrender himself to custody. *State v. Dempsey*, 26 Mont. 504.

Miscellaneous Grounds — Appeal Not Taken in Time Limited. — *Central of Georgia R. Co. v. Alabama, etc., R. Co.*, 130 Ala. 559; *Hatton v. Hatton*, 136 Cal. 353; *Matter of Calkins*, 112 Cal. 296; *Renard v. Thomas*, 50 Neb. 398.

Appeal Prematurely Taken. — Where notice of appeal in a criminal action is given upon the denial by the court to grant a motion for a new trial and before the entry of judgment, the appeal must be dismissed, as not having been

339. 2. On Court's Own Motion. — See note 1.

340. 3. For Lack of Prosecution. — See note 3.

taken from an appealable order. *State v. Landes*, 26 Wash. 325.

Pendency of Prior Appeal. — Where two appeals are taken from the same judgment, one being taken while the other is pending, the subsequent appeal will be dismissed. *American Contract, etc., Co. v. Perrine*, 40 Fla. 412. Compare *Cherryfield, etc., Electric R. Co., Appellants*, 95 Me. 361.

Defect of Parties. — Where the appellant, in violation of a statute, has not made all of his coparties to the judgment co-appellees and served notice upon such coparties, the appeal will be dismissed. *Brown v. Sullivan*, 158 Ind. 224; *Mellott v. Messmore*, 158 Ind. 207. See also *National Bank v. Newheart*, 41 Fla. 470, wherein it was held that it is a ground for dismissal that an appeal is taken from a joint decree by only one of the parties against whom such decree was rendered, where the time for taking an appeal has expired and it is too late to bring in the other parties.

Where Appellant Has No Appealable Grounds. — *Grabill v. Plummer*, 95 Md. 56.

Frivolous Exceptions. — In *Williams v. Clarke*, (Mass. 1902) 65 N. E. Rep. 419, the court said: "The only question of law apparent on the face of the record, except whether the judgment is warranted by the pleadings, is that which the trial judge is authorized to declare frivolous, and when the appeal is simply on the ground of the exceptions it should be dismissed. In other cases the merely formal possibility of denying that the record warranted the judgment where there is no ground on which it can be disputed, has not prevented the dismissal of an appeal."

Where the Appeal Is Taken by an Improper Party. — *Witt v. Baars*, 36 Fla. 119. See also *supra*, III. *Parties to Appellate Proceedings.*

Failure to File Assignment of Errors. — An appeal will not be dismissed, under Code Prac. La. 897, for failure of the appellant to file an assignment of errors, where the transcript is duly certified as containing all the testimony adduced, and the grounds for reversal relied on are apparent upon the face of the record. *Havana American Co. v. Board of Assessors*, 105 La. 471; *Hernsheim v. Board of Assessors*, 105 La. 473.

Defective Record. — A defective or insufficient record is not ground for a motion to dismiss the appeal. *Merriman v. Chicago, etc., R. Co.*, (C. C. A.) 120 Fed. Rep. 240.

Defective Notice of Appeal. — An appeal will not be dismissed on account of a clerical error in the notice of appeal as to the date of the judgment appealed from, where it is clear that the respondent has not been injured or misled thereby. *Salem Traction Co. v. Anson*, 41 Oregon 562.

A Defective Statement of Case on Appeal is not ground for dismissal. *Northern Pac. R. Co. v. Lake*, 10 N. Dak. 541.

339. 1. *Eggleston v. Royal Trust Co.*, 192 Ill. 101, citing 2 ENCYC. OF PL. AND PR. 336. See also the following cases:

Alabama. — *Throne Franklin Shoe Co. v. Gunn*, 123 Ala. 640.

Colorado. — *McCarthy v. Crump*, 28 Colo. 398.

Georgia. — See also *Austell v. Atlanta*, 100 Ga. 182.

Massachusetts. — *Wirth v. Wirth*, 181 Mass. 541.

Minnesota. — *Thomas v. Craig*, 60 Minn. 501.

Mississippi. — *Gardner v. New Orleans, etc., R. Co.*, 78 Miss. 640.

Missouri. — *Hull v. Beard*, 80 Mo. App. 200.

Montana. — *State v. Millis*, 19 Mont. 444.

Costs. — In *Thomas v. Craig*, 60 Minn. 501, the court was without jurisdiction and for that reason dismissed the appeal, but because each party had proceeded with the appeal instead of applying promptly to have it dismissed, the order of dismissal was without costs or disbursements to either party. See also COSTS.

340. 3. *Colorado.* — *In re Barker*, 28 Colo. 257.

Florida. — *Savannah, etc., R. Co. v. Sessoms*, 40 Fla. 390.

Louisiana. — *Hake v. Lee*, 104 La. 123.

Record — Failure to File Transcript in Time. — Where a plaintiff in error fails to file the transcript of record in the appellate court within the time prescribed by law, and, prior to any application to the court for an extension of the time for filing such transcript, the

342. 4. For Lack of Actual Controversy. — See notes 1, 2.

defendant in error moves for a dismissal because of such failure, such motion will be granted where no good cause is shown for the failure. *American Contract, etc., Co. v. Perrine*, 40 Fla. 412; *Savannah, etc., R. Co. v. Sessoms*, 40 Fla. 390.

Failure to File Abstract Within Time Prescribed by Rules. — It is a ground for dismissal that an abstract of the record is not filed within the time prescribed by the rules. *In re Barker*, 28 Colo. 257; *Potts v. Watkins*, 3 Indian Ter. 566.

Delay in Filing Brief and Transmitting Record to Supreme Court — In *Washington* an appeal will not be dismissed merely for delay in serving and filing briefs, or in the transmission of the record to the Supreme Court within the time limited by law, when there is no showing of prejudice to respondents by reason of the delay. *Gay v. New Whatcom*, 26 Wash. 389.

Bill of Exceptions. — *Contra*, *Yandell v. Madison County*, 79 Miss. 212, wherein it was held that where no bill of exceptions has been taken, a Circuit Court is without jurisdiction of an appeal from a judgment of a board of supervisors disallowing a claim against a county, under Code Miss. 1892, § 79, regulating such appeals, and can only dismiss the cause. *Compare Savannah, etc., R. Co. v. Sessoms*, 40 Fla. 390.

In *Daum v. Conley*, 27 Colo. 56, it was held that it is not a ground for dismissal that the party failed to file a bill of exceptions, as he is entitled to have the cause retained for an examination of the record proper. But see *Jett v. Sittle*, 3 Indian Ter. 671, wherein it was held that where the alleged error is one which can be shown by a bill of exceptions only, and no bill of exceptions is filed, the appeal will be dismissed.

Insufficient Appeal Bond. — Where a taxpayer appeals to the Circuit Court, under Code Miss. 1892, § 80, authorizing such appeals, from the judgment of the board of supervisors approving an assessment, the remedy of the appellee for an insufficient appeal bond is an order requiring the bond to be made sufficient, rather than a peremptory dismissal. *Oxford Bank v. Lafayette County*, 79 Miss. 152. See also *APPEAL BONDS*.

342. 1. Jacksonville School Dist.

v. Crowell, 33 Oregon 11 [*citing with approval* 2 ENCYC. OF PL. AND PR. 341]; *Ward v. Alsup*, 100 Tenn. 738 [*citing* 2 ENCYC. OF PL. AND PR. 342]; *Watson v. Merkle*, 21 Wash. 635; *Hice v. Orr*, 16 Wash. 163.

Where Appellee Has Performed What Appellant Sought to Have Done. — Where it is sought by a mandamus to compel the performance of an act and a demurrer to the writ is sustained and the plaintiff appeals, the appeal will be dismissed where it is made to appear by affidavits that the respondent has voluntarily performed such act. *Hice v. Orr*, 16 Wash. 163. See also *Watson v. Markle*, 21 Wash. 635.

A Statute Allowing Agreed Cases does not allow an agreed case to be prepared without real litigation. *Ward v. Alsup*, 100 Tenn. 733.

Effect of Recovery of Judgment in Another Action. — An appeal by the defendant in a suit to quiet title from an adverse judgment will be dismissed if, since the rendition of such judgment, the plaintiff has recovered another judgment in an action to recover possession of the land in question, such other judgment being conclusive as to the plaintiff's estate in the property, the time for appealing from the latter judgment having elapsed without any appeal having been taken. *Moore v. Moores*, 36 Oregon 261.

Appeal for Delay — Assessment of Damages. — Damages will be assessed upon the ground that the record was brought to the Supreme Court for delay, where the only ground for reversal of the verdict against defendant street-car company is that the court should have directed a verdict for the defendant upon the ground that there was no evidence that the plaintiff, when he was struck, was upon the railroad track of the defendant as alleged in the declaration, notwithstanding several witnesses testified that he was on the track. *Potter v. Leviton*, 199 Ill. 93.

2. Jacksonville School Dist. v. Crowell, 33 Oregon 11 [*citing with approval* 2 ENCYC. OF PL. AND PR. 341]; *Ward v. Alsup*, 100 Tenn. 738, *citing* 2 ENCYC. OF PL. AND PR. 342. See also *Owens v. Read Phosphate Co.*, 115 Ga. 768; *Wirth v. Wirth*, 181 Mass. 541.

Escape Pending Appeal in Capital Case. — Where, pending an appeal in a capital case, the prisoner escapes, the

343. See notes 1, 2.

344. *How Shown.* — See notes 1, 2.

345. 5. *For Want of Jurisdiction.* — See notes 1, 2, 3. See also *supra*, II. 12. *Void Judgments.*

court may, in its discretion, either dismiss the appeal, or hear and determine the assignments of error, or continue the case. *State v. Dixon*, 131 N. Car. 809.

Settlement in Pais. — Where the record shows that the controversy between the parties to an appeal has been settled, the appeal will be dismissed. *Thomson-Houston Electric Co. v. Nassau Electric R. Co.*, (C. C. A.) 119 Fed. Rep. 354.

Vacation of Assessment Pending Appeal. — Where, pending an appeal to the Supreme Court from an order of the District Court on appeal from an assessment, the assessment is vacated, its validity will not be determined. *Berry v. Des Moines*, 115 Iowa 44.

343. 1. *Ward v. Alsup*, 100 Tenn. 738, *citing* 2 ENCYC. OF PL. AND PR. 343.

Fictitious. — *Where Purpose Is to Affect Interests of Others Not Parties.* — *Ward v. Alsup*, 100 Tenn. 738, *citing* 2 ENCYC. OF PL. AND PR. 343, 344.

2. *Ward v. Alsup*, 100 Tenn. 738, *citing* 2 ENCYC. OF PL. AND PR. 343.

Acquirement of the Property in Controversy. — *Moore v. Moores*, 36 Oregon 261.

Compliance with Order. — *Campbell v. Hall*, 28 Wash. 626.

Mandamus. — Where a writ of mandamus is fully complied with after the taking of an appeal from the judgment awarding it, the appeal will be dismissed. *New Orleans v. Emsheimer*, 181 U. S. 153.

Satisfaction of Judgment. — *Owens v. Read Phosphate Co.*, 115 Ga. 768, in which case satisfaction of the judgment was coerced by execution.

Cessation of Rights. — *Ex p. Cannon*, 41 Tex. Crim. 76.

Contested Election Cases. — When an appeal is taken in a contested election case after the term of the office in litigation has expired, the appeal will not be dismissed, since the judgment of the trial court would thus be allowed to stand as a bar to litigation over the fees of the office. In such case the case itself will be dismissed, thus placing the parties *in statu quo* as to their claims to the fees. *McWhorter v. Northcut*, 94 Tex. 86.

Change of Law. — Where pending an appeal involving the construction of a law, the law is changed so that the parties have no further interest dependent upon its construction, the appeal will be dismissed. *Dinsmore v. Southern Express Co.*, 183 U. S. 115.

344. 1. *Watson v. Merkle*, 21 Wash. 635; *Hice v. Orr*, 16 Wash. 163, in each of which cases the court *cited* 2 ENCYC. OF PL. AND PR. 344. See also *Ward v. Alsup*, 100 Tenn. 738.

Costs. — *Moore v. Moores*, 36 Oregon 261, *citing* with approval 2 ENCYC. OF PL. AND PR. 344. See also *Watson v. Merkle*, 21 Wash. 635.

2. *Ward v. Alsup*, 100 Tenn. 738, *citing* 2 ENCYC. OF PL. AND PR. 344.

345. 1. *State v. Baine*, 131 Ala. 176; *Jossey v. Atchison, etc.*, R. Co., 28 Colo. 248; *McCarthy v. Crump*, 28 Colo. 398; *Bogert v. Adams*, 5 Colo. App. 510; *Roberts v. More*, 5 Colo. App. 511; *Chamberlain v. Finley*, 40 Fla. 91; *McGahey v. Smith*, 113 Ga. 604; *Union Drainage Dist. v. Highway Com'rs*, 109 Ill. 80, *reversing* 87 Ill. App. 93; *Berry v. Des Moines*, 115 Iowa 44; *Clayton v. Sievertsen*, 115 Iowa 687; *Holton v. Bimrod*, 61 Kan. 13; *Board of Councilmen v. Farmers' Bank*, 105 Ky. 811; *State v. Quinn*, 96 Me. 496; *Morgan v. McCausland*, 96 Me. 449; *State v. Ward*, 95 Md. 118; *Thomas v. Craig*, 60 Minn. 501; *Yandell v. Madison County*, 79 Miss. 212; *Gardner v. New Orleans, etc.*, R. Co., 78 Miss. 640; *State v. Millis*, 19 Mont. 444; *Keogh v. Snow*, 9 N. Dak. 458; *Corder v. Speake*, 37 Oregon 105; *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142.

Decision in State Court Pending Appeal in Federal Court. — When, pending an appeal in a federal court, the same controversy is decided by a state court in another suit between the same parties, the decision of the latter court is not ground for a dismissal of the appeal, but is a matter of defense to be heard by the federal court in its determination of the appeal upon the merits. *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28.

Colorado Statute — Bedocketing Cause as Pending on Writ of Error. — *Mills's*

- 345.** 6. Official Neglect. — See note 4.
346. 7 Where Error Not Shown. — See notes 1, 2.
 8. Examination of Merits on Motion. — See notes 3, 4.
347. 9. Scope of Inquiry — Generally. — See note 1.
 Ground of the Motion Confined to the Record. — See notes 3, 4.
348. 10. Notice of Motion. — See notes 2, 5, 6.
 11. Requisites of Motion. — See notes 8, 9, 10.

Annot. Code Colo., § 388a, provides that whenever the Supreme Court shall dismiss an appeal for lack of jurisdiction to entertain the same, and it appears that the court would have jurisdiction if the action had come up on writ of error, the cause shall be re-docketed as pending on writ of error. In *McCarthy v. Crump*, 28 Colo. 398, it was held that this provision applies only to causes which are taken directly to the Supreme Court, and not to causes which are appealed from the Court of Appeals.

345. 2. *Brown v. Sullivan*, 158 Ind. 224; *Mellott v. Messmore*, 158 Ind. 297; *Terre Haute, etc., R. Co. v. Erdel*, 158 Ind. 344; *Hays v. Pugh*, 158 Ind. 500; *Johnson v. Hosmer*, 108 La. 697; *Hull v. Beard*, 80 Mo. App. 200; *Renard v. Thomas*, 50 Neb. 398.

Intermediate Appellate Court's Want of Jurisdiction. — In *Mercer v. Mercer*, 27 Colo. 216, an appeal to the Supreme Court of Colorado from the Court of Appeals was dismissed because the Court of Appeals did not have jurisdiction of the original appeal.

3. *Adams v. Wright*, 129 Ala. 305; *McHowell v. State*, 41 Tex. Crim. 227.

Appeal Taken from Void Judgment. — It is ground for dismissal that the judgment from which the appeal was taken is void. *Randall v. Wadsworth*, 130 Ala. 633.

4. **Failure of Clerk to Record Entry of Appeal.** — In *Florida*, by statute, it is required that the entry of an appeal in a chancery cause shall be recorded in the chancery order book, such record of the entry being intended in lieu of the issuance and service upon the appellee of a citation on appeal, and being jurisdictional. In *Chamberlain v. Finley*, 40 Fla. 91, where the clerk failed to record such entry of appeal, the Supreme Court refused to make an order requiring the clerk to record the entry of appeal *nunc pro tunc*, and on the motion of the appellee dismissed the appeal.

346. 1. *Nosler v. Coos Bay Nav.*

Co., 40 Oregon 305, citing with approval 2 ENCYC. OF PL. AND PR. 346.

2. *United States.* — *Armijo v. Armijo*, 181 U. S. 558.

3. **Extent to Which Court Will Consider Merits.** — Where a motion to dismiss is based on the ground that the appellant's rights have not been affected, the court will consider whether the appellant occupies the position of a person whose rights have been defeated by the judgment, decree, or order complained of. *Penn Mut. L. Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659.

4. *Corder v. Speake*, 37 Oregon 105, citing with approval 2 ENCYC. OF PL. AND PR. 347. Compare *Meekins v. Norfolk, etc., R. Co.*, 131 N. Car. 1; *Ayers v. Makely*, 131 N. Car. 60.

347. 1. *Corder v. Speake*, 37 Oregon 105 [citing 2 ENCYC. OF PL. AND PR. 347]; *Penn Mut. L. Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659.

3. **Refusing Additional Affidavits.** — In *Isom v. Rex Crude Oil Co.*, 136 Cal. 454, the court, after it had heard the motion to dismiss, refused to allow the respondent to file in support of the motion additional affidavits.

4. *Gage County v. King Bridge Co.*, 58 Neb. 827, citing with approval 2 ENCYC. OF PL. AND PR. 347.

348. 2. See also *Eggleston v. Royal Trust Co.*, 192 Ill. 101.

5. **Necessity to Designate Day on which Motion Will Be Heard.** — In *Swortfiguer v. White*, 137 Cal. 391, the motion to dismiss the appeal was abortive because the notice did not designate the day on which the motion would be heard.

6. **Proof of Service on Motion to Dismiss.** — Where a motion is made to dismiss an appeal for failure of the transcript to show service of the notice of appeal, and at the hearing of such motion proof of such service is made, the motion to dismiss will be denied. *Stratton's Estate*, 112 Cal. 513.

8. **Necessity to Comply with Rule of Court.** — Where a rule of court requires

348. 12. When Motion Must Be Made — In General. — See note 11.

349. See note 2.

Waiver. — See note 6.

350. Exception. — See note 5.

that "all motions shall be in writing," such rule is applicable to motions to dismiss, and unless it is complied with the appellee's argument on his motion to dismiss an appeal will not be considered. *Chicago, etc., R. Co. v. Binkowski*, 72 Ill. App. 22.

Signature. — A motion to dismiss an appeal must be signed by the counsel of record. *Haggin v. Lorenze*, 25 Mont. 569.

348. 9. Haggin v. Lorenze, 25 Mont. 569.

10. State v. Estes, 34 Oregon 196, citing 2 ENCYC. OF PL. AND PR. 348. See also *Bell v. Southern Pac. R. Co.*, 137 Cal. 77, in which case a motion was made to dismiss the appeal on the ground that the transcript was not filed in time. The motion was contested for the reason that the grounds upon which the motion to dismiss was based were not stated. Notice was given that the motion would be made upon the certificate of the clerk and an affidavit, copies of which were annexed to the notice and served with it. The certificate was the usual one made in such cases for the purposes of the motion and such as was prescribed by the rules. The affidavit merely showed that no transcript had been served on the attorneys for the respondents. The court declared that the sufficiency of the notice must be determined by the facts in each case, and held that the attorney for the appellant was sufficiently apprised of the grounds of the motion.

Rule in Nevada. — By Nevada Sup. Ct. Rule No. 3, subd. 2, it is required that on a motion to dismiss an appeal there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount and character of the judgment; the date of its rendition; the fact and date of the filing of the notice of appeal, together with the facts and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of the filing the undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the

statement, if there be one; and also that the appellant has received a duly certified transcript of the record, or that he has not requested the clerk to certify to a correct transcript of the record, or, if he has made such request, that he has not paid the fees therefor, if the same had been demanded. *Robinson v. Kind*, 25 Nev. 261.

11. Eggleston v. Royal Trust Co., 192 Ill. 101. See also *Hake v. Lee*, 104 La. 146, in which case it was held that the motion was made in apt time.

Time of Making Objection to Order of Appeal. — A motion to dismiss an appeal because of informality in, or absence of, an order of appeal, must be filed within three days after the filing of the transcript in the court. *Vallee v. Hunsberry*, 108 La. 136.

A Motion to Dismiss for Failure to Docket an Appeal Cannot Be Made After the Appeal Has Been Docketed, provided the appeal be docketed at the term next succeeding the call for the district, though it was not docketed within the time prescribed by the court rules. *Benedict v. Jones*, 131 N. Car. 473.

May Be Made at Any Time Before the Appeal Is Docketed. — A motion to dismiss an appeal for failure to docket the appeal within the time required by rule of court may be made at any time before the appellant takes advantage of the appellee's delay by docketing the appeal. *Worth v. Wilmington*, 131 N. Car. 532.

349. 2. For Default in Filing Transcript. — In *Alabama*, under rule 45, a motion to dismiss because the transcript has not been filed within the time prescribed must be made on or before the next Thursday after the default in filing. *Martin Mach. Works v. Miller*, 132 Ala. 629.

6. See also Vallee v. Hunsberry, 108 La. 136.

350. 5. A Motion Based on Improper Conduct of the Appellant Subsequent to the Perfection of the Bill is within the exceptions, and may be made seasonably before the case on appeal is called, even though the appellee has recognized the appeal by pleading and acting therein.

- 350.** 13. *By Whom Made — By Parties.* — See note 8.
351. *By Attorney of Record.* — See note 1.
Dismissal by Appellant. — See notes 3, 4.
353. 16. *Effect of Dismissal — In General.* — See note 4.
355. VII. *SUCCESSIVE APPEALS — 1. Second Appeal in General.*
 — See notes 2, 3.
356. *From Entry of Judgment After Appeal.* — See note 5.
357. 2. *Dismissal on Technical Grounds — Void Appeal.* — See note 3.
358. VIII. *REINSTATEMENT — In General.* — See note 10.

Gage County v. King Bridge Co., 58 Neb. 827.

350. 8. *Contra.* — In *Bullock v. Taylor*, 112 Cal. 147, there was a plurality of parties defendant and judgment was rendered against one of them, there being a judgment of nonsuit as to the others. The party defendant against whom judgment was rendered appealed, assigning error in the granting of the nonsuit, and a motion to dismiss was made by his codefendants on the ground that they were necessary parties to the appeal. It was insisted that they could not make such motion because they were not parties to the record on appeal. The court in overruling this objection said: "(1) The matter going to the jurisdiction of this court to entertain the appeal, it would seem to be immaterial in what manner comes the suggestion that the steps necessary to confer such jurisdiction have not been taken, and so the court has said in *Matter of Castle Dome Min., etc., Co.*, 79 Cal. 250. (2) To hold that only a party receiving notice of appeal may move to dismiss, is to place with the appellant, in any case where there are several parties adverse to him, the power to select his opponents on appeal; naturally he would choose those least interested in sustaining the judgment."

351. 1. See *Haggin v. Lorenze*, 25 Mont. 569.

3. *Austell v. Atlanta*, 100 Ga. 182; *Ladd v. Kuhn*, 154 Ind. 313. See also *Page v. Southern Bell Telephone, etc., Co.*, 40 Fla. 425, wherein the court, at the request in writing of the plaintiff in error, affirmed the judgment at his cost.

Exceptions to Rule. — This general right, however, is subject to exceptions and cannot be exercised under any and all circumstances. *Ladd v. Kuhn*, 154 Ind. 313.

Where the Appeal Is on Behalf of a Privy who is entitled to appeal and who objects to the dismissal, the appellant will not be allowed to dismiss. *Ladd v. Kuhn*, 154 Ind. 313.

4. See also *Page v. Southern Bell Telephone, etc., Co.*, 40 Fla. 425.

353. 4. *Washington.* — *Post v. Spokane*, 28 Wash. 701.

355. 2. *State v. Boyce*, 25 Wash. 422. See also *McAnaw v. Clark*, 167 Mo. 443.

3. *State v. Boyce*, 25 Wash. 422.

Double Appeal. — *Subsequent Appeal While First Appeal Is Pending.* — In *American Contract, etc., Co. v. Perrine*, 40 Fla. 412, a party while an appeal was pending took a subsequent appeal from the same judgment. The court declared that whether or not the second appeal was a nullity, as is held by some authorities, it was irregular, and that because of such irregularity it should be dismissed.

356. 5. *State v. Boyce*, 25 Wash. 422.

357. 3. *Vordermark v. Wilkinson*, 147 Ind. 56, citing 2 ENCYC. OF PL. AND PR. 357.

358. 10. *Misapprehension of Statute.* — Misapprehension of the terms of a statute requiring briefs to be filed within a certain time, under the penalty of a dismissal of the appeal, is not ground for reinstatement of an appeal dismissed for noncompliance with the statute. *Kaiser v. Wells*, 63 Ohio St. 349.

Dismissal for Lack of Final Judgment.

— Where an appeal is dismissed because the record fails to show the rendition of a final judgment by the lower court, a rehearing and reinstatement may be granted upon affidavits showing that there was in fact a final judgment, the recital thereof having been omitted through an oversight of the clerk. *Mills v. State*, 41 Tex. Crim. 447.

361. IX. EXAMINATION OF CASE ON APPEAL — 1. Calendar — Advancement of Cause. — See note 3.

363. 2. Scope of Review — a. RECORD. — See note 2.

364. See note 1.

b. WHAT IS BROUGHT UP BY APPEAL. — See notes 2, 3.

366. c. FROM PORTIONS OF JUDGMENT — Subsequent Correction — See note 2.

Subsequent Order. — See note 3.

d. APPEAL FROM SUBSEQUENT ORDERS — New Trial. —

See note 5.

368. Prior Order. — See note 2.

369. f. INTERLOCUTORY DECREE — From Final Decision. — See note 4.

The Failure of the Trial Court to Settle the Case is not ground for reinstatement of an appeal dismissed for failure to docket it, it being the duty of the appellant to docket as much of the record as he can obtain, and to move for certiorari for the balance. *Worth v. Wilmington*, 131 N. Car. 532.

361. 3. Application Made Before Filing Abstract and Briefs. — In *Dickinson v. Freed*, 24 Colo. 483, it was said: "It is the established practice of this court where, as a matter of right or for good cause shown, a cause may be advanced, not to entertain an application therefor until the abstract and all the briefs have been filed in accordance with the rule of court, and the case is ready for submission."

363. 2. U. S. Blowpipe Co. v. Spencer, 46 W. Va. 590; *Memphis, etc., R. Co. v. Martin*, 131 Ala. 269; *Alabama Midland R. Co. v. Brown*, 129 Ala. 282; *Neher v. Crawford*, 10 N. Mex. 725.

364. 1. U. S. Blowpipe Co. v. Spencer, 46 W. Va. 590 [wherein English, J., quoted with approval 2 ENCYC. OF PL. AND PR. 363, 364]; *Williams v. State*, 130 Ala. 107; *Davis v. Nelson*, 73 Vt. 328.

2. On Appeal from the Judgment Alone the only question presented is the sufficiency of the pleadings and findings to support the judgment. *Coleman v. Stalnacke*, 15 S. Dak. 242.

3. From Dismissal of Appeal. — On an appeal from an order of an intermediate appellate court dismissing an appeal, only the grounds specified in the motion to dismiss in the lower court will be considered. *Thames v. Chitwood*, 24 Tex. Civ. App. 389.

366. 2. American Sales Book Co. v. Bullivant, (C.C. A.) 117 Fed. Rep. 255.

3. Motion for New Trial. — See also *Collier v. Collins*, 172 N. Y. 99.

5. Sufficiency of Evidence. — On appeal from an order granting or refusing a new trial, the sufficiency of the evidence cannot be reviewed. *Haitiwanger v. Columbia, etc., R. Co.*, 64 S. Car. 7.

Sufficiency of Complaint. — Where the appellant does not appeal from the judgment, but merely from an order denying a motion for a new trial, the sufficiency of the complaint cannot be considered. *Lambert v. Marcuse*, 137 Cal. 44 [in which case the court distinguished *Holland v. McDade*, 125 Cal. 353]; *Sutter County v. Tisdale*, 136 Cal. 474. See also *Charles Schatzlein Paint Co. v. Passmore*, 26 Mont. 500.

368. 2. Prior Order Denying Petition to Set Aside Judgment. — Upon an appeal from an order denying a petition to set aside and vacate a judgment, the denial by the court in the same cause of an earlier petition, which asked for the same relief as the subsequent one, is not reviewable, under Ball. Code Wash., § 6500, subd. 7, which provides that an appeal from any final order made after judgment shall bring up for review any previous order in the same action which involves the merits and necessarily affects the order appealed from, since the statute contemplates only such previous orders as are made in the particular proceeding in which the appeal is taken. *Wilson v. Seattle Dry Dock, etc., Co.*, 26 Wash. 297.

369. 4. Specification on Notice of Appeal. — Where an appeal is taken to the Court of Appeals directly from the decision of a Surrogate Court rendered after the case has been remanded by the Appellate Division and pursuant

- 371. 3. Unnecessary Questions — In General.** — See notes 4, 5, 6.
372. 4. Review of Reasons Advanced Below. — See notes 4, 5.
373. 5. On Second Appeal — a. LAW OF THE CASE. — See notes 1, 2, 3.
374. See note 1.

to the order of remand, a specification in the notice of appeal of error on the part of the Appellate Division will not authorize the Court of Appeals to review the decision of the Appellate Division. *Matter of Union Trust Co.*, 172 N. Y. 494.

371. 4. Carmel Natural Gas, etc., Co. v. Small, 150 Ind. 427, *quoting* 2 ENCYC. OF PL. AND PR. 371. See also *Dame v. Laconia Car Co. Works*, 71 N. H. 407.

Consideration of Moot Question. — Where, in an action against a city for damages for the appropriation of ground for the construction of a sewer, it appears from the record that the sewer was constructed by virtue of a statute enacted for such enterprises, and not under a claim of an easement, a finding by the court that the city had a right, in the nature of an easement, to enter and construct the sewer, presents a moot question, and will not be considered on appeal. *Gas Light, etc., Co. v. New Albany*, 158 Ind. 268.

5. Carmel Natural Gas, etc., Co. v. Small, 150 Ind. 427, *quoting* 2 ENCYC. OF PL. AND PR. 371.

6. Carmel Natural Gas, etc., Co. v. Small, 150 Ind. 427, *quoting* 2 ENCYC. OF PL. AND PR. 371.

372. 4. Butte Hardware Co. v. Frank, 25 Mont. 344.

5. Colorado. — *Henry v. McNealey*, 24 Colo. 456.

Georgia. — *Griffith v. Finger*, 115 Ga. 592.

Hawaii. — *Calaca v. Caldeira*, 13 Hawaii 214.

Illinois. — *Alford v. Dannenberg*, 177 Ill. 331.

Montana. — *Butte Hardware Co. v. Frank*, 25 Mont. 344.

New Mexico. — *Lockhart v. Wills*, 9 N. Mex. 344.

Texas. — *Houston, etc., R. Co. v. State*, 24 Tex. Civ. App. 117.

United States. — *Dinsmore v. Southern Express Co.*, 183 U. S. 115.

Where Case Is Submitted to Court under Stipulation. — Where a case has been submitted to a trial judge without the intervention of a jury, with an agreement that he shall hear and decide all

questions of law and fact, and he, in deciding the case, renders judgment and also files a written opinion giving his reasons for the judgment, error cannot be assigned on arguments or reasoning of the judge in this opinion. Where in such a case the judge in his written opinion states his conclusions of fact as to a particular part of the case, error cannot be assigned upon these conclusions. *Griffith v. Finger*, 115 Ga. 592.

373. 1. Vincent v. Phillips, 48 La. Ann. 351; *Silva v. Pickard*, 14 Utah 245, in each of which cases the court *cited* 2 ENCYC. OF PL. AND PR. 373. See also *Priest v. Eide*, 19 Mont. 53; *Beach v. Macon Grocery Co.*, (C. C. A.) 120 Fed. Rep. 736.

2. Vincent v. Phillips, 48 La. Ann. 351; *Silva v. Pickard*, 14 Utah 245, in each of which cases the court *cited* 2 ENCYC. OF PL. AND PR. 373.

3. Vincent v. Phillips, 48 La. Ann. 351; *Silva v. Pickard*, 14 Utah 245, in each of which cases the court *cited* 2 ENCYC. OF PL. AND PR. 373. See also the following cases:

Georgia. — *Southern Mut. Ins. Co. v. Hudson*, 115 Ga. 638.

Kentucky. — *Hopkins v. Adam Roth Grocery Co.*, 105 Ky. 357.

Nebraska. — *Fuller v. Cunningham*, 48 Neb. 857.

New Mexico. — *Crary v. Field*, 10 N. Mex. 257.

United States. — *U. S. v. Camou*, 184 U. S. 572.

Prior Decision on Demurrer. — *Little v. Caldwell*, 112 Cal. 27, wherein it was held that a decision rendered on demurrer upon a former appeal is the law of the case.

Where There Is a Change in Parties. — A party to the first appeal cannot object because other persons whose rights are affected, but who make no complaint of the results of the first appeal, were not then before the court. *McClanahan v. Hockman*, 96 Va. 392.

374. 1. Vincent v. Phillips, 48 La. Ann. 351; *Silva v. Pickard*, 14 Utah 245, in each of which cases the court *cited* 2 ENCYC. OF PL. AND PR. 373 *et seq.* See also the following cases:

377. See note 1.

378. *b.* SUBSEQUENT PROCEEDINGS IN TRIAL COURT.— See note 2.

379. See note 1.

c. ERROR IN PRIOR DECISION. — See note 2.

Extent of Principle. — See note 8.

381. *6. Stare Decisis.* — See note 7. See also Am. and Eng. Encyc. of Law (2d ed.), title *Stare Decisis*.

Montana. — *Yellowstone Nat. Bank v. Gagnon*, 25 Mont. 268.

Nebraska. — *Barton v. Shull*, 62 Neb. 570.

New Mexico. — *Crary v. Field*, 10 N. Mex. 257.

North Carolina. — *Best v. British, etc.*, *Mortg. Co.*, 131 N. Car. 70; *Jones v. Wilmington, etc.*, *R. Co.*, 131 N. Car. 133.

Oregon. — *Stager v. Troy Laundry Co.*, 41 Oregon 141.

South Dakota. — *Wright v. Lee*, 10 S. Dak. 263.

Virginia. — *McClanahan v. Hockman*, 96 Va. 392.

United States. — *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77.

Questions Expressly Excluded on Former Appeal. — Where the court on a former appeal expressly confines its decisions to questions presented on oral argument, questions not so presented may be considered on a second appeal, though the opinion on the former appeal purported to pass upon all material questions. *Sweeney v. Montana Cent. R. Co.*, 25 Mont. 543.

Motion for Rehearing on Second Appeal. — A motion for a rehearing will not be granted on a second appeal where the contention of the moving party, if sustained, would require a reversal of the decision on the former appeal. *Priest v. Eide*, 19 Mont. 53.

Sufficiency of Evidence. — In an action at law the ruling made by the Supreme Court on a prior appeal, to the effect that the evidence introduced by the plaintiff on the first trial was sufficient to require its submission to the jury, is, on a second appeal, the law of the case, and cannot be reviewed or reversed where it appears that practically the same evidence for the plaintiff was introduced on the second trial. *Southern Mut. Ins. Co. v. Hudson*, 115 Ga. 638.

Right to Appeal. — The trial court cannot deny the right to appeal because the judgment from which the

appeal is sought was entered pursuant to an order of remand. Whether there is anything to review is a question for the appellate court. *Southern Bldg., etc., Assoc. v. Carey*, 117 Fed. Rep. 325.

377. 1. *Vincent v. Philips*, 48 La. Ann. 351; *Silva v. Pickard*, 14 Utah 245, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 373 *et seq.* See also the cases cited in the two preceding notes.

378. 2. *McClung v. Harris*, 11 Okla. 64; *Olsen v. North Pac. Lumber Co.*, (C. C. A.) 119 Fed. Rep. 77.

Question on Second Appeal. — *McClung v. Harris*, 11 Okla. 64; *U. S. v. Camou*, 184 U. S. 572.

379. 1. *Stoll v. Loving*, (C. C. A.) 120 Fed. Rep. 805.

2. See the cases cited *supra*, in notes to pp. 373, 374.

8. **Where New Evidence Is Introduced.** — In *Kray v. Muggli*, 84 Minn. 90, the court said: "The evidence before us at this time is materially different from what it was on the former trial. The trial court expressly finds that there was received on this trial a large mass of new and additional evidence, and the findings of fact are different in one respect, at least, from what they were on the former trial. This being the situation, the doctrine of the law of the case does not apply. None of the cases hold that such doctrine applies on the second appeal of the same case, where the evidence on the second trial was essentially different from that on the first."

381. 7. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 1, in which case the court said: "The doctrine of *stare decisis* is based upon the assumption that the rules of law to which this doctrine applies have previously been determined by a court having final jurisdiction of the questions involved. For this reason, where the decision of a tribunal is subject to review by one having superior au-

382. 7. On Motion for Rehearing. — See also REHEARING.

384. *d.* WHEN APPLICATION MUST BE MADE — In General. — See notes 1, 2.

After Remittitur. — See note 3.

385. *e.* GROUNDS OF MOTION — In General. — See note 1.

386. *f.* NEW QUESTIONS. — See notes 1, 2, 3, 4.

387. *g.* RECORD — Motion Based on Record. — See notes 1, 2.

389. *h.* DISCRETIONARY — Strong Case Required. — See note 1.

390. *i.* ARGUMENT ON REHEARING. — See notes 1, 2.

thority over it, for that purpose, or the question determined may be passed upon by such tribunal in another case, the doctrine of *stare decisis* does not apply with full force until the same questions have been determined by the court of last resort."

384. 1. *In re Seydel*, 14 S. Dak. 115.

Where Motion Is Lodged in Clerk's Office Before Expiration of Term. — In *Cooper v. Portner Brewing Co.*, 113 Ga. 1, the court said: "The motion for a rehearing in the present case not having been presented until after the term at which the judgment was rendered had adjourned, this court has no jurisdiction to entertain the same. This is true notwithstanding the fact that the motion was presented and actually lodged in the clerk's office before the expiration of ten days from the date of the judgment; that provision in the rule in reference to motions for rehearings being presented within ten days being, by the terms of the rule itself, only applicable when the term at which the judgment was rendered continues more than ten days after the date of the judgment. The motion for a rehearing must be denied."

2. *In re Seydel*, 14 S. Dak. 115.

3. *Merchants' Nat. Bank v. Greenwood*, 16 Mont. 460 [citing *Columbia Min. Co. v. Holter*, 1 Mont. 429]; *In re Seydel*, 14 S. Dak. 115.

385. 1. *Michigan*. — *Dowagiac Mfg. Co. v. Corbit*, 127 Mich. 473.

Montana. — *Forrester v. Boston*, etc., *Consol. Copper*, etc., Min. Co., 21 Mont. 565.

South Carolina. — *Maxwell v. Foster*, 64 S. Car. 1; *Haltiwanger v. Columbia*, etc., R. Co., 64 S. Car. 7; *Brown v. Newell*, 64 S. Car. 27; *Brown v. Carolina Midland R. Co.*, 64 S. Car. 365.

386. 1. *Merchants' Nat. Bank v. Greenwood*, 16 Mont. 460; *Beck v. Thompson*, 22 Nev. 419, in each of which cases the court cited 2 ENCYC.

OF PL. AND PR. 386. See also the following cases:

Colorado. — *Durango v. Chapman*, 27 Colo. 169; *Water Supply*, etc., Co. v. *Tenney*, 24 Colo. 344; *Orman v. Ryan*, 25 Colo. 383.

North Dakota. — *Sweigle v. Gates*, 9 N. Dak. 538.

Failure of Appellant to Take Exception.

— In *Durango v. Chapman*, 27 Colo. 169, it was held that on a petition for a rehearing the court will not allow the petitioner to set up for the first time the fact that exceptions were not properly taken or preserved to the judgment of the trial court. The court said: "We are not prepared to say that counsel for defendant in error, in his oral argument, did not refer to the absence of an exception to the judgment of the trial court, although we do not recall it; but where entirely new questions are raised on such argument from those contained in the printed briefs filed, counsel urging them, if they do not wish to take the chances that they be overlooked by the court, must supplement such argument by either printed or typewritten brief, calling our attention to such points as they desire to have considered not contained in their original briefs, for it is manifestly impossible for us to remember points made in a case which are not thus presented." See also BRIEFS.

2. *Beck v. Thompson*, 22 Nev. 419, quoting with approval 2 ENCYC. OF PL. AND PR. 386.

3. *Beck v. Thompson*, 22 Nev. 419.

4. *Beck v. Thompson*, 22 Nev. 419.

387. 1. *In re Seydel*, 14 S. Dak.

115, citing 2 ENCYC. OF PL. AND PR. 387.

2. *In re Seydel*, 14 S. Dak. 115 [citing 2 ENCYC. OF PL. AND PR. 387]; *Hall v. Reese*, 24 Tex. Civ. App. 221.

389. 1. *Dowagiac Mfg. Co. v. Corbit*, 127 Mich. 473.

390. 1. *Douglas v. Smith*, 50 Neb. 899.

2. *Anderson v. Cook*, 25 Mont. 330.

390. 8. Examination of Questions of Fact — a. ACTION AT LAW. — See notes 5, 6. See also NEW TRIAL.

Where the Motion Is Based on a Single Point the whole case will nevertheless be open for rehearing if the order granting the hearing be general. *Hicks v. Southern R. Co.*, 63 S. Car. 559.

390. 5. *St. Louis, etc., R. Co. v. Wilson*, 70 Ark. 136; *White v. Dearborn*, 70 N. H. 622; *Neil v. Kelley*, 70 N. H. 625; *Colby v. Campbell*, 70 N. H. 629; *Jellison v. Jellison*, 70 N. H. 633; *India Wharf Brewing Co. v. Brooklyn Wharf, etc., Co.*, 173 N. Y. 167; *Matter of Board of Education*, 173 N. Y. 321; *Meyers v. Falk*, 90 Va. 385.

6. *Arkansas.* — *St. Louis, etc., R. Co. v. Wilson*, 70 Ark. 136; *St. Louis, etc., R. Co. v. Osborn*, 67 Ark. 399; *St. Louis, etc., R. Co. v. Baker*, 67 Ark. 531.

California. — *People v. Miller*, 122 Cal. 84; *Brittan v. Oakland Sav. Bank*, 112 Cal. 1; *People v. Louie Foo*, 112 Cal. 17.

Colorado. — *Colorado City v. Liase*, 28 Colo. 468; *Empson Packing Co. v. Vaughn*, 27 Colo. 66.

Florida. — *Rawlins v. State*, 40 Fla. 155; *Eggart v. State*, 40 Fla. 527; *Driggers v. State*, 38 Fla. 7.

Georgia. — *Lackey v. State*, 115 Ga. 242; *McDaniel v. Allison*, 115 Ga. 751; *Macon v. Wing*, 113 Ga. 90; *Norman v. Goode*, 113 Ga. 121; *Satterfield v. Coggins*, 113 Ga. 189; *Graham v. State*, 113 Ga. 724; *Lane v. State*, 113 Ga. 724.

Idaho. — *Bernier v. Anderson*, (Idaho 1902) 70 Pac. Rep. 1027.

Illinois. — *Chicago City R. Co. v. Fennimore*, 199 Ill. 9; *Springside Coal Min. Co. v. Grogan*, 169 Ill. 50; *West Chicago St. R. Co. v. Feldstein*, 169 Ill. 139; *Chicago, etc., R. Co. v. Pontiac*, 169 Ill. 155; *Chicago, etc., R. Co. v. Delaney*, 169 Ill. 581, *affirming* 68 Ill. App. 307; *Emmons v. Hilton*, 72 Ill. App. 124; *Wilkinson v. Adams*, 72 Ill. App. 541. See also *Potter v. Leviton*, 199 Ill. 93; *Chicago, etc., R. Co. v. Randolph*, 199 Ill. 126.

Indiana. — *Gifford v. Hess*, 15 Ind. App. 450.

Iowa. — *State v. Mulholland*, 115 Iowa 170; *Lanza v. Legrand Quarry Co.*, 115 Iowa 299; *Emerson v. Miller*, 115 Iowa 315; *Perin v. Cathcart*, 115 Iowa 553; *Yeager v. Spirit Lake*, 115 Iowa 593; *Welch v. Brownning*, 115 Iowa 690.

Kansas. — *Evans v. Fleming*, 62 Kan. 811.

Kentucky. — *Taulbee v. Moore*, 106 Ky. 749; *Lischy v. Schrader*, 104 Ky. 657.

Minnesota. — *Cappis v. Wiedemann*, 86 Minn. 156; *Lobdell v. Keene*, 85 Minn. 90; *Payne v. Hackney*, 84 Minn. 195; *Baxter v. Coughlin*, 80 Minn. 322.

Mississippi. — *Louisville, etc., R. Co. v. McDonald*, 79 Miss. 641.

Missouri. — *Crossan v. Crossan*, 169 Mo. 631; *Minnier v. Sedalia, etc., R. Co.*, 167 Mo. 99.

Montana. — *State v. Howell*, 26 Mont. 3; *Chicago Title, etc., Co. v. O'Marr*, 25 Mont. 242; *Huston v. Nuss*, 19 Mont. 113; *Hefferlin v. Krieger*, 19 Mont. 123. See also *McIntyre v. McCabe*, 19 Mont. 333; *Harrington v. Butte, etc., Min. Co.*, 19 Mont. 411.

Nebraska. — *Jones v. Stewart*, 62 Neb. 207; *Farmers, etc., Ins. Co. v. Dobney*, 62 Neb. 213; *Moore v. Omaha L. Assoc.*, 62 Neb. 497; *Hawver v. Parkway Real Estate Co.*, 62 Neb. 504; *Mullally v. Dingman*, 62 Neb. 702; *Booth v. Kessler*, 62 Neb. 704; *Bell v. Rice*, 50 Neb. 547; *Emerson v. Kilroy*, 50 Neb. 591; *Stewart v. Smith*, 50 Neb. 631; *Fremont, etc., R. Co. v. French*, 48 Neb. 639.

Nevada. — *Roberts v. Webster*, 25 Nev. 94; *McGurn v. McInnis*, 24 Nev. 370; *McNamee v. Nesbitt*, 24 Nev. 400.

New Hampshire. — *Martin v. Livingston*, 68 N. H. 562.

New Mexico. — *Heisch v. Bell*, (N. Mex. 1902) 70 Pac. Rep. 572.

New York. — *People v. Filippelli*, 173 N. Y. 509.

Oklahoma. — *Boyd v. Bryan*, 11 Okla. 56.

Tennessee. — *Central Mfg. Co. v. Cotton*, 108 Tenn. 63; *Minton v. Stahlman*, 96 Tenn. 98.

Virginia. — *Alleghany Iron Co. v. Teaford*, 96 Va. 372.

Washington. — *Rattelmiller v. Stone*, 28 Wash. 104.

Wisconsin. — *Cullen v. Hanisch*, 114 Wis. 24.

Circumstantial Evidence which is sufficient to support the verdict will preclude an appellate court from disturbing it. *Bausman v. Cameron*, 26 Wash. 352.

391. See note 1.

b. VERDICT AND FINDINGS OF COURT — Verdict. — See note 2. See also NEW TRIAL.

396. Findings of Court. — See notes 1, 2.

Verdict Against Greater Number of Witnesses. — That the greater number of witnesses testified in favor of the party against whom the verdict was rendered is not a ground for reversal. *Fremont, etc., R. Co. v. French*, 48 Neb. 639.

Finding Against Preponderance of Evidence. — Although the finding of the jury seems to the appellate court to be against the preponderance of the evidence, still if it has evidence to support it the appellate court will not disturb it. *St. Louis, etc., R. Co. v. Osborn*, 67 Ark. 399.

Distinction Between Rules in Appellate Court and Trial Court. — While it is a well-observed and recognized rule, when applied to appellate courts, that the verdict of a jury should not be disturbed when there is a substantial conflict of the evidence and there is some evidence to sustain the verdict, yet such rule has no application to trial courts when exercising their jurisdiction in passing upon motions for new trials. *Bernier v. Anderson*, (Idaho 1902) 70 Pac. Rep. 1027. See also NEW TRIALS.

Examination of Evidence to Determine Appropriateness of Instructions. — Where no exception is saved to a judgment in the bill of exceptions, the evidence may not be examined for the purpose of determining whether it is sufficient to sustain the judgment, but it may be examined for the purpose of determining whether the court properly submitted the case to the jury under appropriate instructions. *Alta Invest. Co. v. Warden*, 25 Colo. 215.

On Appeals to the United States Supreme Court from state courts, questions of fact decided by the state courts will not be reviewed. *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92.

391. 1. *St. Louis, etc., R. Co. v. Wilson*, 70 Ark. 136; *Roberts v. Webster*, 25 Nev. 94. See also cases cited in the next preceding note.

2. *Flath v. Casselman*, 10 N. Dak. 419, citing 2 ENCYC. OF PL. AND PR. 391. See also the following cases:

Montana. — *Helena, etc., Smelting, etc., Co. v. Lynch*, 25 Mont. 497; *Merchants' Nat. Bank v. Greenhood*, 16 Mont. 395.

Nebraska. — *Crites v. Hart*, 49 Neb. 54; *Davidson v. Crosby*, 49 Neb. 60; *Spurck v. Dean*, 49 Neb. 66; *Graham v. Frazier*, 49 Neb. 90; *Johnson v. Wirth*, 49 Neb. 115; *Bartram v. Sherman*, 49 Neb. 181; *McCormick Harvesting Mach. Co. v. Seeman*, 49 Neb. 312; *Halbert v. Rosenbalm*, 49 Neb. 498; *Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co.*, 49 Neb. 537; *Purnell v. Minor*, 49 Neb. 555; *Sterling Mfg. Co. v. Hough*, 49 Neb. 618; *King v. Murphy*, 49 Neb. 671.

Nevada. — *Barnes v. Western Union Tel. Co.*, 24 Nev. 125.

New Mexico. — *Territory v. Pino*, 9 N. Mex. 598.

New York. — *Merchants' Nat. Bank v. Barnes*, 172 N. Y. 618.

North Dakota. — *State v. Montgomery*, 9 N. Dak. 405.

Oklahoma. — *Boyd v. Bryan*, 11 Okla. 56; *Harvey v. Territory*, 11 Okla. 156; *Osborne v. Case*, 11 Okla. 479; *Long v. McWilliams*, 11 Okla. 562; *Smith v. Territory*, 11 Okla. 656.

Pennsylvania. — *Robeson v. Pels*, 202 Pa. St. 399.

Tennessee. — *Central Mfg. Co. v. Cotton*, 108 Tenn. 63; *Memphis St. R. Co. v. Norris*, 108 Tenn. 632.

Utah. — *Braegger v. Oregon Short Line R. Co.*, 24 Utah 391; *State v. Haworth*, 24 Utah 398.

Virginia. — *Meyers v. Falk*, 90 Va. 385.

Where the Evidence and Not the Facts Are Certified by the bill of exceptions, the appellate court will not reverse the judgment, unless, after rejecting all the conflicting oral evidence of the exceptor and giving full faith to that of the adverse party, the decision still appears to be wrong. *State v. Henry*, 51 W. Va. 283.

396. 1. *Granby v. Ménard*, 31 Can. Sup. Ct. 14 [wherein Girouard, J., cited 2 ENCYC. OF PL. AND PR. 396]; *Weaver v. Lock*, 4 Kan. App. 335; *Freeman v. Moffitt*, 135 Mo. 269; *Pursley v. Good*, 94 Mo. App. 382; *Booth v. Kessler*, 62 Neb. 704, holding that findings of fact by the trial court are entitled to the same weight as a verdict of a jury, whether the case is brought up on error or appeal.

Presumptions in Favor of Findings Based upon Stipulation. — No presump-

tions can be indulged upon appeal against any stipulated fact. *Conway v. Supreme Council, etc.*, 137 Cal. 384.

Where Plaintiff's Case Is Made Out by Defendant's Testimony. — The ruling that on appeal the finding of a trial court will not be disturbed where such finding is based on conflicting evidence has no just application where such finding is rendered for the defendant and the latter's testimony admits the essential facts of the plaintiff's case and contradicts none of them. *Kingsbury v. Joseph*, 94 Mo. App. 298.

Review of Intermediate Appellate Court's Decision on Mixed Question of Law and Fact. — In *Illinois* the appellate court's finding upon a mixed question of law and fact is conclusive upon the Supreme Court and will not be reviewed. *Coverdale v. Royal Arcanum*, 199 Ill. 649, in which case the court cited *Moerschbaecher v. Supreme Council, etc.*, 188 Ill. 9. See also *Lautman v. Miller*, 158 Ind. 382.

If the appellate court reverses because it finds the facts differently from the trial court and recites its findings in its judgment, such finding is conclusive upon the Supreme Court, and all the court can do is to determine whether the law has been properly applied. *Aachen, etc., F. Ins. Co. v. Crawford*, 199 Ill. 367, *affirming* 100 Ill. App. 454. See also *Coverdale v. Royal Arcanum*, 199 Ill. 649.

396. 2. *Granby v. Ménard*, 31 Can. Sup. Ct. 14, wherein Girouard, J., cited 2 ENCYC. OF PL. AND PR. 396. See also the following cases:

California. — *Welsh v. Bardshar*, 137 Cal. 154. See also *Freman v. Marshall*, 137 Cal. 159.

Colorado. — *Hector Min. Co. v. Valley View Min. Co.*, 28 Colo. 315; *Columbia Bldg., etc., Assoc. v. Clarke*, 27 Colo. 103; *Cache La Poudre Reservoir Co. v. Windsor Reservoir, etc., Co.*, 25 Colo. 53; *Minor v. Lovell*, 25 Colo. 249; *Frisholm v. Fitzgerald*, 25 Colo. 290; *Rhode v. Steinmetz*, 25 Colo. 308; *Davis v. Holbrook*, 25 Colo. 493; *Colorado Fuel, etc., Co. v. Pryor*, 25 Colo. 540; *Lathrop v. Tracy*, 24 Colo. 382; *Henry v. McNealey*, 24 Colo. 456; *Sterling No. 2 Ditch Co. v. Iliff, etc., Ditch Co.*, 24 Colo. 491.

Georgia. — See *Kennedy v. Schofield*, 113 Ga. 1057.

Hawaii. — *Yowell v. Gomes*, 13 Hawaii 123; *Scott v. Nahale*, 13 Hawaii 255.

Illinois. — See *Coverdale v. Royal Arcanum*, 199 Ill. 649.

Indiana. — *Carver v. Forry*, 158 Ind. 76; *Home Electric Light, etc., Co. v. Globe Tissue Paper Co.*, 146 Ind. 673.

Iowa. — *Gaar v. Nichols*, 115 Iowa 223; *Spurrier v. McLennan*, 115 Iowa 461; *Berry v. Berry*, 115 Iowa 543; *Newton v. Templeman*, 115 Iowa 643.

Kansas. — *Weaver v. Lock*, 4 Kan. App. 335.

Louisiana. — *Delisle v. Bourriague*, 105 La. 77.

Massachusetts. — See *Cleveland v. Springfield Sav. Inst.*, (Mass. 1902) 65 N. E. Rep. 27, holding that a finding which is warranted by the evidence and which the court cannot declare to be wrong as a matter of law will not be disturbed.

Michigan. — *Gee v. Hasbrouck*, 128 Mich. 509; *Heineman v. Sullivan*, 127 Mich. 682. See also *Fix v. Soleau*, 127 Mich. 72.

Mississippi. — *Dennis v. Spence*, 80 Miss. 396.

Missouri. — *Freeman v. Moffitt*, 135 Mo. 269; *Pursley v. Good*, 94 Mo. App. 382; *Rogers v. Hopper*, 94 Mo. App. 437; *Corrigan v. Kansas City*, 93 Mo. App. 173; *Bozarth v. Lincoln Legion of Honor*, 93 Mo. App. 564. See also *Nickerson v. Lynch*, 135 Mo. 471.

Montana. — *Reardon v. Patterson*, 19 Mont. 231.

Nebraska. — *Hawver v. Parkway Real Estate Co.*, 62 Neb. 504; *Shafer v. Hostetler*, 50 Neb. 71; *Ryley v. Sandean*, 50 Neb. 111; *Creighton University v. Riley*, 50 Neb. 341; *Montgomery v. Albion Nat. Bank*, 50 Neb. 652; *Sterling Mfg. Co. v. Hough*, 49 Neb. 618; *Nebraska-Moline Plow Co. v. Klingman*, 48 Neb. 204; *Geneva Nat. Bank v. Bailor*, 48 Neb. 866.

Nevada. — *Palmer v. Colverwell*, 24 Nev. 114; *Barnes v. Western Union Tel. Co.*, 24 Nev. 125.

New Jersey. — *Allerton v. Grundy*, 67 N. J. L. 55; *Atlantic City v. Goldstein*, 67 N. J. L. 517.

New Mexico. — *De Baca v. Santo Domingo*, 10 N. Mex. 38; *Badaracco v. Badaracco*, 10 N. Mex. 761.

North Carolina. — *Morris v. Liverpool, etc., Ins. Co.*, 131 N. Car. 212.

Oklahoma. — *Pettee v. John Deere Plow Co.*, 11 Okla. 467.

South Carolina. — *State v. Holcomb*, 63 S. Car. 22; *Ex p. Rountree*, 57 S. Car. 75.

Tennessee. — *Central Mfg Co. v. Cotton*, 108 Tenn. 63.

Utah. — *Wason v. Butterfield Min. Co.*, 24 Utah 222.

Wisconsin. — *Sutton v. Chicago, etc.*, R. Co., 114 Wis. 647.

Wyoming. — *Wyman v. Quagle*, 9 Wyo. 326; *W. W. Kimball Co. v. Payne*, 9 Wyo. 441.

United States. — *Dooley v. Pease*, 180 U. S. 126; *American Nat. Bank v. Watkins*, (C. C. A.) 119 Fed. Rep. 545.

The General Rule Stated. — "It is the general rule in courts of review, subject, of course, to certain exceptions, that findings of fact will not be disturbed merely because the judges, from an inspection of the printed record, feel that if they had been sitting as triers of fact they would have come to a different conclusion." *Hector Min. Co. v. Valley View Min. Co.*, 28 Colo. 315, *per* Campbell, C. J.

Where No Question of Law Is Presented. — In *Carver v. Forry*, 158 Ind. 76, the rule was stated as follows. "In order to justify this court in disturbing a judgment of a trial court in any case or proceeding on the evidence alone, it must appear that the evidence is such as to raise or present for decision a question of law on some material issue, and that such question, under the judgment of the trial court, was decided erroneously." *Citing Lee v. State*, 156 Ind. 541; *Mead v. Burk*, 156 Ind. 577.

On Error from the United States Supreme Court to a State Court the findings of fact made by the latter are conclusive. *Bement v. National Harrow Co.*, 186 U. S. 70.

Credibility of Witnesses. — Where the appellate court cannot hold that there is a clear preponderance of evidence against the findings of the trial court, without discrediting several unimpeached witnesses, the findings will not be disturbed. *Schilling v. Twitcheil*, 15 S. Dak. 296.

Alabama Statute. — In *Jordan v. Lindsay*, 132 Ala. 567, it was held under Acts Ala. 1894-95, pp. 586-588, that the court was authorized and required to review the finding and conclusion of the circuit judge on the evidence, though there was no special finding of facts.

Rule in South Dakota. — The findings of a trial court on disputed questions of fact are always presumptively right, and though not as controlling as the

verdict of a jury, must stand, unless the evidence clearly preponderates against them. *Hill v. Whale Min. Co.*, 15 S. Dak. 574; *Sands v. Cruikshank*, 15 S. Dak. 142; *Grewing v. Minneapolis Threshing Mach. Co.*, 12 S. Dak. 127; *Hulst v. Benevolent Hall Assoc.*, 9 S. Dak. 144; *McKenna v. Whittaker*, 9 S. Dak. 442; *Webster v. White*, 8 S. Dak. 479; *Reid v. Kellogg*, 8 S. Dak. 596; *Feldman v. Trumbower*, 7 S. Dak. 408; *Randall v. Burk Tp.*, 4 S. Dak. 337.

In Mandamus Proceedings. — Findings of fact by the court on the trial of issues in mandamus are conclusive on the appellate court if there is evidence to support them. *Heineman v. Sullivan*, 127 Mich. 682. See also **MANDAMUS**.

Necessity to Request Declarations of Law. — In *Missouri*, where the trial court in trying issues of fact sits as a jury and gives a general verdict, the only way in which its errors can be corrected, if it decides the law wrongly or makes a misapplication of the law to the facts, is to request declarations of law in order that the appellate court may see on what theory it proceeded. To review the case would simply be giving an opinion on the weight of the evidence where no point of law was saved or raised in the trial court. *Bozarth v. Lincoln Legion of Honor*, 93 Mo. App. 564.

Where Bill of Exceptions Is Insufficient. — Where the only ground set up in a motion for a new trial is that a finding of fact by the court and the judgment based thereon are not supported by the evidence, and the court is unable to say from the bill of exceptions with any reasonable degree of certainty what the evidence was, the judgment must be affirmed. *Overton v. Lohmann*, 67 Ark. 464. See also **BILLS OF EXCEPTIONS**.

Findings of Fact Based on Affidavits. — Where a motion is heard on conflicting affidavits the decision of the trial court will not be disturbed unless it is clearly against the weight of the evidence and manifestly wrong. *Home Electric Light, etc., Co. v. Globe Tissue Paper Co.*, 146 Ind. 673; *Montgomery v. Albion Nat. Bank*, 50 Neb. 652; *Sterling Mfg. Co. v. Hough*, 49 Neb. 618; *Nebraska Moline Plow Co. v. Klingman*, 48 Neb. 204; *Geneva Nat. Bank v. Bailor*, 48 Neb. 866; *Ex p. Rountree*, 57 S. Car. 75.

400. *c.* IN CRIMINAL CASES. — See notes 1, 2. See also NEW TRIAL.

401. *d.* REFEREE'S REPORT. — See REFERENCES.

402. *e.* APPEAL IN EQUITY. — See notes 1, 2.

In *Mankato First Nat. Bank v. Buchan*, 76 Minn. 54, the appeal was from an order vacating and setting aside a writ of attachment. The court said: "An examination of the affidavits used upon the hearing of the motion to vacate discloses a conflict of evidence as between the parties, and in such a case the determination of the court below is conclusive, unless there is a clear preponderance of evidence opposed to that determination." To the same effect is *Finance Co. v. Hursey*, 60 Minn. 17; *Rosenberg v. Burnstein*, 60 Minn. 18.

In *Montana*, on an appeal from an order denying an application to discharge a writ of attachment which is heard wholly upon affidavits, the Supreme Court will review the evidence. *Wilson v. Barbour*, 21 Mont. 176.

The court will regard the fact that the case was not one where the witnesses testified in person and where the manner in which they gave their evidence might have materially aided the trial judge in weighing their credibility, and accordingly if the finding of the lower court based upon affidavits is clearly against the preponderance of evidence such finding will be set aside. *Newell v. Whitwell*, 16 Mont. 243.

Where Evidence in Part Consists of Depositions. — In *Lathrop v. Tracy*, 24 Colo. 382, the court, after referring to the rule which forbids the disturbance of a finding of fact, said: "The appellant contends that inasmuch as some of the evidence was in the form of depositions the foregoing rule is inapplicable, and that it is our duty in such a case to sift the evidence with a view to determine on which side it preponderates. By far the larger and more material part of the evidence was oral testimony by witnesses heard in the presence of the court, and so the case does not, as contended by appellant, entirely fall without this rule, but, at most, is modified only as to the depositions."

Erroneous Finding Based on Stipulation. — Where all the facts are embodied in a stipulation a finding which is not warranted by such stipulation will be

set aside on appeal. *Ions v. Harbison*, 112 Cal. 260, in which case the court said: "For example: If a jury be called, and the parties, instead of calling witnesses to prove disputed facts, present a written stipulation containing all the facts, the jury would be dismissed, because there is no disputed fact to be determined by them; the sole question being one of law arising upon the conceded facts."

400. 1. *Lipscomb v. State*, 75 Miss. 559, wherein *Whitfield, J.*, quoted with approval 2 ENCYC. OF PL. AND PR. 400.

2. *Louisiana*. — *State v. Moise*, 104 La. 63.

Montana. — *State v. Ford*, 26 Mont. 1.

New Jersey. — *Atlantic City v. Goldstein*, 67 N. J. L. 517.

Oklahoma. — *Filson v. Territory*, 11 Okla. 351.

Texas. — *Schackey v. State*, 41 Tex. Crim. 255.

West Virginia. — *State v. Henry*, 51 W. Va. 283.

402. 1. *Illinois*. — *Arnold v. Northwestern Telephone Co.*, 199 Ill. 201.

Indian Territory. — *Daugherty v. Bogy*, 3 Indian Ter. 197.

Kentucky. — *Sebree Deposit Bank v. Clark*, 105 Ky. 212.

Michigan. — *Smith v. Cuddy*, 127 Mich. 664.

Oregon. — *Larch Mountain Invest. Co. v. Garbade*, 41 Oregon 123.

South Carolina. — *Brown v. Newell*, 64 S. Car. 27.

• *Utah*. — *Sandberg v. Victor Gold, etc.*, Min. Co., 24 Utah 1; *Wilson v. Cunningham*, 24 Utah 167.

Review of Oral Testimony. — If a chancery case is heard in open court, on oral testimony, and the evidence is conflicting, the findings of the chancellor will not be reversed unless error is palpable. *Arnold v. Northwestern Telephone Co.*, 199 Ill. 201, reversing 96 Ill. App. 373.

Where Court Certifies Disbelief in Credibility of Witnesses. — A certification by the circuit judge of his disbelief in the testimony adduced by a party to a chancery cause, notwithstanding the advantage possessed by such judge in seeing and hearing the witnesses, will not conclude the Supreme Court from

403. See note 1.

404. *f.* WHEN FACTS MAY BE EXAMINED AT LAW. — See notes 1, 2, 3. See also NEW TRIAL.

reviewing the case on the merits. *Rosencrance v. Rosencrance*, 127 Mich. 322, in which case the court said: "While the conscience of the court is not to yield to testimony of a witness whom he disbelieves, and while we recognize the advantage of seeing and hearing the witness, and the presumption arising therefrom, this court is not concluded by the certification of disbelief, and by the presumption, from reviewing a case upon the merits."

The Doctrine in *Missouri* is not that the Supreme Court has abdicated its supervisory control over questions of fact in equity causes, but only that where there is a conflict of testimony or where the testimony is evenly balanced and the findings seem to be correct the Supreme Court will so far defer to the chancellor's judgment as to affirm it; but the court will not hesitate to review his findings and reverse his decrees when the party having the burden of proof has wholly failed to make out his case and the chancellor has erred in rendering a decree in favor of such party. *Brown v. Fickie*, 135 Mo. 405.

402. 2. *Kentucky*. — *Sebree Deposit Bank v. Clark*, 105 Ky. 212.

Michigan. — *Fix v. Soleau*, 127 Mich. 72.

Missouri. — *U. S. Casualty Co. v. Kacer*, 169 Mo. 301.

Nebraska. — *Ryley v. Sandean*, 50 Neb. 111. See also *Creighton University v. Riley*, 50 Neb. 341.

Utah. — *Wilson v. Cunningham*, 24 Utah 167; *Harter v. Sorensen*, 24 Utah 342; *Gorringe v. Read*, 24 Utah 455.

Where Evidence Is Seriously Conflicting. — Where in a proceeding for injunction the evidence is seriously conflicting, the appellate court will defer to the judge who had the witnesses before him. *Schumacher v. Shawhan*, 93 Mo. App. 573.

Where Oral Evidence Is Not Preserved in Bill of Exceptions. — Where the chancellor's decree is based in part upon evidence taken orally before him, and such oral evidence is not incorporated in a bill of exceptions, the appellate court must presume that the findings of fact made by him were based upon competent and sufficient evidence. *Gaines v. Waters*, 64 Ark. 609.

The presumption of the correctness of a finding of facts by a chancellor may be invoked in the Supreme Court by an appellee upon whose motion that part of the evidence which was delivered orally in the court below was stricken from the record because not properly certified by a bill of exceptions. *Bunckley v. Jones*, 79 Miss. 1.

Where Deed Is Not Copied in Transcript. — In *Irby v. Southern Bldg., etc., Assoc.*, 67 Ark. 287, which was a suit to foreclose a mortgage, the chancellor found that the mortgagor's wife joined in the execution of the mortgage or deed of trust and accordingly decreed a foreclosure, and it was held that as the appellant failed to make such mortgage a part of the transcript it was to be presumed that the chancellor's findings were correct.

The Findings of a Master are entitled to great weight and will generally be followed in the appellate court; but the appellate court must nevertheless examine the record and form its own conclusions. *Briggs v. Neal*, (C. C. A.) 120 Fed. Rep. 224. See also REFERENCES.

Where the Court Fails to Make a Finding on a certain issue supported by clear and uncontradicted evidence the appellate court will make the finding which the lower court ought to have made. *De Witt v. De Witt*, 202 Pa. St. 255.

403. 1. *Kentucky*. — *Sebree Deposit Bank v. Clark*, 105 Ky. 212.

Nevada. — *Stanton v. Crane*, 25 Nev. 114; *Crawford v. Crawford*, 24 Nev. 410.

Pennsylvania. — *Helb v. Hake*, 203 Pa. St. 626.

United States. — *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563.

In New Hampshire questions of fact will not be determined on appeal in equity. *Champollion v. Corbin*, 71 N. H. 78; *Fellows v. Fellows*, 68 N. H. 611.

On Error from the United States Supreme Court to a State Court, the findings made by the latter are conclusive, whether the case be in law or in equity. *Bement v. National Harrow Co.*, 186 U. S. 70.

404. 1. *Matter of Calkins*, 112 Cal. 296.

405. *g.* ON QUESTIONS OF LAW — In General. — See note 1.

407. Refusal to Find Facts. — See FINDINGS OF COURT.

409. *i.* PRESUMPTIONS ON APPEAL FROM INTERMEDIATE APPELLATE COURT. — See note 1.

[9. Examination of Constitutional Questions. — In some jurisdictions an appellate court will not enter upon questions as to the constitutionality of statutes when the case can be determined on other grounds. See note 1*a*.]

410. X. REVIEW OF EXERCISE OF DISCRETIONARY POWER — Burden on Appellant. — See note 3.

No Review. — See note 4.

404. 2. Withers *v.* Kemper, 25 Mont. 432; State *v.* Foster, 26 Mont. 71; Stamm *v.* Albuquerque, 10 N. Mex. 491; Prior *v.* Rio Grande Irrigation, etc., Co., 10 N. Mex. 711; Morgantown Second Nat. Bank *v.* Weston, 172 N. Y. 250.

3. When Order Denying New Trial Will Be Reversed. — When the evidence fails to sustain the verdict of the jury and there is found in the record no evidence to support the findings of the jury, an order denying a new trial will be reversed. Matter of Calkins, 112 Cal. 296. See also NEW TRIAL.

Judgment Clearly Wrong. — Singer Mfg. Co. *v.* Rogers, 70 Ark. 385; Green *v.* Sansom, 41 Fla. 94; Yager *v.* McCormack, 41 Fla. 204; Gage *v.* Trawick, 94 Mo. App. 307; McDonald *v.* Lannen, 19 Mont. 78; Robinson *v.* Kilpatrick-Koch Dry Goods Co., 50 Neb. 795.

Where Findings Are Not Supported as to Part of Defendants. — Where there is no evidence to support the findings and judgment as to a part of the defendants the judgment will be reversed as to them. Alter *v.* State, 62 Neb. 239.

405. 1. Steffen *v.* St. Louis, 135 Mo. 44; People *v.* Most, 171 N. Y. 423; Morris *v.* Liverpool, etc., Ins. Co., 131 N. Car. 212.

Direction of Verdict. — Zahn *v.* Milwaukee, etc., R. Co., 114 Wis. 38; Lawless *v.* State, 114 Wis. 189.

Erroneous Legal Conclusions. — Where the trial court makes special findings of fact, the truth of which is conceded, but thereon bases an order under a misapprehension of the law, the Supreme Court may ignore the erroneous legal conclusion, and render such judgment as the special findings authorize. O'Haire *v.* Burns, 25 Colo. 158.

Referee's Conclusions of Law if erroneous may be set aside and the law prop-

erly applied to the facts found by either the trial or the appellate court. Steffen *v.* St. Louis, 135 Mo. 44. See also REFERENCES.

409. 1. Effect of Affirmance by New York Appellate Division. — Where a verdict is unanimously upheld by the New York Appellate Division, the Court of Appeals has no power to review the evidence. National Revere Bank *v.* National Bank of Republic, 172 N. Y. 102; Morgantown Second Nat. Bank *v.* Weston, 172 N. Y. 250; Monongahela Valley Bank *v.* Weston, 172 N. Y. 259; Rider *v.* Syracuse Rapid Transit R. Co., 171 N. Y. 139; People *v.* Most, 171 N. Y. 423; Archer *v.* Mt. Vernon, 171 N. Y. 639.

The Rule in the United States Supreme Court is that the concurrent decisions of two courts upon a question of fact in an equity case will be followed, unless clearly shown to be erroneous. Brainard *v.* Buck, 184 U. S. 99.

1*a*. Hill *v.* Tarver, 130 Ala. 592.

410. 3. Roe *v.* Versailles Bank, 167 Mo. 406.

4. Pontiac Buggy Co. *v.* Dupree, 23 Tex. Civ. App. 298, citing 2 ENCYC. OF PL. AND PR. 410. See also the following cases:

Alabama. — Davis Wagon Co., *v.* Cannon, 129 Ala. 301.

Arkansas. — Supreme Lodge, etc., *v.* Robbins, 70 Ark. 364.

Colorado. — Frisholm *v.* Fitzgerald, 25 Colo. 290.

Florida. — McCoggle *v.* State, 41 Fla. 525; Eggart *v.* State, 40 Fla. 527.

Georgia. — Bibb County *v.* Reese, 115 Ga. 346; Satterfield *v.* Coggins, 113 Ga. 189.

Hawaii. — Merricourt *v.* Norwalk F. Ins. Co., 13 Hawaii 218.

Illinois. — Gardner *v.* Meeker, 169 Ill. 40.

Indian Territory. — Denison, etc., R.

411. Illustrations of Discretionary Power. — See notes 1, 2.

Co. v. Raney-Alton Mercantile Co., 3 Indian Ter. 104.

Iowa. — *State v. Williams*, 115 Iowa 97; *Kling v. Chicago, etc., R. Co.*, 115 Iowa 133; *Brooks v. American Yeomen*, 115 Iowa 588.

Kentucky. — *Louisville, etc., R. Co. v. Com.*, 104 Ky. 226, holding that there is no jurisdiction on appeal to control the action of the railroad commission in the discretion vested in it by the Constitution to relieve railroad companies as provided in said Constitution.

Maine. — *Cherryfield, etc., Electric R. Co., Appellants*, 95 Me. 361.

Maryland. — *New York, etc., R. Co. v. Jones*, 94 Md. 24; *Hearn v. Quillen*, 94 Md. 39.

Massachusetts. — *Benjamin v. Casey*, 181 Mass. 542.

Minnesota. — *Brown v. Radebaugh*, 84 Minn. 347; *Baxter v. Coughlin*, 80 Minn. 322.

Missouri. — *Roe v. Versailles Bank*, 167 Mo. 406.

Nebraska. — *Omaha L. & T. Co. v. Douglas County*, 62 Neb. 1; *Ord v. Nash*, 50 Neb. 335; *Fanton v. State*, 50 Neb. 351; *Andres v. Kridler*, 49 Neb. 535.

New Jersey. — *Smith v. Livesey*, 67 N. J. L. 269.

North Carolina. — *Wood v. Atlantic, etc.*, R. Co., 131 N. Car. 48; *Best v. British, etc., Mortg. Co.*, 131 N. Car. 70; *Morris v. Liverpool, etc., Ins. Co.*, 131 N. Car. 212; *Bird v. Bradburn*, 131 N. Car. 488.

Oregon. — *Willard v. Bullen*, 41 Oregon 25; *Ex p. Warren*, 41 Oregon 309; *Salem Traction Co. v. Anson*, 41 Oregon 562.

Pennsylvania. — *Hall v. Oyster*, 168 Pa. St. 399.

Rhode Island. — *Banigan v. Woonsocket Rubber Co.*, 22 R. I. 93.

South Carolina. — *Dunton v. Harper*, 64 S. Car. 338.

South Dakota. — *Wilson v. Seaman*, 15 S. Dak. 103; *Kelley v. Anderson*, 15 S. Dak. 107; *Baskerville v. Gaar*, 15 S. Dak. 211.

Texas. — *Augustine v. State*, 41 Tex. Crim. 59; *Buchanan v. State*, 41 Tex. Crim. 129; *Nite v. State*, 41 Tex. Crim. 340; *San Antonio Gas Co. v. Singleton*, 24 Tex. Civ. App. 341.

Utah. — *Whipple v. Preece*, 24 Utah 364

Virginia. — *Hite v. Com.*, 96 Va. 489. *Washington*. — *Hughes v. Horton*, 26 Wash. 110. See also *Wilson v. Seattle Dry Dock, etc., Co.*, 26 Wash. 297.

Wisconsin. — *Cullen v. Hanisch*, 114 Wis. 24; *State v. German Exch. Bank*, 114 Wis. 436.

United States. — *U. S. v. Rio Grande Dam, etc., Co.*, 184 U. S. 416; *New Orleans v. Fisher*, 180 U. S. 185; *Briggs v. Neal, (C. C. A.)* 120 Fed. Rep. 224.

Rulings Within Discretion, but Not Based Thereon. — A ruling within the discretion of the trial court will be presumed, in the absence of a contrary showing, to have been based upon such discretion; but where it affirmatively appears that such discretion was not exercised, and that the ruling was based upon matters of law, it will be reviewable. *Martin v. Fayetteville Bank*, 131 N. Car. 121; *Ayers v. Makely*, 131 N. Car. 60.

411. 1. *Carr v. Adams*, 70 N. H. 622.

Cross-examination. — The extent to which a witness may be cross-examined is within the discretion of the trial court, and hence is not reviewable. *Orange County Fruit Exch. v. Hubbell*, 10 N. Mex. 47; *Guertin v. Hudson*, 71 N. H. 505. See also EXAMINATION OF WITNESSES.

The Appointment of Interpreters lies within the discretion of the trial court, and is not reviewable on appeal. *De Baca v. Santo Domingo*, 10 N. Mex. 38.

Consolidation of Actions. — The consolidation of actions is a matter within the discretion of the trial court, and hence not reviewable except for abuse of discretion. *Lincoln Lucky, etc., Min. Co. v. Hendry*, 9 N. Mex. 149. See also CONSOLIDATION OF ACTIONS.

Applications for Change of Venue on account of local prejudice are addressed to the trial court's discretion, the exercise of which will not be disturbed except for manifest abuse. *Pearce v. Territory*, 11 Okla. 438. See also CHANGE OF VENUE.

Rehearing. — Granting or refusing a rehearing is within the discretion of the court to which the application is made, and hence error in refusing to grant such a motion is not cause for reversal. *U. S. v. Rio Grande Dam, etc., Co.*, 184 U. S. 416.

An Order Relieving the Parties from Stipulations is within the discretion of

412. See note 2.

414. See note 1.

New Trial. — See note 4. See also **NEW TRIAL.**

416. **Limitation of Principle.** — See note 1.

the trial court, and will not be reviewed unless such court has abused its discretion. *Meldrum v. Kenefick*, 15 S. Dak. 370. See also **STIPULATIONS.**

Setting Aside Verdicts. — A trial court has a wide discretion in setting aside verdicts obtained in the absence of either party to the suit, and such discretion will not be interfered with on appeal, unless the ends of justice will manifestly be promoted by such interference. *White v. L. Hoster Brewing Co.*, 51 W. Va. 259.

Requiring or Refusing to Require Security for Costs is within the discretion of the trial court, and hence such court's action in this regard is not appealable except for abuse. *Cullen v. Hanisch*, 114 Wis. 24. See also **SECURITY FOR COSTS.**

Competency of Expert Witnesses. — The determination of the qualifications of witnesses to testify as experts is primarily within the discretion of the trial court; and where there is any evidence tending to establish the competency of such witnesses in this regard the ruling of the trial court admitting their testimony will not be reviewed. *Stevenson v. Ebervale Coal Co.*, 203 Pa. St. 316.

Continuances. — Error in denying a motion for a continuance has been held an error in the exercise of discretion, and hence not ground for reversal. *U. S. v. Rio Grande Dam, etc., Co.*, 184 U. S. 416. See also **CONTINUANCES.**

411. 2. Wisconsin. — *Rice v. Ashland County*, 114 Wis. 130. See also **AMENDMENTS.**

Ruling Based on Matter of Law. — Where it affirmatively appears that the trial court in refusing to allow an amendment to a pleading did not exercise its discretion, and based its ruling upon matters of law, such as the legal sufficiency of the proposed amendment or want of power on the part of the court to grant it, the ruling is reviewable. *Ayers v. Makely*, 131 N. Car. 60; *Martin v. Fayetteville Bank*, 131 N. Car. 121.

412. 2. Best v. British, etc., Mortg. Co., 131 N. Car. 70; *White v. Lokey*, 131 N. Car. 72.

414. 1. Short v. People, 27 Colo. 175; *Frisholm v. Fitzgerald*, 25 Colo. 290; *Stone v. Boscawen Mills*, 71 N. H. 288; *State v. Warren*, 41 Oregon 348. See **ORDER OF PROOF.**

4. State v. Shevlin-Carpenter Co., 66 Minn. 217, citing 2 ENCYC. OF PL. AND PR. 414. See also the following cases: *New Mexico*. — *Cevada v. Miera*, 10 N. Mex. 62; *Liverpool, etc., Ins. Co. v. Perrin*, 10 N. Mex. 90; *Schofield v. Territory*, 9 N. Mex. 526.

Oregon. — *Crossen v. Oliver*, 41 Oregon 505.

Pennsylvania. — *Dougherty v. Andrews*, 202 Pa. St. 633.

South Dakota. — *Kelley v. Anderson*, 15 S. Dak. 107; *Troy Min. Co. v. Thomas*, 15 S. Dak. 238; *Bedtkey v. Bedtkey*, 15 S. Dak. 310.

United States. — *Smith v. Hopkins*, (C. C. A.) 120 Fed. Rep. 921.

Rule Limited to Decision of Trial Judge. — The rule that the appellate court will not review a decision granting or refusing a new trial on the ground of insufficiency of the evidence, which will not be reviewed on appeal except for abuse of the trial court's discretion, has no application where the motion is heard and decided by any other judge than the one who tried the case. *Sands v. Cruikshank*, 15 S. Dak. 142.

Washington Statute. — An order granting a new trial is made appealable by statute. See *Ball. Annot. Codes & Stat. Wash.*, § 6500; *Reeder v. Traders' Nat. Bank*, 28 Wash. 139.

Notwithstanding the statute authorizes an appeal from an order granting a new trial, it has been held that the granting of a new trial is in the discretion of the trial court, and hence will not be reviewed except for abuse. *Bracka v. Fish*, 28 Wash. 410.

West Virginia Statute. — *Requiring Payment of Costs* as a condition for a new trial is, under Code W. Va., c. 138, § 5, largely in the discretion of the trial court, and the ruling of such court in this regard will not be reversed except for abuse. *Garber v. Blatchley*, 51 W. Va. 147.

416. 1. Haupt v. Independent Tel. Messenger Co., 25 Mont. 122.

420. XI. PRESUMPTIONS ON APPEAL — 1. In General. — See note 3.

421. See note 1.

424. See notes 1, 2.

425. a. OMISSIONS IN RECORD. — See note 4.

427. b. LIMITATIONS OF RULE. — See note 2.

428. c. TO SUSTAIN DECISION APPEALED FROM. — See note 4.

431. See note 1.

433. See note 1.

420. 3. *State v. Judge*, 105 La. 758, quoting 2 ENCYC. OF PL. AND PR. 420. See also the following cases:

Alabama. — *Pruitt v. State*, 130 Ala. 147.

Illinois. — *Boyles v. Chytraus*, 175 Ill. 370; *Chicago, etc., R. Co. v. Calumet*, 151 Ill. 512.

Oklahoma. — *Grand Lodge, etc., v. Furman*, 6 Okla. 649.

421. 1. *State v. Judge*, 105 La. 758, quoting 2 ENCYC. OF PL. AND PR. 421. See also the following cases:

Illinois. — *Boyles v. Chytraus*, 175 Ill. 370; *Chicago, etc., R. Co. v. Calumet*, 151 Ill. 512.

Mississippi. — *Dennis v. Spence*, 80 Miss. 396.

West Virginia. — *State v. Henry*, 51 W. Va. 283.

Where Exceptions to Referee's Report Have Been Overruled. — In *Jones v. Van Horn*, 28 Colo. 126, it was objected that the bill of exceptions failed to show that all of the evidence taken before a referee was without merit because the court had failed to examine the testimony returned by the referee, and therefore there were no findings which could be reviewed sufficient to justify an appeal.

424. 1. *State v. Judge*, 105 La. 758; *Center Creek Water, etc., Co. v. Thomas*, 19 Utah 360, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 423, 424.

Burden of Showing Error. — In criminal as in civil trials presumptions of the correctness of the rulings of the trial court and of the regularity of the proceedings below are indulged by a court of review, and the burden of showing prejudicial error rests upon him who asserts it, and it should be made to appear from the record in the case as presented in the appellate tribunal before a reversal is had. *Short v. People*, 27 Colo. 175.

2. *State v. Judge*, 105 La. 758; *Center Creek Water, etc., Co. v. Thomas*, 19 Utah 360, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 423, 424.

Oklahoma. — *Grand Lodge, etc., v. Furman*, 6 Okla. 649.

West Virginia. — *State v. Henry*, 51 W. Va. 283.

425. 4. *Center Creek Water, etc., Co. v. Thomas*, 19 Utah 360, citing 2 ENCYC. OF PL. AND PR. 425. See also the following cases:

Indiana. — *Harris v. State*, 155 Ind. 15.

Iowa. — *State v. Mulholland*, 115 Iowa 170.

Nebraska. — *Bostwick v. Keller*, 62 Neb. 815.

Oklahoma. — *Grand Lodge, etc., v. Furman*, 6 Okla. 649.

Texas. — *Pontiac Buggy Co. v. Dupree*, 23 Tex. Civ. App. 298.

Vermont. — *Chase v. Bernier*, 73 Vt. 307.

Virginia. — *Baker v. Briggs*, 99 Va. 360.

427. 2. *Carney v. Duniway*, 35 Oregon 131, citing 2 ENCYC. OF PL. AND PR. 426.

428. 4. *Oklahoma.* — *Menten v. Shuttee*, 11 Okla. 381; *McFadyen v. Masters*, 11 Okla. 16.

Presumption that Instructions State Law Correctly. — An instruction which is not made a part of the record will be presumed to have stated the law correctly. *Taylor v. Mallory*, 96 Va. 18.

431. 1. *Virginia.* — *Baker v. Briggs*, 99 Va. 360.

433. 1. Reasons for the Trial Court's Decision. — Where the record shows that a motion for a new trial, filed out of time, was denied, but does not show the trial court's reasons for such denial, or that there was any objection on account of the time of the making of such motion, it will nevertheless be

- 434. 2. Presumptions as to Record and Proceedings on Appeal** — *a. RECORD* — In General. — See note 1.
- 435. Inelusiveness.** — See note 2.
- 439. *c.* UNDERTAKING—BILL OF EXCEPTIONS—ABSTRACT** — Bill of Exceptions. — See note 2.
- 441. *f.* CASE ON APPEAL — CERTIFICATE — Statement.** — See note 1.
- 3. Omission of Evidence Generally.** — See note 2.
- 444. 4. Rulings.** — See note 1.
- 446. 5. Motions.** — See MOTIONS.
- 447. 6. Orders** — In General. — See note 3.
- 448. 7. Presumptions as to Jurisdiction** — *a. COURTS OF GENERAL JURISDICTION.* — See note 3. See also JURISDICTION; VENUE.

presumed that the motion was denied because filed too late. *Casteel v. State*, 9 Wyo. 267.

434. 1. Oregon. — *Martin v. Eagle Development Co.*, 41 Oregon 448.

435. 2. Presumption that Amendment of Pleading Is Contained in Transcript. — Where the record shows that pleadings were amended at the trial, but the nature of the amendment does not appear, the clerk's certificate that the transcript is full and complete creates a presumption that the pleadings as set forth contain the amendment. If such is not the fact, the party desiring to avail himself of the portion omitted should suggest diminution and procure a complete transcript. *Schrandt v. Young*, 62 Neb. 254.

439. 2. Order Allowing Time. — In the absence of any showing to the contrary, where exceptions appear to have been settled after the statutory period had elapsed, it will be presumed that the time was extended by consent or for good cause shown. *Coler v. Sterling*, 15 S. Dak. 415. See also BILLS OF EXCEPTIONS.

441. 1. Specifications of Statement or Bill of Exceptions on Motion for New Trial. — In the absence of an additional abstract on the part of the respondent showing that the errors relied on in support of a motion for a new trial were not specified in the bill of exceptions or statement as required by statute, the appellate court will presume that such specifications were annexed to the bill or statement. *Taylor v. Vandenberg*, 15 S. Dak. 480.

2. Adkins v. Monmouth, 41 Oregon 266, citing 2 ENCYC. OF PL. AND PR. 441. See also the following cases.

California. — *Brittan v. Oakland Sav. Bank*, 112 Cal. 1.

Illinois. — *Chicago v. South Park Com'rs*, 169 Ill. 387.

Nebraska. — *Lewis Invest. Co. v. Boyd*, 48 Neb. 604; *Hudson v. Pen-nock*, 48 Neb. 359.

Oregon. — *State v. Colestock*, 41 Oregon 9.

444. 1. Packer v. People, 26 Colo. 306, citing 2 ENCYC. OF PL. AND PR. 444 *et seq.* See also the following cases:

Colorado. — *Short v. People*, 27 Colo. 175.

Kentucky. — *Marion County v. Wil-son*, 105 Ky. 302.

Iowa. — See *Gaar v. Nichols*, 115 Iowa 223, holding that the decision of the trial court, in a law action tried without a jury, will be presumed to be based on a finding of fact made by the trial court, though none is requested, when the evidence is sufficient to sup-port the decision on such theory.

447. 3. Illinois. — *Taylor v. Wal-son*, 177 Ill. 439.

Refusing New Trial. — Where the grounds of a motion for a new trial do not appear in the record the appellate court will not presume that they were the same as the errors assigned on ap-peal, and will not review the ruling of the trial court, all presumptions being in favor of such ruling. *Thompson v. Hays*, 24 Utah 275.

448. 3. Venue. — Where the com-plaint in an action concerning realty does not show that the property is situ-ated in the county wherein the action was brought, but no motion for a change of venue is made, it will be presumed on appeal that the action

453. *d.* NOTICE OF PROCEEDINGS BEFORE QUASI-JUDICIAL BOARD. — See note 2. See also NOTICE.

8. Jurisdiction of Person — *a.* PRESUMPTION AS TO SERVICE. — See SERVICE OF PROCESS AND PAPERS.

455. *b.* SUBSTITUTED SERVICE. — See PUBLICATION.

456. *c.* JUDGMENT BY DEFAULT. — See DEFAULTS.

458. **9. Organization of Courts.** — See JUDGES; TERMS OF COURTS.

459. **10. Juries.** — See JURY; INDICTMENTS, INFORMATIONS, AND COMPLAINTS.

461. **11. As to Parties.** — See note 2. See also PARTIES TO ACTIONS.

462. **Presumptions as to Pleadings** — *a.* IN GENERAL. — See note 1.

463. *b.* ISSUES. — See ANSWERS IN CODE PLEADING; GENERAL ISSUE; PLEAS AT LAW.

464. *c.* FILING AND STRIKING OUT PLEADINGS. — See FILING PLEADINGS AND PAPERS; STRIKING OUT.

465. *d.* JOINDER OF GOOD AND BAD COUNTS. — See COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS.

e. MISJOINDER OF COUNTS. — See COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS; MULTIFARIOUSNESS AND MISJOINDER.

467. *f.* RULINGS ON DEMURRER — **In General.** — See note 5. See also DEMURRERS AT COMMON LAW AND UNDER THE CODES; DEMURRERS IN CHANCERY.

468. *g.* AMENDMENTS. — See AMENDMENTS.

471. *j.* INDICTMENTS. — See note 7.

13. Presumptions as to Evidence — *a.* IN GENERAL. — See note 8.

b. AS TO ADMISSIBILITY OF EVIDENCE. — See *infra*, XII. 7. *Affecting Evidence.*

474. **Trial by Court.** — See note 4.

was instituted in the proper county. *Coleman v. Stalnacke*, 15 S. Dak. 242.

453. **2.** *Burke v. Inter State Sav., etc., Assoc.*, 25 Mont. 315.

461. **2.** **Where Record Contains no Certificate of Evidence.** — Where the record contains no bill of exceptions or certificate of evidence it will be presumed that the facts before the court justify an order allowing a new party defendant to come in. *Taylor v. Walson*, 177 Ill. 439.

469. **1.** *Illinois.* — *Taylor v. Walson*, 177 Ill. 439.

467. **5.** *Barrett v. Central Bldg., etc., Assoc.*, 130 Ala. 294.

471. **7.** **Where the Charge to the Grand Jury Is Erroneous** it will be pre-

sumed that the grand jury ignored the erroneous instructions and followed the statute in arriving at their conclusions. *People v. Glen*, 173 N. Y. 395.

8. *Gray v. Cicero*, 177 Ill. 459.

Presumption as to Sufficiency of Evidence. — Where the evidence is presented in the record it will be presumed that the jury's finding of facts was warranted by the evidence. *Hefferlin v. Krieger*, 19 Mont. 123. See also *supra*, IX. 8. *a.* *Action at Law*, note 6, and *infra*, XI. 15. *a.* *In General*, note 1.

474. **4.** *Smith v. Perry*, 52 Neb. 738 [quoting with approval 2 ENCYC. OF PL. AND PR. 474]; *Waite v. Frank*, 14 S. Dak. 626. *Contra*, *Starkweather v. Bell*, 12 S. Dak. 146, holding that

- 475.** *c.* QUESTIONS. — See EXAMINATION OF WITNESSES.
d. DEPOSITIONS. — See DEPOSITIONS.
477. 14. *As to Instructions.* — See INSTRUCTIONS.
482. *b.* WHERE RECORD DOES NOT CONTAIN ALL INSTRUCTIONS. — See note 3.
483. *c.* BURDEN ON APPELLANT. — See note 3.
484. *d.* PRESUMPTION THAT INSTRUCTIONS ARE BASED ON EVIDENCE. — See note 2.
486. 15. *Findings* — *a.* IN GENERAL. — See note 1. See also FINDINGS OF COURT.

where the decision of the court might have been entirely different but for the admission of incompetent evidence the error is a reversible one; Haney, J., *dissenting* on this point and *citing* 2 ENCYC. OF PL. AND PR. 474.

482. 3. *State v. Maher*, 25 Nev. 465, *citing* 2 ENCYC. OF PL. AND PR. 482. See also the following cases:

Alabama. — *Hurd v. State*, 116 Ala. 440; *Brewton v. Glass*, 116 Ala. 629.

Massachusetts. — *Corey v. Havener*, (Mass. 1902) 65 N. E. Rep. 69.

Oklahoma. — *McFadyen v. Masters*, 11 Okla. 16.

South Dakota. — *Kolbe v. Harrington*, 15 S. Dak. 263.

United States. — *Northern Pac. R. Co. v. Tynan*, (C. C. A.) 119 Fed. Rep. 288.

483. 3. *State v. Maher*, 25 Nev. 465, *citing* with approval 2 ENCYC. OF PL. AND PR. 483.

484. 2. *Montana.* — *State v. Gill*, 21 Mont. 151.

Oregon. — *Advance Thresher Co. v. Esteb*, 41 Oregon 469.

486. 1. *Alabama.* — *Norille v. State*, 131 Ala. 35; *Ward v. Shirley*, 131 Ala. 568; *Feibelman v. State*, 130 Ala. 122; *Wright v. State*, 129 Ala. 123.

Colorado. — *Short v. People*, 27 Colo. 175; *Barr v. Foster*, 25 Colo. 28, which was a writ of error; *Hopkins v. Burr*, 24 Colo. 502; *Pettit v. People*, 24 Colo. 517.

Georgia. — *Griffith v. Finger*, 115 Ga. 592.

Illinois. — *Boyles v. Chytraus*, 175 Ill. 370; *Mallers v. Whittier Mach. Co.*, 170 Ill. 434.

Indiana. — *Kirkman v. State*, 158 Ind. 156.

Iowa. — *Kitzman v. Kitzman*, 115 Iowa 227; *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 535.

Maryland. — *Baltimore v. Austin*, 95 Md. 90.

Massachusetts. — *Henderson v. Foster*, (Mass. 1903) 65 N. E. Rep. 810.

Missouri. — See also *Deering v. Hannah*, 93 Mo. App. 618.

Montana. — *Power v. Stocking*, 26 Mont. 478; *Hefferlin v. Krieger*, 19 Mont. 123; *Stevens v. Ravalli County*, 25 Mont. 306.

Nebraska. — *Michigan University v. McGuckin*, 62 Neb. 489; *Hans v. State*, 50 Neb. 150; *Iowa L. & T. Co. v. Walker*, 50 Neb. 667; *Roberts v. Hopper*, 50 Neb. 681; *Douglas v. Smith*, 50 Neb. 899; *Aultman v. Welch*, 49 Neb. 117; *Storz v. Finklestein*, 48 Neb. 28; *Winters v. Means*, 48 Neb. 333; *Warner v. Hutchins*, 48 Neb. 672; *Madison First Nat. Bank v. Carson*, 48 Neb. 763. See also *Holt v. State*, 62 Neb. 134; *Stuart v. Burcham*, 50 Neb. 823.

New Mexico. — *Lincoln Lucky, etc., Min. Co. v. Hendry*, 9 N. Mex. 149; *U. S. v. Lesnet*, 9 N. Mex. 271.

North Dakota. — *U. S. Savings, etc., Co. v. McLeod*, 10 N. Dak. 111; *State v. Massey*, 10 N. Dak. 154; *Kipp v. Angell*, 10 N. Dak. 199; *Geils v. Fluegel*, 10 N. Dak. 211.

Oregon. — *U. S. Mortgage Co. v. Marquam*, 41 Oregon 391; *Martin v. Eagle Development Co.*, 41 Oregon 448.

South Dakota. — *Naddy v. Dietze*, 15 S. Dak. 26; *Kountz v. Kountz*, 15 S. Dak. 66; *Coleman v. Stalnacke*, 15 S. Dak. 242.

Utah. — *Olson v. Oregon Short Line R. Co.*, 24 Utah 460; *Culmer v. Caine*, 22 Utah 216.

Weight of Findings. — *Norille v. State*, 131 Ala. 35.

Where There Is No Special Finding nor any request therefor, and the facts are not agreed upon, the conclusion of the trial court cannot be revised. *Norille v. State*, 131 Ala. 35.

Findings of a Master cannot be revised without the evidence. *Henderson v. Foster*, (Mass. 1903) 65 N. E. Rep. 810. See also REFERENCES.

487. Illinois. — See note 1.

Presumption. — See note 2.

489. c. WHERE NO FINDINGS ARE MADE — In General. — See note 2.

Where All Evidence Is Not Reported. — In *Massachusetts*, where a report does not purport to be a report of the evidence or to set it all forth, and it merely states certain facts and the general finding of the judge, the only question that can be considered is whether the specific facts stated are necessarily inconsistent with the general conclusion reached. *Cleveland v. Springfield Sav. Inst.*, (Mass. 1902) 65 N. E. Rep. 27.

Sufficient Showing that All Evidence Is Included. — In *Oxford State Bank v. Holscher*, 115 Iowa 196, the abstract recited that the appellant on a certain day filed a complete transcript of the testimony. An amended abstract which was filed by the appellee averred that he therein set out his amended abstract of the testimony, and concluded, "We have set out the testimony somewhat full" because the appellants ask a reversal of the judgment on the ground that the evidence was insufficient to support it. It was held that it sufficiently appeared that all the evidence was before the court.

Omission of Part of Testimony from Bill of Exceptions. — The sufficiency of the evidence to support the findings will not be examined where part of the testimony has been omitted from the bill of exceptions. *Greene v. Greene*, 49 Neb. 546. See also **BILLS OF EXCEPTIONS**.

Where Judgment Is Reversed by Intermediate Appellate Court. — In *Colorado* it has been held that where the court of appeals reverses a judgment of the trial court the Supreme Court will not weigh the evidence and disturb the conclusion of the court of appeals. *People v. Court of Appeals*, 24 Colo. 186.

In Equity. — Where a party obtains relief under a decree it is his duty to preserve the evidence, and if the evidence in the record does not sustain the decree it must be reversed, but where no relief is given by the decree and it merely dismisses the complainant's bill for want of equity it is incumbent upon the complainant to show that the evidence entitled him to the relief for which he prayed, and to do this he must

preserve the whole of the evidence. *Kelly v. Funkhouser*, 171 Ill. 205.

Only Evidence Relating to Error Assigned Essential. — Where it affirmatively appears that all the evidence relating to a particular assignment of error has been brought up by a bill of exceptions, the assignment will be considered, though the evidence on other points has not been brought up. *Goodale Lumber Co. v. Shaw*, 41 Oregon 544.

Construction of Findings. — When a finding is susceptible of two constructions, one of which would render the result arrived at by the court erroneous, the appellate court will presume that the trial court intended to make a finding which would support its judgment, and hence the construction will be adopted which will support the judgment. *U. S. v. Andrews*, 179 U. S. 96.

487. 1. *West Chicago St. R. Co. v. Manning*, 170 Ill. 417; *West Chicago St. R. Co. v. Feldstein*, 169 Ill. 139, *affirming* 69 Ill. App. 36; *McLaughlin v. Hinds*, 151 Ill. 403; *Western Stone Co. v. Whalen*, 151 Ill. 472; *Goldie v. Werner*, 151 Ill. 551.

Conclusiveness as to Evidentiary as Well as Ultimate Facts. — In suits at law a judgment of affirmance by the appellate court is conclusive, not only of the controverted ultimate questions of fact, but also of those evidentiary or subordinate facts on which the ultimate facts are based. *Springside Coal Min. Co. v. Grogan*, 169 Ill. 50.

2. *Culmer v. Caine*, 22 Utah 216, *citing* 2 ENCYC. OF PL. AND PR. 487.

Inconsistent Findings. — Where the findings are irreconcilably inconsistent, the judgment will be reversed though the evidence is not in the record. *Kountz v. Kountz*, 15 S. Dak. 66.

489. 2. *Wright v. State*, 129 Ala. 123; *Yellowstone Nat. Bank v. Gagnon*, 25 Mont. 268; *Thompson v. Ferry*, 180 U. S. 484.

Compare *Spier v. Hyde*, 78 N. Y. App. Div. 151, wherein it was held that where the trial court fails to make a finding, the judgment cannot be sustained on the ground that the evidence was sufficient to authorize the omitted finding.

489. Presumption when Record Contains Evidence — Omission of Findings. — See note 4.

491. *d.* GENERAL FINDING. — See note 1.

492. 16. Verdicts — *a.* IN GENERAL. — See note 4. See also *supra*, XI. 15. Findings.

497. 17. In Referred Causes. — See note 8. See also REFERENCES.

499. XII. REVERSIBLE ERROR — 1. In General — *a.* MUST BE PREJUDICIAL. — See note 2.

500. See notes 1, 2.

489. 4. Compare *De Witt v. De Witt*, 202 Pa. St. 255, wherein it was held that where the lower court fails to find upon an issue as to which the evidence was clear and uncontradicted, the appellate court will make the finding which the lower court ought to have made.

491. 1. *Deering v. Schreyer*, 171 N. Y. 451.

492. 4. *United States*. — U. S. v. Copper Queen Consol. Min. Co., 22 U. S. Sup. Ct. Rep. 761.

497. 8. *Speakman v. Burleson*, 123 Ala. 673.

499. 2. *Lipscomb v. State*, 75 Miss. 559, wherein *Whitfield, J.*, cited 2 ENCYC. OF PL. AND PR. 499; *Service v. Farmington Sav. Bank*, 62 Kan. 857.

Matters Not Affecting Substantial Rights of Parties. — An appellate court will not ordinarily reverse a judgment when a judgment of reversal will not affect any substantial right of a party. *U. S. Savings, etc., Co. v. Leftwich*, 132 Ala. 131.

Balanced Errors. — Where an error is committed against each party and the errors are capable of being balanced, the judgment will be adjusted and affirmed. *McNamara v. Schwanger*, 106 Ky. 1.

500. 1. *Alabama*. — *Vinegar Bend Lumber Co. v. Hamilton-Brown Shoe Co.*, 129 Ala. 271; *Schloss v. Inman*, 129 Ala. 424; *Carter v. Odom*, 121 Ala. 162; *Lambie v. Sloss Iron, etc., Co.*, 118 Ala. 427.

Arkansas. — *Moore v. Winter*, 67 Ark. 189; *St. Louis, etc., R. Co. v. Baker*, 67 Ark. 531; *St. Louis Southwestern R. Co. v. Russell*, 64 Ark. 236; *St. Louis Southwestern R. Co. v. Berger*, 64 Ark. 613.

California. — *Pacific Invest. Co. v. Ross*, 131 Cal. 8.

Colorado. — *Kirk v. Meldrum*, 28 Colo. 453; *Empson Packing Co. v.*

Vaughn, 27 Colo. 66; *Short v. People*, 27 Colo. 175; *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129; *Davis v. Holbrook*, 25 Colo. 493; *Peck v. Farnham*, 24 Colo. 141; *Lathrop v. Tracy*, 24 Colo. 382, wherein it was held that the plaintiff was not prejudiced by rulings upon the evidence.

Florida. — *Green v. State*, 40 Fla. 191; *McCoy v. State*, 40 Fla. 494.

Georgia. — *Russell v. Mohr-Weil Lumber Co.*, 115 Ga. 35; *Evans v. State*, 115 Ga. 229; *Southern R. Co. v. Barfield*, 115 Ga. 724.

Illinois. — *Chicago City R. Co. v. Fennimore*, 199 Ill. 9; *West Chicago St. R. Co. v. Waniatta*, 169 Ill. 17, affirming 68 Ill. App. 481; *Cleveland, etc., R. Co. v. Hall*, 72 Ill. App. 448; *Springfield v. Brooks*, 72 Ill. App. 481; *Wilkinson v. Adams*, 72 Ill. App. 541. See also *Springside Coal Min. Co. v. Grogan*, 169 Ill. 50.

Indiana. — *Kniss v. Holbrook*, 16 Ind. App. 229; *Turpie v. Lowe*, 158 Ind. 47, 314; *Wray v. Fry*, 158 Ind. 92; *Peele v. Ohio, etc., Oil Co.*, 158 Ind. 374; *Lautman v. Miller*, 158 Ind. 382; *Hanson v. Cruse*, 155 Ind. 176; *Gilliland v. Jones*, 144 Ind. 662.

Indian Territory. — *Woolsey v. Jackson*, 3 Indian Ter. 597.

Iowa. — *Perin v. Cathcart*, 115 Iowa 553; *Iowa Cent. Bldg., etc., Assoc. v. Vogt*, 115 Iowa 59. See also *State v. Mulholland*, 115 Iowa 170.

Kentucky. — *Belle of Nelson Distilling Co. v. Riggs*, 104 Ky. 1; *Lewis v. Brandenburg*, 105 Ky. 14.

Maryland. — *Brooke v. Gregg*, 89 Md. 234; *Fisher v. Diehl*, 94 Md. 112.

Massachusetts. — *Morse v. Puffer*, (Mass. 1903) 65 N. E. Rep. 804; *Boston Penny Sav. Bank v. Bradford*, 181 Mass. 199; *Dixon v. Smith*, 181 Mass. 218; *Russell v. Bryant*, 181 Mass. 447; *Daly v. Demmon*, 181 Mass. 543;

505. See note 1.

507. See note 1.

508. *b.* MUST BE SHOWN BY RECORD.—See note 1.

Comerford v. New York, etc., R. Co., 181 Mass. 528.

Michigan.—*Abrey v. Detroit*, 127 Mich. 374; *Carver v. Detroit, etc., Plank-Road Co.*, 126 Mich. 458.

Minnesota.—*Payne v. Hackney*, 84 Minn. 195.

Mississippi.—*Arbuckle v. State*, 80 Miss. 15; *Conrad v. State*, 80 Miss. 229; *Bunckley v. Jones*, 79 Miss. 1.

Montana.—*Mulligan v. Montana Union R. Co.*, 19 Mont. 135; *State v. Giroux*, 19 Mont. 149; *Reardon v. Patterson*, 19 Mont. 231. See also Code Civ. Pro., § 778; *Matusevitz v. Hughes*, 26 Mont. 212, *Caplice Commercial Co. v. Cassidy*, 25 Mont. 81; *Sloan v. Glancy*, 19 Mont. 70.

Nebraska.—*Coil v. State*, 62 Neb. 15; *Faulkner v. Gilbert*, 62 Neb. 126; *Schrandt v. Young*, 62 Neb. 254; *Simons v. Fagan*, 62 Neb. 287; *Nightingale v. State*, 62 Neb. 371; *Argabright v. State*, 62 Neb. 402; *Green v. Tierney*, 62 Neb. 561; *Reuther v. Zimbleman*, 50 Neb. 165; *Ord v. Nash*, 50 Neb. 335; *Merchants' Sav. Bank v. Noll*, 50 Neb. 615; *Storz v. Finklestein*, 50 Neb. 177; *Whitney v. Gretna State Bank*, 50 Neb. 438; *Stewart v. Smith*, 50 Neb. 631; *Graham v. Frazier*, 49 Neb. 90; *Butler v. Greene*, 49 Neb. 280; *Halbert v. Rosenbalm*, 49 Neb. 498; *King v. Murphy*, 49 Neb. 670; *Farmers' L. & T. Co. v. Memminger*, 48 Neb. 17; *Newman v. Ryne*, 48 Neb. 362.

New Hampshire.—*Illinois University v. Spalding*, 71 N. H. 163; *Wilbur v. Berry*, 71 N. H. 619.

Tennessee.—*Minton v. Stahlman*, 96 Tenn. 98.

Virginia.—*Taylor v. Mallory*, 96 Va. 18; *Wright v. Independence Nat. Bank*, 96 Va. 728.

Washington.—*Marvin v. Yates*, 26 Wash. 50; *Green v. Tidball*, 26 Wash. 338, which case was decided under Ball. Code Wash., §§ 4957, 6535; *Wyatt v. Heman*, 26 Wash. 533.

United States.—*Jackson v. U. S.*, (C. C. A.) 102 Fed. Rep. 473.

500. 2. *Jenkins v. Mammoth Min. Co.*, 24 Utah 513, citing 2 ENCYC. OF PL. AND PR. 500. See also the following cases:

Alabama.—*Zirkle v. Jones*, 120 Ala. 444.

Illinois.—*Monson v. Meyer*, 92 Ill. App. 127, 190 Ill. 105.

Kentucky.—*Lexington, etc., County Min. Co. v. Stephens*, 104 Ky. 502.

Ohio.—*Taylor v. Standard Brick Co.*, 66 Ohio St. 360.

Texas.—*Ford v. State*, 41 Tex. Crim. 1; *Johnson v. State*, 41 Tex. Crim. 9.

Utah.—*Sandberg v. Victor Gold, etc.*, Min. Co., 24 Utah 1.

West Virginia.—*Arthur v. Charleston*, 51 W. Va. 132; *West End Real Estate Co. v. Nash*, 51 W. Va. 341.

Wisconsin.—*Allen v. Voje*, 114 Wis. 1; *Miles v. Stanke*, 114 Wis. 94; *Rice v. Ashland County*, 114 Wis. 130; *Lanphere v. State*, 114 Wis. 193.

United States.—*American Nat. Bank v. Watkins*, (C. C. A.) 119 Fed. Rep. 545; *Chicago v. LeMoynes*, (C. C. A.) 119 Fed. Rep. 662.

Clerical Errors in the computation of amounts, which are apparent from the record, will not be noticed on appeal, except to the extent of remitting the case for correction of the amounts. *Stevens v. Hargraves*, 22 R. I. 235.

505. 1. *Fisher v. State*, 1 Penn. (Del.) 388, wherein the court cited 2 ENCYC. OF PL. AND PR. 500. See also cases cited in the two preceding notes.

Right on Whole Record.—*Lockhart v. Wills*, 9 N. Mex. 344.

Where Substantial Justice Has Been Administered by the trial court, its decision will not be reviewed. *Pearce v. Strickler*, 9 N. Mex. 467.

507. 1. *Fisher v. State*, 1 Penn. (Del.) 388, wherein the court cited 2 ENCYC. OF PL. AND PR. 507.

508. 1. *Monson v. Meyer*, 92 Ill. App. 127 [citing 2 ENCYC. OF PL. AND PR. 508], affirmed 190 Ill. 105. See also the following cases:

Colorado.—*De Long v. Patterson*, 27 Colo. 30, wherein the court said: "In an appellate court a cause must be determined upon the record brought up for review, and the court should not base its decision, in whole or in part, upon facts which, if they exist at all, are outside the record;" *Rio Grande County v. Phye*, 27 Colo. 107; *Short v. People*, 27 Colo. 175.

Florida.—*Boykin v. State*, 40 Fla. 484.

Georgia.—*Griffith v. Finger*, 115 Ga. 592; *Barnett v. Tant*, 115 Ga. 659;

- Bond v. Winn**, 113 Ga. 18; **Norman v. Goode**, 113 Ga. 121; **McCowan v. Brooks**, 113 Ga. 532; **Scott v. Maddox**, 113 Ga. 795; **Laffitte v. Burke**, 113 Ga. 1000. See also **Jinks v. State**, 115 Ga. 243.
- Illinois**. — **Chamberlin v. Cary**, 169 Ill. 34, *affirming* 67 Ill. App. 542; **Chicago v. South Park Com'rs**, 169 Ill. 387; **Merkel v. William Schmidt Baking Co.**, 72 Ill. App. 239.
- Indiana**. — **Bonham v. Citizen's St. R. Co.**, 158 Ind. 106; **R. G. Marcy Mfg. Co. v. Flint, etc., Mfg. Co.**, 158 Ind. 173; **Fredericksburg v. Wilcoxon**, 158 Ind. 359; **Fulton County v. Gibson**, 158 Ind. 471; **Berry v. Chicago, etc., R. Co.**, 158 Ind. 668; **Harris v. State**, 155 Ind. 15. See also **Pittsburgh, etc., R. Co. v. Machler**, 158 Ind. 159; **Terre Haute, etc., R. Co. v. Erdel**, 158 Ind. 344.
- Indian Territory**. — **Hockett v. Alston**, 3 Indian Ter. 432; **Simon v. Aubrey**, 3 Indian Ter. 680; **Noyes v. Tootle**, 2 Indian Ter. 144.
- Iowa**. — **State v. Mulholland**, 115 Iowa 170; **Kitzman v. Kitman**, 115 Iowa 227; **Jackson v. Seevers**, 115 Iowa 370; **Pearl v. Omaha, etc., R. Co.**, 115 Iowa 535.
- Louisiana**. — **Ft. Wayne First Nat. Bank v. Ft. Wayne Artificial Ice Co.**, 105 La. 133; **State v. Posey**, 105 La. 350.
- Maryland**. — **Baltimore v. Austin**, 95 Md. 90.
- Massachusetts**. — **Spiers Fish Co. v. Robbins**, (Mass. 1902) 65 N. E. Rep. 25; **P. P. Emory Mfg. Co. v. Rood**, (Mass. 1902) 65 N. E. Rep. 58; **Corey v. Havener**, (Mass. 1902) 65 N. E. Rep. 69; **Williams v. Clarke**, (Mass. 1902) 65 N. E. Rep. 419; **Leland v. Converse**, 181 Mass. 487. See also **Henderson v. Foster**, (Mass. 1903) 65 N. E. Rep. 810.
- Michigan**. — **Huff v. Cole**, 127 Mich. 351; **Tobin v. Modern Woodmen of America**, 126 Mich. 161. See also **Frohlich v. Carroll**, 127 Mich. 561.
- Mississippi**. — **Dennis v. Spence**, 80 Miss. 396; **Bunckley v. Jones**, 79 Miss. 1; **Louisville, etc., R. Co. v. McDonald**, 79 Miss. 641.
- Missouri**. — **Scaggs v. Western Home Town Mut. F. Ins. Co.**, 94 Mo. App. 88; **Gage v. Trawick**, 94 Mo. App. 307; **Loker v. Southwestern Missouri Electric R. Co.**, 94 Mo. App. 481; **Mankameyer v. Egelhoff**, 93 Mo. App. 183; **Deering v. Hannah**, 93 Mo. App. 618; **State v. Lusk**, 93 Mo. App. 680. See also **Nickerson v. Lynch**, 135 Mo. 471; **State v. Briscoe**, 135 Mo. 660; **State v. Rolley**, 135 Mo. 677.
- Montana**. — **State v. Gill**, 21 Mont. 151; **Wood v. Gleim**, 19 Mont. 22; **State v. Millis**, 19 Mont. 444; **Rumney Land, etc., Co. v. Detroit, etc., Cattle Co.**, 19 Mont. 557.
- Nebraska**. — **Bush v. State**, 62 Neb. 128; **Bostwick v. Keller**, 62 Neb. 815; **Royse v. State Nat. Bank**, 50 Neb. 16; **Hans v. State**, 50 Neb. 150; **Reynolds v. McCandless**, 50 Neb. 225; **Roberts v. Hopper**, 50 Neb. 681; **Douglas v. Smith**, 50 Neb. 899; **O'Brien v. Parsons**, 49 Neb. 729; **Hudson v. Pen-nock**, 48 Neb. 359; **Madison First Nat. Bank v. Carson**, 48 Neb. 763; **American Invest. Co. v. McGregor**, 48 Neb. 779; **Jacobs v. St. Joseph Milling Co.**, 48 Neb. 898.
- Oklahoma**. — **McFadyen v. Masters**, 11 Okla. 16.
- Pennsylvania**. — **Slingluff v. Sisler**, 193 Pa. St. 264.
- Virginia**. — **Baker v. Briggs**, 99 Va. 360; **Taylor v. Mallory**, 96 Va. 18.
- Washington**. — **Carpenter v. Barry**, 26 Wash. 255.
- Burden of Proving Error** — **Indiana**. — **Baltimore, etc., R. Co. v. Jones**, 158 Ind. 87.
- Effect of Quashal of Bill of Exceptions**. — A question involving an examination of the bill of exceptions cannot be considered after the bill has been quashed. **Reed v. Rice**, 48 Neb. 586.
- Amendment of Pleadings**. — An assignment of error to the allowance of an amendment to a pleading will not be considered where the record does not show what the amendment was. **Anderson v. Cook**, 25 Mont. 330.
- Review of Ruling on Demurrer**. — In order to avoid an erroneous ruling of the court in overruling demurrers to bad paragraphs of the complaint on the ground that the verdict was based on good paragraphs, the burden is upon the plaintiff on appeal to show by the record that the verdict rests exclusively on some good paragraph or paragraphs of the complaint. **Baltimore, etc., R. Co. v. Jones**, 158 Ind. 87.
- Reversal and Remand in Discretion of Court**. — In **Louisiana**, when the record of a suit discloses enough to satisfy the court that the whole story of the case is not told, that essential facts have not been given in evidence and important documents have been omitted, and that substantial justice cannot be done between the parties in the state

513. See notes 1, 2.

514. *c.* WHO MAY ALLEGE ERROR — (1) *Generally.* — See note 2.

515. (2) *Errors Affecting Only Coparty.* — See note 2.

516. 2. *Errors Not Available on Appeal* — *a.* ESTOPPEL TO COMPLAIN. — See notes 1, 2.

of the record as filed there, the court will, in its discretion, in the interest of justice, remand the case. *Muller v. Hoth*, 105 La. 246.

Evidence — *Where Trial Court Has Directed Verdict.* — In order to enable the court on appeal to rule on the correctness of the action of the lower court in directing a verdict, all the material evidence bearing on the issues must be preserved in the record. *Kitzman v. Kitman*, 115 Iowa 227.

513. 1. *Bill of Exceptions.* — Where the alleged errors are wholly dependent upon the nature of the evidence admitted and excluded, and the bill of exceptions has been quashed on motion before the final submission, the judgment will be affirmed. *Reynolds v. McCandless*, 50 Neb. 225. See also *BILLS OF EXCEPTIONS.*

Where objections are made to the court's action on the evidence in refusing a peremptory instruction by the defendant, but the bill of exceptions does not contain any of the evidence, such objections will not be regarded. *Mankameyer v. Egelhoff*, 93 Mo. App. 183.

Where Case Is Submitted on Agreed Printed Abstract. — Where the case is submitted pursuant to a rule of court on an agreed printed abstract, the court will not look beyond the abstract; and, in order to a reversal of the judgment below, error must affirmatively appear from the abstract itself. *Closson v. Rohman*, 50 Neb. 323. See also *North Platte Water-Works Co. v. North Platte*, 50 Neb. 853, holding that in a case so submitted the court will not look to the record certified by the clerk for any purpose whatever.

2. Disregard of Recitals in Transcript. — In the absence of a bill of exceptions, issues of fact cannot be considered on appeal, even though the transcript of the pleadings and proceedings recites that the cause was originally determined on an agreed statement of facts copied in such transcript. *Stuart v. Burcham*, 50 Neb. 823, *following State Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 47 Neb. 1.

Judgment in Excess of Verdict. — In the absence of a statement of facts or bill of exceptions showing the circumstances under which a judgment was rendered, the Supreme Court will not review the action of the trial court in entering judgment in excess of the verdict of the jury. *Carpenter v. Barry*, 26 Wash. 255.

514. 2. *Rogers v. Central L. & T. Co.*, 49 Neb. 676.

515. 2. *Colorado.* — *School Dist. No. 15 v. Flanigan*, 28 Colo. 431.

516. 1. *Moline, etc., Co. v. Walter A. Wood Mowing, etc., Mach. Co.*, 49 Neb. 869; *Schloreit v. Boyden*, 9 Wyo. 392, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 516.

Waiver by Answer. — Where the defendant adopts a theory of the case consonant with the form of action adopted by the plaintiff, and seeks relief pursuant to such theory, he cannot thereafter object that the plaintiff has adopted the wrong form of action. *Bates v. Drake*, 28 Wash. 447.

Disqualification of Juror. — Where a party knows when the jury is empaneled all the facts claimed to constitute a disqualification as to one of the jurors, he thereby waives objection to such juror. *Cote v. Grand Trunk R. Co.*, 70 N. H. 620. See also *Queenan v. Territory*, 11 Okla. 261. See further *JURY.*

Necessity for Objections and Exceptions. — See *EXCEPTIONS AND OBJECTIONS.*

2. Moline, etc., Co. v. Walter A. Wood Mowing, etc., Mach. Co., 49 Neb. 869; *Heisch v. Bell*, (N. Mex. 1902) 70 Pac. Rep. 572; *Pohalski v. Ertheiler*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 33, in each of which cases the court cited with approval 2 ENCYC. OF PL. AND PR. 516. See also the following cases:

Arkansas. — *Southern Ins. Co. v. Hastings*, 64 Ark. 253; *American Mortg. Co. v. Milam*, 64 Ark. 305.

California. — *Weidenmueller v. Stearns Ranchos Co.*, 128 Cal. 623.

Idaho. — *Bernier v. Anderson*, (Idaho 1902) 70 Pac. Rep. 1027, wherein the court declared that the case "must be

517. See note 1.

heard and determined upon the theory on which counsel for the respective parties presented the same to the trial court without objection or exception."

Illinois. — *Reynolds v. Mandel*, 175 Ill. 615; *Thorn v. Wallace*, 88 Ill. App. 562.

Massachusetts. — *Burrell v. Way*, 176 Mass. 164.

Missouri. — *State v. St. Louis*, 169 Mo. 31; *O'Neill v. Blase*, 94 Mo. App. 648; *Wilson v. Standard Operating Co.*, 93 Mo. App. 121; *Kansas City v. Madsen*, 93 Mo. App. 143.

Montana. — See *Johnson v. Puritan Min. Co.*, 19 Mont. 30.

New York. — *Consolidated Ice Co. v. New York*, 53 N. Y. App. Div. 260; *New York v. Union R. Co.*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 451.

North Dakota. — *Willard v. Monarch Elevator Co.*, 10 N. Dak. 400.

See also EXCEPTIONS AND OBJECTIONS; THEORY OF THE CASE.

Questions Not Presented to Intermediate Appellate Court. — In *Colorado* it has been held that where an appeal is taken to the Court of Appeals and a writ of error is sued out from the Supreme Court to review the judgment of the Court of Appeals, the plaintiff in error is confined to the position which he took in the Court of Appeals. *Robinson v. Denver*, etc., R. Co., 24 Colo. 98.

Where Questions of Grave Public Policy Are Involved. — Where an appeal involves a question of grave public policy, the people are indirectly parties to it, and their interests should be looked after by the courts, even when the party who might have objected is silent. *Massachusetts Nat. Bank v. Shinn*, 163 N. Y. 360.

Instructions — Appellant's Instruction Open to Same Objection. — Where it is error to use the phrase "in good faith," without explanation, in an instruction for respondent, the appellant is in no condition to complain when the same phrase, without explanation is used in an instruction for appellant. *State v. Fidelity, etc., Co.*, 94 Mo. App. 184. See also INSTRUCTIONS.

Change of Theory by Appellant. — Where the appellant by his instructions in effect admits that there is sufficient evidence to submit the issues to the jury, he cannot on appeal shift his position and claim the contrary. *Hop-*

kins v. Modern Woodmen of America, 94 Mo. App. 402. See also *Boward v. Bankers' Union of the World*, 94 Mo. App. 442.

Denial of Motion to Strike Out Amended Petition — Effect of Pleading Over. — Where a motion to strike out an amended petition is denied and the defendant pleads over, objection to the court's ruling on the motion will be deemed to have been waived. *Corrigan v. Kansas City*, 93 Mo. App. 173.

Montana Statute. — Under Code Civ. Pro. Mont., § 1736, providing that on appeal from a final judgment "any statement" used on a motion for a new trial may be used, a bill of exceptions used on a motion for a new trial which was denied may be used on appeal from the final judgment, though no appeal be taken from the order denying a new trial. *Whalen v. Harrison*, 26 Mont. 316.

517. 1. *Moline, etc., Co. v. Walter A. Wood Mowing, etc., Mach. Co.*, 49 Neb. 869, citing with approval 2 ENCYC. OF PL. AND PR. 516. See also the following cases:

Alabama. — *Southern R. Co. v. Bunt*, 131 Ala. 591.

Missouri. — *Clark v. Lopp*, 80 Mo. App. 542.

New York. — *Kane v. Hutkoff*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 678.

North Dakota. — *McCabe v. Aetna Ins. Co.*, 9 N. Dak. 19.

Wisconsin. — *Allen v. Voje*, 114 Wis. 1.

Motion to Instruct. — *Gilbert v. Watts-De Golyer Co.*, 169 Ill. 129, affirming 66 Ill. App. 625.

Validity of Ordinance. — The appellate court will consider on appeal only those grounds of the invalidity of an ordinance which were alleged in the trial court. *State v. St. Louis*, 169 Mo. 31.

Error in Rejecting Testimony. — In *Heisch v. Bell*, (N. Mex. 1902) 70 Pac. Rep. 572, which was an action in the nature of replevin, the plaintiff was proceeding to prove the value of the property and damages for detention thereof, but as the defendant's counsel objected to such proof and the court sustained the objection, the plaintiff was prevented from making the desired proof. It was held on appeal by the defendant that the court erred in sustaining the objection to this proof, but

518. See note 1.

519. See note 1.

b. INVITED ERROR — (1) Generally — Error by Party. —

See notes 2, 3.

By Court on Request. — See note 4.

521. See note 1.

523. (2) *As to Evidence.* — See notes 1, 4.

(3) *Instructions.* — See INSTRUCTIONS.

527. *c. ERROR FAVORABLE TO APPELLANT.* — See note 2.

that as the error was induced by the defendant he could not be permitted to take advantage of it, and that it was therefore harmless and not reversible error.

Conflicting Objections. — Where a party objects to the charge of the court as being erroneous, he cannot therefore complain of the action of the court in granting a new trial at the instance of the other party. *Troy Min. Co. v. Thomas*, 15 S. Dak. 238.

A Demurrer to the Evidence is a waiver of all previous objections and exceptions thereto. *Southern R. Co. v. Leinart*, 107 Tenn. 635. See also DEMURRERS TO EVIDENCE.

518. 1. *Boyles v. Chytraus*, 175 Ill. 370.

Waiver of Record. — Where a warrant of attorney to confess judgment by its terms waives and releases all errors which may intervene in any proceeding for the confession of a judgment, the court will not review errors which are thus waived and released. *Boyles v. Chytraus*, 175 Ill. 370.

519. 1. *Pohalski v. Ertheiler*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 33, citing 2 ENCYC. OF PL. AND PR. 519.

2. *Cathey v. Bowen*, 70 Ark. 348.

Improper Remark of Court. — No complaint can be made of a remark by the trial court in apparent approval of a statement made by the appellant's counsel. *Huff v. Cole*, 127 Mich. 351.

3. See *St. Louis Southwestern R. Co. v. Russell*, 64 Ark. 236.

Improper Argument. — Where counsel for one party makes an improper argument, failure to restrain the counsel for the other party in pursuing the same line of argument in reply is not reversible error. *Furlow v. State*, 41 Tex. Crim. 12. See also ARGUMENTS OF COUNSEL.

4. *Sheridan v. Chicago*, 175 Ill. 421, quoting with approval 2 ENCYC. OF PL.

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AND PR. 519. See also the following cases:

New Mexico. — *Heisch v. Bell*, (N. Mex. 1902) 70 Pac. Rep. 572.

Texas. — *Hall v. Reese*, 24 Tex. Civ. App. 221.

Virginia. — *Norfolk, etc., R. Co. v. Mann*, 99 Va. 180.

521. 1. *Sheridan v. Chicago*, 175 Ill. 421, quoting with approval 2 ENCYC. OF PL. AND PR. 519 *et seq.*

523. 1. *Willard v. Monarch Elevator Co.*, 10 N. Dak. 400.

Ruling Suggested by Appellant. — A party cannot complain of the admission of evidence under a rule adopted by the court claimed to be erroneous, when such rule was adopted at the instance or upon the suggestion of the party complaining. The same is true as to rulings rejecting evidence. *Trott v. Chicago, etc., R. Co.*, 115 Iowa 80, in which case the court cited *Crawford v. Wolf*, 29 Iowa 567.

4. *Sachs v. American Surety Co.*, 72 N. Y. App. Div. 60, citing with approval 2 ENCYC. OF PL. AND PR. 523.

527. 2. *Gramm v. Sterling*, 8 Wyo. 527, quoting 2 ENCYC. OF PL. AND PR. 527. See also the following cases:

Montana. — *King v. Lincoln*, 26 Mont. 157.

New Mexico. — *Orange County Fruit Exch. v. Hubbell*, 10 N. Mex. 47.

Oregon. — *State v. Kelly*, 41 Oregon 20; *State v. Sally*, 41 Oregon 366.

South Carolina. — *Thompson v. Security Trust, etc., Ins. Co.*, 63 S. Car. 290.

Texas. — *Augustine v. State*, 41 Tex. Crim. 59; *Tuttle v. State*, 41 Tex. Crim. 96; *Bailey v. State*, 41 Tex. Crim. 157.

United States. — *Friedly v. Giddings*, 119 Fed. Rep. 438.

Undue Credit to Appellant. — On an appeal in a mortgage foreclosure, the defendant cannot complain of credits erroneously allowed in her favor.

531. See notes 1, 2.

[*d* ABANDONMENT OF OBJECTIONS.—The court will not consider assignments of error which are abandoned by the failure of counsel to call attention thereto in their briefs and arguments. See note 2*a*. See also ASSIGNMENT OF ERRORS; BRIEFS; EXCEPTIONS AND OBJECTIONS.]

[*e*. ERRORS WAIVED BY APPEALING TO INTERMEDIATE APPELLATE COURT.—In *Illinois*, by appealing to the appellate court and there assigning errors over which that court had jurisdiction and could properly pass, the appellant waives questions as to which such appellate court had no jurisdiction and cannot, on appeal to the Supreme Court from a judgment of the appellate court, urge errors which are exclusively cognizable by the Supreme Court. See note 2*b*.]

532. 3. Presumption Where Error Is Shown.—See notes 1, 2.

533. See note 1.

534. 4. Errors in Judgment — *a*. GENERALLY.—See note 2.

Iowa Cent. Bldg., etc., Assoc. v. Vogt, 115 Iowa 59.

Where Defendant Is Convicted of Offense Less than That Proved.—Where the jury correctly find the defendant guilty of murder, but erroneously give him the benefit of facts not in evidence by finding him guilty of murder in the third degree, it is an error of which he will not be permitted to complain. McCoy v. State, 40 Fla. 494.

531. 1. Gramm v. Sterling, 8 Wyo. 527, quoting 2 ENCYC. OF PL. AND PR. 527 *et seq*.

2. Augustine v. State, 41 Tex. Crim. 59; Bailey v. State, 41 Tex. Crim. 157.

2*a*. Goldie v. Werner, 151 Ill. 551.

2*b*. Indiana Millers' Mut. F. Ins. Co. v. People, 170 Ill. 474, wherein it was held that as the appellate court has no jurisdiction to declare a statute unconstitutional, an appeal to the appellate court will prevent the appellant from afterwards assigning on appeal to the Supreme Court that a statute was unconstitutional, the decision being based upon a statute.

532. 1. Supreme Council, etc., v. Orcutt, (C. C. A.) 119 Fed. Rep. 682; Jackson v. U. S., (C. C. A.) 102 Fed. Rep. 473.

2. California.—Buckers Irrigation, etc., Co. v. Platte Valley Irrigation Co., 28 Colo. 187.

Montana.—State v. Johnson, 26 Mont. 9.

New York.—Ward v. Hoag, 78 N. Y. App. Div. 510.

Virginia.—Norfolk, etc., R. Co. v.

Mann, 99 Va. 180; Richmond Traction Co. v. Hildebrand, 98 Va. 22.

West Virginia.—State v. Clark, 51 W. Va. 457.

United States.—U. S. v. Gentry, (C. C. A.) 119 Fed. Rep. 70.

Minority Rule.—In *South Carolina* it has been held that a case will not be reversed for an erroneous instruction unless the court is satisfied that there is reasonable ground to believe that the error may have affected the verdict. Boggero v. Southern R. Co., 64 S. Car. 104.

533. 1. State v. Shadwell, 26 Mont. 52.

Instructions.—Norfolk, etc., R. Co. v. Mann, 99 Va. 180; Richmond Traction Co. v. Hildebrand, 98 Va. 22.

In Criminal Cases the presumption of prejudice arising from error shown must be rebutted beyond a reasonable doubt. State v. Clark, 51 W. Va. 457.

Degree of Certainty Required in Rebuttal.—It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice and could not have prejudiced the complaining party, that the rule that error without prejudice is no ground for reversal is applicable. U. S. v. Gentry, (C. C. A.) 119 Fed. Rep. 70.

534. 2. Lipscomb v. State, 75 Miss. 559, wherein Whitfield, J., cited 2 ENCYC. OF PL. AND PR. 534; Cotton v. Southwestern Mut. L. Ins. Co., 115 Iowa 729.

See also cases cited in next succeeding notes.

535. See notes 1, 2.

536. See notes 1, 4.

b. NONSUITS. — See note 5.

c. VARIANCE. — See VARIANCE.

537. *d.* NOT RESPONSIVE TO ISSUES. — See JUDGMENTS.

5. Errors Occurring on Trial — *a.* IN GENERAL. — See note 3.

539. See note 1.

540. *b.* JURY. — See note 2.

541. See note 1.

535. 1. Where There Is a Substantial Deficiency in the Judgment, and the error is apparent of record, the judgment will be reversed. *Jackson v. Brockton*, (Mass. 1902) 64 N. E. Rep. 418, in which case the judgment was reversed although it had been paid, payment having been accepted in ignorance of the mistake.

2. *Olson v. Huntimer*, 8 S. Dak. 220 [citing with approval 2 ENCYC. OF PL. AND PR. 534]; *Roberts v. Minneapolis Threshing Mach. Co.*, 8 S. Dak. 579 [citing with approval 2 ENCYC. OF PL. AND PR. 535]. Compare *Metcalf v. Nelson*, 8 S. Dak. 87, wherein Fuller, J., dissented on the authority of 2 ENCYC. OF PL. AND PR. 535.

536. 1. *Olson v. Huntimer*, 8 S. Dak. 220 [citing with approval 2 ENCYC. OF PL. AND PR. 534]; *Roberts v. Minneapolis Threshing Mach. Co.*, 8 S. Dak. 579 [citing with approval 2 ENCYC. OF PL. AND PR. 535]; *Metcalf v. Nelson*, 8 S. Dak. 87.

4. *Cotton v. Southwestern Mut. L. Ins. Co.*, 115 Iowa 729.

5. *Bopp v. New York Electric Vehicle Transp. Co.*, 78 N. Y. App. Div. 337; *Ratliff v. Ratliff*, 131 N. Car. 425. See also *Weinhard v. Commercial Nat. Bank*, 41 Oregon 359, wherein it was held that error in refusing a nonsuit where there was no evidence upon a material part of the plaintiff's case was cured by the subsequent introduction by both parties of evidence on this point.

537. 3. *Lipscomb v. State*, 75 Miss. 559, wherein *Whitfield, J.*, cited 2 ENCYC. OF PL. AND PR. 537. See also the following cases:

Kentucky. — *Belle of Nelson Distilling Co. v. Riggs*, 104 Ky. 1.

Michigan. — *Carver v. Detroit, etc., Plank-Road Co.*, 126 Mich. 458.

Montana. — *Maloney v. King*, 25 Mont. 188.

Instances of Harmless Error — *Physical*

Examination. — *Belle of Nelson Distilling Co. v. Riggs*, 104 Ky. 1, wherein it was held that it was not ground for reversal that the trial court required the plaintiff to submit to a physical examination. See also PHYSICAL EXAMINATION.

Error in Refusing to Consider a Question raised below will on appeal be held harmless, where it appears that the question, if it had been considered, must necessarily have been decided against the appellant. *Porter v. Charleston, etc., R. Co.*, 63 S. Car. 169.

Where Appeal Is Frivolous or Vexatious. — In *Carver v. Detroit, etc., Plank-Road Co.*, 126 Mich. 458, the appeal was wholly without merit, and the judgment was affirmed, with twenty-five dollars additional costs because the appeal was vexatious. See also COSTS.

Damages will not be awarded on the theory that the appeal was frivolous or vexatious when it appears to have been taken in good faith, even though a narrow range of review is permitted by the record. *Jaco v. Southern Missouri, etc., R. Co.*, 94 Mo. App. 567.

539. 1. *Lipscomb v. State*, 75 Miss. 559, wherein *Whitfield, J.*, cited 2 ENCYC. OF PL. AND PR. 537-539.

Where the Case Is Withdrawn from the Jury, improper remarks of the judge during the trial constitute harmless error. *Smith v. Hopkins*, (C. C. A.) 120 Fed. Rep. 921.

540. 2. *Utah*. — *Whipple v. Preece*, 24 Utah 364.

Challenge for Cause. — *Endowment Rank, etc., v. Steele*, 108 Tenn. 624.

Irregularities in Impaneling the Grand Jury constitute harmless error, where it appears that the accused has not been prejudiced thereby. *State v. Fidler*, 23 R. I. 41.

541. 1. *Washington*. — See *State v. Gates*, 28 Wash. 689. See also NGW TRIAL.

542. 6. Error in Pleadings — a. IN GENERAL. — See note 1.

544. b. COMPLAINT. — See notes 1, 2. See also COMPLAINTS AND PETITIONS IN CODE PLEADING.

545. Affecting One Count. — See notes 1, 2.

546. d. RULINGS ON DEMURRERS. — See DEMURRERS AT COMMON LAW AND UNDER THE CODES; DEMURRERS IN CHANCERY

549. 7. Affecting Evidence — a. IN GENERAL. — See note 2.

An Excessive Verdict ordinarily raises a presumption of partiality on the part of the jury; but where the excess is remitted, and the appellate court is satisfied that the error resulted from an insufficient presentation of the case and not from partiality, the case will not be reversed. *Hawes v. Warren*, 119 Fed. Rep. 978.

542. 1. Lipscomb v. State, 75 Miss. 559, wherein *Whitfield, J.*, cited 2 ENCYC. OF PL. AND PR. 542.

Alabama, — *Louisville, etc.*, R. Co. v. *Hall*, 131 Ala. 161; *Zirkle v. Jones*, 129 Ala. 444.

Defect of Parties. — It is a ground for reversal that the court below rendered a judgment in the absence of necessary parties. *Craver v. Spencer*, 40 Fla. 135. See also PARTIES TO ACTIONS.

Refusing to Strike Redundant Matter in a pleading is harmless error, unless it appears that such matter materially affected the interests of the other party. *Atchison, etc.*, R. Co. v. *Marks*, 11 Okla. 82. See also SCANDAL AND IMPERTINENCE.

Error Cured by Instruction. — When different defenses are pleaded, one of which is inconsistent with the other, and by an instruction one of the inconsistent defenses is eliminated from the case, the plaintiff cannot predicate error because of the inconsistent pleading. *Green v. Tiernev*, 62 Neb. 561.

544. 1. State v. Seattle Gas, etc., Co., 28 Wash. 488.

2. Philomath v. Ingle, 41 Oregon 289.
Immaterial Allegations in the Complaint. — Error in refusing to strike out immaterial allegations in the complaint is not prejudicial where evidence sustaining such allegations is admitted without objection. *Rattelmiller v. Stone*, 28 Wash. 104.

Harmless Error in Sustaining Demurrer to Cross-complaint. — Where a cross-complaint is clearly insufficient for want of facts, sustaining a demurrer thereto on the ground that "it fails to state sufficient facts to constitute a

cross-complaint," is harmless. *Wray v. Fry*, 158 Ind. 92.

Defendant's Pleading. — *Defects of Form* in an answer are cured by the verdict. *Nodine v. Union First Nat. Bank*, 41 Oregon 386.

Washington Statute. — Under Ball. Code, § 4957, which directs the Supreme Court to disregard any error or defect which does not affect a substantial right of the adverse party, and § 6535, which requires the court to determine all causes on appeal upon the merits thereof, disregarding all technicalities, and to consider all amendments which could have been made as made, a cause will not be reversed, after a trial upon the merits, merely for the reason that the cause of action was defectively stated, when there is no showing of substantial injury resulting to appellant on account thereof. *Green v. Tidball*, 26 Wash. 338.

545. 1. Southern R. Co. v. Bunt, 131 Ala. 591.

Affecting Immaterial Allegations. — Where the court by instruction confines the damages to certain items, and the jury does not exceed the limit thus prescribed, error in not sustaining an exception to an allegation of the petition claiming other items of damage is harmless. *Campbell v. Ulch*, 24 Tex. Civ. App. 618.

2. Where the Case Is Submitted upon a Single Issue, error in overruling exceptions to other issues presented by the complaint is harmless. *Galveston, etc.*, R. Co. v. *Johnson*, 24 Tex. Civ. App. 180.

549. 2. Lipscomb v. State, 75 Miss. 559; *Gardner v. Gardner*, 23 Nev. 207, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 549. See also the following cases:

Nebraska, — *King v. Murphy*, 49 Neb. 670.

New Hampshire, — *Marsh v. Concord Mut. F. Ins. Co.*, 71 N. H. 253; *Spalding v. New Hampshire F. Ins. Co.*, 71 N. H. 441.

552. *b.* ADMISSION OF EVIDENCE — In General. — See notes 1, 2.

553. See notes 2, 3, 4.

555. See note 2.

Prejudicial Error. — See note 6.

New Jersey. — Lackenauer *v.* Lyon, etc., Brewing Co., 67 N. J. L. 677.

North Carolina. — Petteway *v.* McIntyre, 131 N. Car. 432.

North Dakota. — State *v.* Montgomery, 9 N. Dak. 405.

Utah. — Sandberg *v.* Victor Gold, etc., Min. Co., 24 Utah 1.

Washington. — Rattelmiller *v.* Stone, 28 Wash. 104; Seattle *v.* L. H. Griffith Realty, etc., Co., 28 Wash. 605.

Wisconsin. — Lee *v.* Hammond, 114 Wis. 550.

United States. — Rainey *v.* Potter, (C. C. A.) 120 Fed. Rep. 651; American Nat. Bank *v.* Watkins, (C. C. A.) 119 Fed. Rep. 545.

Final Result. — Greenville First Nat. Bank *v.* Greenville Oil, etc., Co., 24 Tex. Civ. App. 645.

In **Equity Cases** errors in the reception or rejection of evidence are not deemed prejudicial in the absence of reasonable ground to believe that if the improper evidence had not been considered and if the proper evidence rejected had been admitted and given due weight, the result might probably have been different. Herman *v.* Schlesinger, 114 Wis. 382.

552. 1. Gardner *v.* Gardner, 23 Nev. 207 [citing 2 ENCYC. OF PL. AND PR. 549 *et seq.*]; Wright *v.* State, 129 Ala. 123; Southern R. Co. *v.* Barfield, 115 Ga. 724; Chicago, etc., R. Co. *v.* Glenny, 175 Ill. 238; Dixon *v.* Smith, 181 Mass. 218; Comerford *v.* New York, etc., R. Co., 181 Mass. 528; Smith *v.* Morrill, 71 N. H. 409; Chaperon *v.* Portland Electric Co., 41 Oregon 39; Fidelity Mut. L. Ins. Assoc. *v.* Mettler, 185 U. S. 308.

Where the Trial Is by the Court Without a Jury the same rule is applicable. Wright *v.* State, 129 Ala. 123.

2. Gardner *v.* Gardner, 23 Nev. 207 [citing 2 ENCYC. OF PL. AND PR. 549 *et seq.*]; Tobin *v.* Portland Mills Co., 41 Oregon 269.

Verdict Warranted by Competent Evidence. — Where the verdict for a party in whose favor incompetent evidence has been admitted is not as large as was warranted by competent evidence in the case, the admission of the in-

competent evidence is harmless error. Sandberg *v.* Victor Gold, etc., Min. Co., 24 Utah 1.

553. 2. Lackenauer *v.* Lyon, etc., Brewing Co., 67 N. J. L. 677; Smith *v.* Morrill, 71 N. H. 409.

Evidence upon Excluded Issues. — Where the court excludes an issue as not in the case because not raised by the pleadings, the admission of incompetent evidence upon such issue is harmless error. Nix *v.* C. Reiss Coal Co., 114 Wis. 493. See also Gutzman *v.* Clancy, 114 Wis. 589.

Matter of Inducement. — Error in admitting evidence of matters of inducement is harmless, especially where the case is tried by the court without a jury, and there is competent evidence sufficient to sustain the judgment. Greenville First Nat. Bank *v.* Greenville Oil, etc., Co., 24 Tex. Civ. App. 645.

3. Camp *v.* Simon, 23 Utah 56 [citing 2 ENCYC. OF PL. AND PR. 69]; Vinegar Bend Lumber Co. *v.* Hamilton-Brown Shoe Co., 129 Ala. 271.

Conceded Facts — Facts Admitted by the Pleading. — Camp *v.* Simon, 23 Utah 56, citing 2 ENCYC. OF PL. AND PR. 553.

4. *New York.* — Ward *v.* Hoag, 78 N. Y. App. Div. 510.

Texas. — Powell *v.* Walker, 24 Tex. Civ. App. 312.

West Virginia. — Barker *v.* Ohio River R. Co., 51 W. Va. 423.

555. 2. State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182.

6. *Colorado.* — Holy Cross Gold Min., etc., Co. *v.* O'Sullivan, 27 Colo. 237.

Where It Does Not Appear Affirmatively that Error Was Not Prejudicial. — When incompetent evidence is admitted to prove a fact not otherwise conclusively established, and it does not affirmatively appear from the record that the incompetent evidence did not affect the verdict unfavorably to the objecting party, the error will be deemed prejudicial. Bee Pub. Co. *v.* World Pub. Co., 62 Neb. 732.

Where the alleged error consists in the admission of evidence which was inadmissible, a reversal will be directed

556. Prejudice Removed by Further Testimony. — See note 2.

559. See note 2.

Error Cured. — See notes 5, 6.

560. See notes 1, 2, 3.

561. See note 1.

unless it appears beyond doubt that the error complained of did not prejudice the rights of the party. *Smuggler Union Min. Co. v. Broderick*, 25 Colo. 16, in which case the court cited *Denver, etc., R. Co. v. Wilson*, 12 Colo. 20; *Boston, etc., R. Co. v. O'Reilly*, 158 U. S. 334, and other cases.

556. 2. Delaware. — *Fisher v. State*, 1 Penn. (Del.) 388, in which case the court explained *Waldron v. Waldron*, 156 U. S. 361.

Nebraska. — *Smith v. Perry*, 52 Neb. 738.

New York. — *Hey v. Collman*, 78 N. Y. App. Div. 584.

South Dakota. — *Dennett v. Reisdorfer*, 15 S. Dak. 466; *Distad v. Shanklin*, 15 S. Dak. 507; *Waite v. Frank*, 14 S. Dak. 626.

United States. — *Rainey v. Potter*, (C. C. A.) 120 Fed. Rep. 651.

Secondary Evidence. — Error in allowing a witness to testify as to the contents of a written instrument is cured by the immediate introduction of the instrument itself, provided the witness has not misstated its terms. *Stewart v. Gregory*, 9 N. Dak. 618.

Facts Admitted. — *Boykin v. State*, 40 Fla. 484, wherein the court cited 2 ENCYC. OF PL. AND PR. 558, note.

Questions Calling for Conclusions. — Error in permitting a witness to answer a question calling for a legal conclusion is cured by the subsequent testimony of the witness, either upon direct or cross examination, disclosing the facts upon which his conclusion was based. *Olson v. O'Connor*, 9 N. Dak. 504.

Explanatory Evidence. — The admission of incompetent evidence which is admittedly true, and which is merely explanatory of other evidence conceded to be admissible, is harmless error. *Seattle v. L. H. Griffith Realty, etc., Co.*, 28 Wash. 605.

559. 2. Marks on Stolen Property. — Error, if any, in admitting testimony as to the brands upon cattle, which the defendant is charged with stealing, is cured by the introduction in evidence of the hides of such cattle. *State v. Sally*, 41 Oregon 366.

5. Ware Cattle Co. v. Anderson, 107 Iowa 231; *New York L. Ins. Co. v. Taliaferro*, 95 Va. 522, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 559. Compare *Attaway v. State*, 41 Tex. Crim. 395.

A Variance in that the complaint does not properly describe a written instrument introduced in evidence by the plaintiff is cured where such instrument is properly pleaded in the defendant's answer, and correctly described in the plaintiff's reply. *Rattelmiller v. Stone*, 28 Wash. 104.

6. Evidence in Rebutter. — Where one party introduces incompetent evidence, he cannot be heard to complain that his adversary introduces the same kind of evidence in rebuttal. *Endowment Rank, etc. v. Steele*, 108 Tenn. 624.

560. 1. Myers v. Taylor, 107 Tenn. 365. See also *Denver, etc., R. Co. v. Wilson*, 28 Colo. 6.

2. Method of Withdrawal. — Where specific and prejudicial error has been committed in the admission of incompetent testimony, something more than a mere remark of the counsel who introduced the testimony, that his question is withdrawn, is necessary to cure the error. It seems there should be an instruction by the court to the jury to disregard the evidence so introduced. *Goodwin v. State*, 114 Wis. 318.

3. Brown v. Pierce County, 28 Wash. 345.

561. 1. Oregon. — *State v. Aiken*, 41 Oregon 294.

Texas. — *Buchanan v. State*, 41 Tex. Crim. 127; *Nite v. State*, 41 Tex. Crim. 340.

Washington. — *Wilson v. West, etc., Mill Co.*, 28 Wash. 312.

Where a Part Only of Incompetent Evidence Is Stricken Out, the error is not cured. *Kneeland v. Great Western Elevator Co.*, 9 N. Dak. 49. See also *People v. Smith*, 172 N. Y. 210.

Requisites of Instructions Withdrawing Evidence. — Instructions withdrawing evidence improperly admitted must be clear and specific. A general instruction not to consider any evidence of the kind improperly admitted will be

562. *c.* EXCLUSION OF EVIDENCE — In General. — See note 2.

563. See note 1.

565. *d.* AS TO QUESTIONS — See note 5. See also EXAMINATION OF WITNESSES.

566. See notes 1, 2, 3.

567. *e.* ON TRIAL WITHOUT JURY. — See notes 1, 2, 3.

8. Errors in Giving or Refusing Instructions — In General.
— See note 4.

insufficient to render the error harmless. *State v. Aiken*, 41 Oregon 294.

An Offer of Incompetent Evidence will be deemed not prejudicial to the opposite party where objection to such offer is made and sustained and the court instructs the jury not to regard the statements of the counsel as to what he offered to prove. *Lee v. Hammond*, 114 Wis. 550.

562. 2. *Montana*. — *Reardon v. Patterson*, 19 Mont. 231.

Reversible Error. — The declarations of the actors, made in the progress of a transaction, constitute a part of the *res gesta*, and are admissible in evidence; and the exclusion of such evidence, when not clearly cumulative, will constitute reversible error. *Ward v. Yazoo*, etc., R. Co., 79 Miss. 145.

Error in Limiting the Cross-examination is cured by the subsequent admission of the evidence thus sought to be brought out. *Kipp v. Silverman*, 25 Mont. 296.

Illustrative Sketches. — It has been held that where an expert witness is testifying as to the effect upon a street of the construction of a viaduct, refusal to allow him to show to the jury a sketch illustrative of his testimony is not prejudicial. *Chicago v. Le Moyne*, (C. C. A.) 119 Fed. Rep. 662.

563. 1. **Presumption of Prejudice.** — *Clewis v. Malone*, 131 Ala. 465; *Nelson v. State*, 130 Ala. 83.

565. 5. *Montana*. — *Matuskevitz v. Hughes*, 26 Mont. 212.

Utah. — *Jenkins v. Mammoth Min. Co.*, 24 Utah 513.

Error Cured by Instructions. — Where counsel asks improper questions, but is promptly reprimanded by the court, and the jury is instructed to disregard such questions, there is no reversible error. *Cannon v. State*, 41 Tex. Crim. 467.

566. 1. *South Dakota*. — *Anderson v. Jordan*, 15 S. Dak. 395.

The Exclusion of Questions on Cross-examination, though erroneous, will be

deemed harmless error where the cross-examiner afterwards calls the same witness and examines him at length. *Simmons v. Oregon R. Co.*, 41 Oregon 151.

2. Error in Allowing Question Cured by Answer. — Where, in reply to an improper question, the witness testifies that he knows nothing about the matter, the error in allowing the question is cured. *Ray v. State*, 108 Tenn. 282.

Where an Improper Question Is Not Answered, the error in its admission is harmless. *Jenkins v. Mammoth Min. Co.*, 24 Utah 513.

3. International, etc., R. Co. v. Bibolet, 24 Tex. Civ. App. 4; *Rainey v. Potter*, (C. C. A.) 120 Fed. Rep. 651.

Erroneous Refusal to Allow Cross-examination as to a point fully established by other than the testimony of the witness being cross-examined is harmless error. *San Antonio v. Porter*, 24 Tex. Civ. App. 444.

Where a Fact Is Established by Competent Evidence, the allowance of a leading question thereto is harmless error. *San Antonio v. Porter*, 24 Tex. Civ. App. 444.

567. 1. *Kansas*. — *Drummond v. Krebs*, 8 Kan. App. 180, *quoting* with approval 2 ENCYC. OF PL. AND PR. 567.

Montana. — *Montana Ore Purchasing Co. v. Butte*, etc., Consol. Min. Co., 25 Mont. 427.

Nebraska. — *King v. Murphy*, 49 Neb. 670.

2. Drummond v. Krebs, 8 Kan. App. 180 [*quoting* with approval 2 ENCYC. OF PL. AND PR. 567]; *Montana Ore Purchasing Co. v. Butte*, etc., Consol. Min. Co., 25 Mont. 427.

3. Drummond v. Krebs, 8 Kan. App. 180, *quoting* with approval 2 ENCYC. OF PL. AND PR. 567.

4. People v. Boughton, 23 Colo. 22; *Lipscomb v. State*, 75 Miss. 559, in each of which cases the court *cited* 2 ENCYC. OF PL. AND PR. 567. See also the following cases:

571. In Instructions Given. — See note 1.

572. See note 1.

573. See note 1.

576. See note 4.

578. Error Cured by Further Instructions. — See notes 1, 2.

579. See note 1.

580. See note 1.

Refusal to Charge. — See note 2.

Alabama. — *Winter v. State*, 123 Ala. 1.

Mississippi. — *Arbuckle v. State*, 80 Miss. 15.

New York. — *National Revere Bank v. National Bank of Republic*, 172 N. Y. 102.

Pennsylvania. — *Provident L., etc., Co. v. Philadelphia*, 202 Pa. St. 78.

Impossibility of Recovery. — *Schloss v. Inman*, 129 Ala. 424.

Where It Is Not Satisfactorily Shown that Error Is Harmless. — In *Missouri*, in the absence of a satisfactory showing that error was harmless, the court will conclude that it was prejudicial to the parties against whom it bears in the particular case. *Camp v. Wabash R. Co.*, 94 Mo. App. 272, in which case an instruction was erroneous, and the amount of the verdict being large the judgment was reversed.

In *Equity Cases*, the verdict of a jury being merely advisory to the court, errors cannot be predicated upon giving or refusing of instructions. *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563.

571. 1. *Montana.* — *Helena, etc., Smelting, etc., Co. v. Lynch*, 25 Mont. 497.

North Dakota. — *State v. Murphy*, 9 N. Dak. 175.

Texas. — *Ft. Worth, etc., R. Co. v. Rogers*, 24 Tex. Civ. App. 382.

United States. — *Friedly v. Giddings*, 119 Fed. Rep. 438.

Instructions upon Issues Found in Appellant's Favor. — Where there are several issues, erroneous instructions upon some of them will not constitute reversible error if the jury find in favor of the appellant upon the issues covered by the instructions complained of, though they find against him upon an issue not covered thereby. *Robinson v. Robinson*, 203 Pa. St. 400.

572. 1. *Alabama.* — *Ratliff v. State*, 122 Ala. 104.

Montana. — *State v. Stevenson*, 26 Mont. 332.

Oklahoma. — *Barclay v. U. S.*, 11 Okla. 503.

Tennessee. — *American Lead Pencil Co. v. Davis*, 108 Tenn. 252.

United States. — *Milby v. U. S.*, (C. C. A.) 120 Fed. Rep. 1.

573. 1. *Schloss v. Inman*, 129 Ala. 424.

576. 4. **Matters Not in Evidence.** — *Compare Sroufe v. Moran Bros. Co.*, 28 Wash. 381, wherein it was held that a mere reference in an action for injuries to the effect of negligence on the part of the plaintiff, where there is no evidence of such negligence, is harmless error.

578. 1. *Alabama.* — *Gulf City Shingle Mfg. Co. v. Boyles*, 129 Ala. 192.

Texas. — *Missouri, etc., R. Co. v. Chittim*, 24 Tex. Civ. App. 599.

2. *New Mexico.* — *Territory v. McGinnis*, 10 N. Mex. 269.

Pennsylvania. — *Provident L., etc., Co. v. Philadelphia*, 202 Pa. St. 78; *Com. v. Washington*, 202 Pa. St. 148.

Tennessee. — *Ware v. State*, 108 Tenn. 466; *Memphis St. R. Co. v. Wilson*, 108 Tenn. 618.

Texas. — *Morgan v. State*, 41 Tex. Crim. 102; *Spears v. State*, 41 Tex. Crim. 527; *Lane v. State*, 41 Tex. Crim. 558; *Toler v. State*, 41 Tex. Crim. 659.

579. 1. *Leonard v. Butte*, 25 Mont. 410.

580. 1. *North Dakota.* — *State v. Young*, 9 N. Dak. 165.

Texas. — *Galveston, etc., R. Co. v. Adams*, 94 Tex. 100.

2. *New Mexico.* — *Lincoln Lucky, etc., Min. Co. v. Hendry*, 9 N. Mex. 149.

New York. — *Continental Nat. Bank v. Tradesmen's Nat. Bank*, 173 N. Y. 272.

Oklahoma. — *Atchison, etc., R. Co. v. Marks*, 11 Okla. 82.

Tennessee. — *Nashville, etc., R. Co. v. Norman*, 108 Tenn. 324.

Texas. — *Bruce v. Koch*, 94 Tex. 192; *Galveston, etc., R. Co. v. Hitz-*

582. See note 2.

584. 9. **Error in Findings.** — See FINDINGS OF COURT.

586. See note 2.

10. Verdicts — *a.* **INFORMALITY OR TRIFLING ERROR.** — See note 5. See also VERDICT.

587. *c.* **DIRECTION OF VERDICT.** — See notes 2, 4. See also DIRECTING VERDICT.

d. **ERRORS CURED BY VERDICT.** — See note 5.

felder, 24 Tex. Civ. App. 318; Missouri, etc., R. Co. v. Chittim, 24 Tex. Civ. App. 599.

Virginia. — Greever v. Graham Bank, 99 Va. 547.

West Virginia. — Arthur v. Charleston, 51 W. Va. 132.

Wisconsin. — Lee v. Hammond, 114 Wis. 550.

Failure to Request. — See article EXCEPTIONS AND OBJECTIONS.

582. 2. *United States.* — Orient Ins. Co. v. Leonard, (C. C. A.) 120 Fed. Rep. 808.

586. 2. Frank v. Scoville, 48 Neb. 169.

5. Slight Error as to Interest. — A slight mistake of only a few cents made by a jury in the computation of interest is not sufficient ground for either reversing or modifying a judgment entered on the verdict, where attention was first called to the mistake in the appellate court and the trial court was given no opportunity to correct it. Carson v. Arvantes, 27 Colo. 77.

Where the Excess of an Excessive Verdict Is Remitted, and the appellate court is convinced that the verdict was not the result of partiality, the error will be deemed cured. Hawes v. Warren, 119 Fed. Rep. 978.

587. 2. **Irregularity in Direction of a Verdict.** — If a demurrer to the evidence would have been sustained, an instruction to the jury to find for the defendant, even after the jury has indicated an intention to find for the plaintiff, is not reversible error. West End Real Estate Co. v. Nash, 51 W. Va. 341.

The Simultaneous Direction of a Verdict and Granting of a Nonsuit is harmless error where the direction of such verdict is nothing more than the determination of the case on the same grounds which called for the nonsuit. Couch v. Welsh, 24 Utah 36.

4. Waiver of Objection. — *Participation in the Trial* after a motion for a directed verdict has been denied constitutes a waiver of objection to the ruling. Bopp v. New York Electric Vehicle Transp. Co., 78 N. Y. App. Div. 337.

Introduction of Testimony after a motion for a directed verdict has been overruled will be deemed a waiver of objection to the ruling, unless the motion is renewed at the close of the case. Fargo First Nat. Bank v. Red River Valley Nat. Bank, 9 N. Dak. 319.

Consent to Trial by Court. — Error in refusing to direct a verdict is waived by thereafter consenting to the trial of the case by the court in lieu of a jury. Erickson v. Citizen's Nat. Bank, 9 N. Dak. 81.

5. Lipscomb v. State, 75 Miss. 559, wherein Whitfield, J., cited 2 ENCYC. OF PL. AND PR. 587; Russell v. Phelps, 73 Vt. 390.

Defects in Pleadings. — Formal defects in pleadings will be cured by the verdict, but not so with the omission of allegations necessary to the cause of action. Philomath v. Ingle, 41 Oregon 289; Nodine v. Union First Nat. Bank, 41 Oregon 386.

Harmless Error in Excluding Evidence. — In Morse v. Puffer, (Mass. 1903) 65 N. E. Rep. 804, it was held that error, if any, in excluding evidence was rendered harmless by the verdict.

APPEARANCES.

590. I. INTRODUCTORY — 1. Definition. — See note 1.

592. 6. Code of Procedure Abolishes Formalities. — See note 4.

593. 7. Ambiguous Position. — See note 1.

594. II. DISTINCTION BETWEEN APPEARING AND PLEADING. — See note 1.

595. III. APPEARANCES GIVING RIGHTS AND APPEARANCES WAIVING RIGHTS. — See note 1.

IV. RIGHT OF STATES TO PRESCRIBE WHAT IS APPEARANCE. — See note 2.

596. V. APPEARANCE PRESUMED FROM RECITALS IN RECORD. — See note 1.

590. 1. *Groves v. Grant County Ct.*, 42 W. Va. 587, *citing* 2 ENCYC. OF PL. AND PR. 590. See also *Flint v. Comly*, 95 Me. 251.

Appearance of Plaintiff. — See *Garrett v. Robinson*, 93 Tex. 406.

592. 4. *California.* — Or by an attorney giving notice of appearance for the defendant, as required by the code provision defining an appearance. *Vrooman v. Li Po Tai*, 113 Cal. 302.

New York. — Service of motion to vacate an attachment is not such appearance. *Wood v. Furtick*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 561.

An examination of a judgment debtor in proceedings supplementary to execution is not prevented by the limitation of the code provision (Code Civ. Pro. N. Y., § 2458) that "the judgment must have been rendered upon the judgment debtor's appearance or personal service of the summons upon him," where the judgment was entered on a forfeited recognizance, the signing of the recognizance being equivalent to a voluntary appearance. The word "appearance," as used in this provision of the code, is not confined to the mere narrow and technical meaning indicated in section 421. *People v. Cowan*, 146 N. Y. 348.

Failure to object to an appearance, and proceeding upon the merits waives all irregularities in such appearance, either as a general appearance or an appearance under Code Civ. Pro. N.

Y., § 421. *Springfield Metallic Casket Co. v. Wielar*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 863.

593. 1. *Bankers L. Ins. Co. v. Robbins*, 59 Neb. 170.

In Court for General Purposes. — A paper reciting that "we * * * hereby enter our appearance to said cause," made by nonresident defendants after a decree *pro confesso* and an order of sale of mortgaged property, signifies an appearance for every purpose in the cause. *Mutual Nat. Bank v. Moore*, 50 La. Ann. 1332.

594. 1. *Groves v. Grant County Ct.*, 42 W. Va. 587, *citing* 2 ENCYC. OF PL. AND PR. 594.

595. 1. *New York.* — A demand of notice of the execution of any reference or writ of inquiry which may be granted upon any application is not a general appearance, but is limited, and gives to the party only such rights as the code provides, and he has no standing to litigate the question whether a cause of action exists against him. *Arkenburgh v. Arkenburgh*, 14 N. Y. App. Div. 367.

2. *Maysville, etc., R. Co. v. Ball*, (Ky. 1900) 56 S. W. Rep. 188.

596. 1. **Answer Insufficient to Show Appearance.** — An answer filed by one purporting to be the attorney for the defendant in an action against a nonresident who has not been served has been held, in the absence of any record recital of appearance, to be insufficient

597. See note 2.

600. Plural Form Used in Record. — See note 1.

VI. CONTRADICTING RECORD. — See note 2.

604. VIII. RIGHTS ACQUIRED BY TECHNICAL APPEARANCE. — See note 1.

605. IX. RIGHT TO APPEAR WITHOUT PROCESS BEING SERVED. — See note 1.

606. X. TIME TO APPEAR. — See note 2.

608. XI. ATTACHMENT. — See note 4.

to show an appearance by the defendant. *Farber v. National Forge, etc., Co.*, 50 Ill. App. 503.

597. 2. *Groves v. Grant County Ct.*, 42 W. Va. 587; *Fulton v. State*, 103 Wis. 238.

Recitals Held to Show an Appearance. — "This cause coming on for trial, it is, by consent of both parties in open court, tried to the court without the intervention of a jury." *Ward v. Western Horse, etc., Ins. Co.*, 42 Neb. 374. "This day came the parties, by their attorneys," etc., is held to mean that the defendant appeared, as the plaintiff was already in court. *Groves v. Grant County Ct.*, 42 W. Va. 587.

600. 1. "Now Came the Defendants," where one only of several defendants appeared and pleaded and the others were defaulted, cannot be held to constitute an appearance on the part of those who were defaulted. *Newton v. Pence*, 10 Ind. App. 672.

Pleading. — *Swafford v. Howard*, (Ky. 1899) 50 S. W. Rep. 43; *Mullins v. Rieger*, 169 Mo. 521.

2. *Dormitzer v. German Sav., etc., Soc.*, 23 Wash. 132.

604. 1. *Smith v. Smith*, 15 Pa. Super. Ct. 366. But see *Domestic Bldg. Assoc. v. Nelson*, 172 Ill. 386.

605. 1. *Duer v. Fox*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 676; *McLoughlin v. Bieber*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 143.

606. 2. Notice of Appearance not served within the time prescribed by statute may, under Code Civ. Pro. N. Y., § 421, be returned by the plaintiff. *Herold v. McBean*, (Supm. Ct. Spec. T.) 27 Civ. Pro. (N. Y.) 214.

Action to Foreclose Mortgage. — But if a general appearance is entered by nonresident defendants after a decree for sale, they cannot avoid the effect of a subsequent personal judgment. *Mutual Nat. Bank v. Moore*, 50 La. Ann. 1332.

After Pro Confesso, and before final

decree, a nonresident defendant may appear and defend as a matter of course. *Akin v. Watson*, (Tenn. Ch. 1899) 52 S. W. Rep. 905.

Pending Appeal from Order Made on Special Appearance. — Where a nonresident is served by publication and he makes a special appearance to object to the jurisdiction of the court, which objection is overruled, his time to appear generally and to plead should be extended until the determination of an appeal taken by him from an order denying his motion to set aside the order of publication. *Everett v. Everett*, 22 N. Y. App. Div. 473.

608. 4. *Buzzard v. Hapeman*, 61 Mo. App. 464; *Coskery v. Wood*, 52 S. Car. 516.

Judgment in Personam is proper where the defendant appears. *Bird v. Sullivan*, 58 S. Car. 50; *Chilhowie Lumber Co. v. Lance*, 50 W. Va. 636.

What Constitutes Appearance. — An objection to the affidavit for attachment, *Gorham v. Tanquerly*, 58 Kan. 233; *Raymond v. Nix*, 5 Okla. 656, or opposing a motion to amend the affidavit, *Burnham v. Lewis*, (Kan. 1902) 70 Pac. Rep. 337, will constitute an appearance and confer jurisdiction of the person.

Objections to the Attachment After Appearance to the Action will not be considered, as the appearance gives jurisdiction of the person. *Rocky Mount Mills v. Wilmington, etc., R. Co.*, 119 N. Car. 693; *Townes v. Augusta*, 46 S. Car. 15.

A Motion to Quash is too late after appearance. *Watson v. Noble*, 65 N. J. L. 506; *Moore v. Richardson*, 65 N. J. L. 531.

Plea in Abatement. — After appearing and pleading to the merits it is too late to plead in abatement. *Earle v. Sayre*, 99 Ga. 617.

Discharge of Property When Writ Does Not Lie. — Such appearance will not prevent the discharge of property from

- 610.** Moving to Dissolve. — See note 1.
Quashing Writ. — See note 2.
- 611.** Waiving Compliance with Statute. — See note 1.
- 612.** Garnishment. — See note 2.
- XII. CHANGE OF VENUE.** — See note 4.
- 613.** See note 1.
To What Court Objections Should Be Made. — See note 2.
Waiver. — See note 3.

the lien of the attachment if it is found that the writ does not lie for the particular claim or against the particular person. *Moore v. Richardson*, 65 N. J. L. 531.

Return to Wrong Court. — After appearing and pleading to an attachment sued out against a nonresident before a justice of the peace and returnable to the County Court, and appealing to the Superior Court from a judgment rendered against him in the County Court, it is too late for the defendant to object that the latter court was without jurisdiction of such attachment. *Wheelwright v. Dyal*, 99 Ga. 247.

610. 1. *Turner v. Larkin*, 7 Del. Co. Rep. (Pa.) 543, 12 Pa. Super. Ct. 284. See also *Warren Sav. Bank v. Silverstein*, 15 Pa. Co. Ct. 584, 4 Pa. Dist. 239. But see *Pain's Pyro-Spectacle Co. v. Lincoln Park, etc., Co.*, 19 Pa. Co. Ct. 23, 6 Pa. Dist. 93. *Contra*, see *Paul v. Rooks*, 16 Colo. App. 44; *Ex p. Perry Stove Co.*, 43 S. Car. 176.

Necessity of Publication, in attachment against a nonresident, is not dispensed with by appearance of his counsel for the single purpose of moving to discharge the levy and dissolve the attachment. *Exchange Nat. Bank v. Clement*, 109 Ala. 270.

2. *Meyer v. Brooks*, 29 Oregon 203. See also *Franklyn v. Taylor Hydraulic Air Compressing Co.*, (N. J. 1902) 52 Atl. Rep. 714.

Objection to Jurisdiction of Res. — In a suit in assumpsit, with attachment in aid, the defendant, not having been served personally, may appear specially and question the jurisdiction of the court over the *res*, and this is not a denial of jurisdiction of the subject-matter so as to authorize entry of a personal judgment against him. *Pack v. American Trust, etc., Bank*, 172 Ill. 192, citing 2 ENCYC. OF PL. AND PR. 610.

611. 1. **Regularity.** — *Lansford v.*

Jones, 18 Pa. Co. Ct. 261, 5 Pa. Dist. 483.

Defect in the Affidavit, or insufficiency of the affidavit. *Watson v. Noblett*, 65 N. J. L. 506.

612. 2. **A Motion to Set Aside Judgment**, made by the garnishee on the ground that he was not indebted to the defendant, operates as a general appearance and waives objection to service of summons. *Wickham v. South Shore Lumber Co.*, 89 Wis. 23.

4. *In re Jones*, 90 Mo. App. 318; *Jones v. St. Louis, etc., R. Co.*, 89 Mo. App. 653; *Carter v. Wamack*, 64 Mo. App. 338, 2 Mo. App. Rep. 997.

613. 1. *Otero Canal Co. v. Fosdick*, 20 Colo. 522.

2. *Cheney v. Crandell*, 28 Colo. 383; *State v. Cryts*, 87 Mo. App. 440; *Montgomery v. Lebanon Town Mut. F. Ins. Co.*, 80 Mo. App. 500, 2 Mo. App. Rep. 657.

The Unauthorized Transfer of the Cause to another court for trial furnishes no valid objection to one who appears and enters into the trial, where the court trying the case has jurisdiction of the subject-matter. *North Hudson County R. Co. v. Flanagan*, 57 N. J. L. 696.

Amendment of Petition After Order of Transfer. — In *Southern Pac. Co. v. Winton*, (Tex. Civ. App. 1901) 66 S. W. Rep. 477, it was held that where, after an ineffectual order of transfer of a cause to a court having jurisdiction of the subject-matter of the action, the plaintiff files what is styled an "amended original petition," and the defendant appears and without answering introduces evidence and otherwise contests the cause and avails himself of all defensive matters set up in his answer before the attempted transfer, the amended petition will be taken as an original action and the appearance by the defendant will be taken as a waiver of process.

3. **Formal Order.** — But see *Collier v. Wilson*, 56 Mo. App. 420.

614. XIII. APPEALS AND APPELLATE PROCEEDINGS — 1. Taking Appeal. — See note 1.

Trial de Novo. — See note 2.

616. 2. What Constitutes Appearance — Motion to Dismiss Appeal. — See note 4.

617. Argument. — See note 1.

Noticing Appeal. — See note 2.

614. 1. Writ of Error. — But see otherwise *Foster v. Borne*, 63 Ohio St. 169, *distinguishing* the remedy by appeal from that by petition in error. And it is also held that after a party has done all within his power by way of seasonable objection to the jurisdiction over his person, subsequently pleading to the merits does not cure an erroneous ruling as to the jurisdiction, and a petition in error to reverse such erroneous judgment does not effect an appearance. *Baltimore, etc., R. Co. v. Freeman*, 112 Fed. Rep. 237, 50 C. A. 211.

A Cross-petition in Error makes the party filing it a party to the proceedings in error. *Robinson Female Seminary v. Campbell*, 60 Kan. 60.

Demurrer and Appeal from Order Overruling. — Demurrer to a bill, by a non-resident defendant, though raising the question of jurisdiction, and then praying an appeal from the order overruling the demurrer, constitute an appearance so as to bring him before the court, without regard to defects in the proceedings by attachment and publication. *Taylor v. Badoux*, (Tenn. Ch. 1899) 58 S. W. Rep. 919.

Want of Power to Enter Default Judgment. — Where personal service within the state is required by statute to authorize a judgment by default, a general appeal from a default judgment entered without proof of such service does not cure the defect, and the judgment is erroneous for want of the statutory proof even though jurisdiction in fact existed. *Rockman v. Ackerman*, 109 Wis. 639; *Zimmerman v. Gerdes*, 106 Wis. 608 [*overruling* *Dikeman v. Struck*, 76 Wis. 332]. *Electric Appliance Co. v. Warren*, (Wis. 1902) 91 N. W. Rep. 970.

2. Deering v. Venne, 7 N. Dak. 576 [*citing* 2 ENCYC. OF PL. AND PR. 614]; *Hendricks v. Settle*, 107 Ky. 344; *McCubrey v. Lankis*, 74 Minn. 302; *Winer v. Maness*, 94 Mo. App. 162; *Foster v. Borne*, 63 Ohio St. 169. See also *Freeman v. Wyandotte L. & T. Co.*, 6 Kan.

App. 86; *Ward v. Western Horse, etc., Ins. Co.*, 42 Neb. 374.

Justices of the Peace. — *Paul v. Rooks*, 16 Colo. App. 44; *Wencker v. Thompson*, (Mo. App. 1902) 69 S. W. Rep. 743; *Chesapeake, etc., R. Co. v. Wright*, 50 W. Va. 653, which last was an appeal after objection to jurisdiction overruled and trial on the merits, the court *citing* 2 ENCYC. OF PL. AND PR. 614.

616. 4. Appearance to Ask Dismissal of Appeal. — Notwithstanding that an appearance in the Circuit Court is not special if the party asks nothing but that the appeal be dismissed, the court does not acquire general jurisdiction. *Houser v. Nolting*, 11 S. Dak. 483.

Appearance of Counsel solely for the purpose of raising objection to the jurisdiction is not a waiver of proof of the fact upon which alone the question of jurisdiction turns. *Whetstone v. Livingston*, 54 S. Car. 539.

A Stipulation for the Reinstatement of a case dismissed on an appeal from a justice of the peace is an entry of appearance. *Baldwin v. Economy Furniture Co.*, 70 Ill. App. 49.

Motion to Dismiss Writ of Error. — The appearance of the defendant in error by motion to dismiss the writ on the ground that the plaintiff in error is precluded from suing out the writ because he had voluntarily dismissed an appeal previously perfected is a waiver of any supposed defects in the citation in error and of the sheriff's return, where the motion to dismiss is overruled. *Hall v. La Salle County*, (Tex. Civ. App. 1898) 46 S. W. Rep. 863.

617. 1. Magee v. Hartzell, 7 Kan. App. 489.

The Regularity of the Appearance of the Plaintiff as appellee, entered by his attorney, on appeal from a justice of the peace to the Circuit Court, cannot be questioned on appeal from the Circuit Court where the parties went to trial without objection. *Jenkins v. Congreve*, 92 Ill. App. 271.

2. Goodin v. Van Haften, (Mich. 1902) 90 N. W. Rep. 23.

617. *Acquiescence.* — See note 5.

618. *3. Effect of General Appearance — Waiver of Process and Notice.* — See notes 1, 2.

Time. — See note 3.

619. *Irregularities.* — See note 2.

4. Case Remanded. — See note 3.

620. *XIV. APPEARANCE BEFORE BOARDS, COUNCILS, COMMISSIONERS, ETC.* — See note 1.

617. *5. Acts Insufficient to Operate as Appearance.* — On appeal from a judgment of a justice of the peace, the appellee's attorney, being in court upon other business, was asked by the court if he would consent to a continuance in the appellee's case, to which he answered that he neither consented nor objected. It was held that this was not an appearance so as to waive notice of appeal. *Pattison v. Missouri, etc., R. Co.*, 93 Mo. App. 643.

618. *1. Las Animas County v. Stone*, 11 Colo. App. 476, *Robinson Female Seminary v. Campbell*, 60 Kan. 60; *Magee v. Hartzell*, 7 Kan. App. 489; *Belleville Pump, etc., Works v. Samuelson*, 16 Utah 119.

In Connecticut it is held that a general appearance is not of itself a waiver of the right to object to a defect in the process, and does not waive the objection that an appeal does not state the time and place of holding the court to which the appeal is taken, under the statutory requirement in that regard. *In re Shelton St. R. Co.*, 70 Conn. 329.

What Is Appearance on Appeal. — On appeal from a judgment of a justice of the peace, an appearance to resist the substitution of destroyed papers and records does not operate as an appearance to answer to the merits, so as to authorize the court to render judgment by default, where it does not appear that the successful party in the justice's court has been notified, according to the statute, that an appeal has been taken. *Wren v. Kirsey*, (Tex. Civ. App. 1895) 30 S. W. Rep. 252.

On an appeal from the special to the general term of the Superior Court the appellee appeared and objected and excepted to the rulings and judgment reversing the judgment of the special term. On appeal to the appellate court from the judgment of the general term it was held that the appellee had, in the general term, submitted himself to the jurisdiction of that court. *New-*

man v. Railway Officials, etc., Acc. Assoc., 15 Ind. App. 29.

2. Jurisdiction of the Subject-matter. — See *infra*, XIX. *Jurisdiction of Subject-matter.* See also EXCEPTIONS AND OBJECTIONS.

3. Mack v. Lewis, 67 Vt. 383.

Filing Bond and Affidavit. — *Goodin v. Van Haaften*, (Mich. 1902) 90 N. W. Rep. 23.

619. *2. Boone v. A'Hern*, 98 Ill. App. 610.

On appeal to the District Court, which is a court of general jurisdiction, from a judgment of a nonsuit in the County Court, failure of the plaintiff to move to set aside the judgment before appealing is cured by demurring and answering to the complaint in the District Court. *Fairbanks v. Macleod*, 8 Colo. App. 190.

Formal Record of Entry or Notice of Appeal may be waived by voluntary appearance. *Garrison v. Parsons*, 41 Fla. 143.

An Objection to the Affidavit for an appeal may be waived by appearance. *Lowry v. Phillips*, 57 Mo. App. 232. See also *Pearson v. Gillett*, 55 Mo. App. 312.

3. Stovall v. Stovall, (Ky. 1897) 39 S. W. Rep. 416.

Objections to the Remanding Order are waived by appearance and going to trial in the lower court. *Levinson v. Sands*, 81 Ill. App. 578.

620. *1. Assessors.* — *Deniston v. Terry*, 141 Ind. 677.

Before Board of Equalization. — A statute creating a board of equalization which provides that notice shall be given to any person or company, its agents or attorney, whose assessment has been raised, and that either of them may appear before the board, etc., does not require appearance in person by the taxpayer, his agent or attorney. Nothing more is required than what would constitute an appearance in a court. *Standard Cattle Co. v. Baird*, 8 Wyo. 144.

620. XV. SPECIAL APPEARANCE — 1. Defined. — See note 2.

621. Jurisdiction Over Subject-matter. — See note 1.

2. When It May Be Made. — See note 2.

623. 3. States Where Special Appearance Is Inhibited — Texas.
— See note 1.

620. 2. South Omaha Nat. Bank v. Farmers, etc., Nat. Bank. 45 Neb. 29.

Pennsylvania. — But see *Warren Sav. Bank v. Silverstein*, 15 Pa. Co. Ct. 584, 4 Pa. Dist. 239; *Turner v. Larkin*, 7 Del. Co. Rep. (Pa.) 543, 12 Pa. Super. Ct. 284.

Effect of Prayer. — Where a corporation appears specially to move to quash a return on a summons, the additional prayer for judgment whether the defendant shall be compelled to plead does not constitute an appearance to the action so as to waive the objection to the service raised by the motion. *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 70 Fed. Rep. 276.

Appeal — Review Confined to Questions Raised Below. — Where the defendant in a suit before a magistrate appears specially and his objections are overruled before the magistrate and on appeal to the Court of Common Pleas, no exception will be considered on appeal to the Supreme Court which involves a question other than those raised by the special appearance. *Wideman v. Pruitt*, 52 S. Car. 84.

Qualified Special Appearance. — Sometimes an appearance to object to a writ or service as defective is effective if the objection is well founded, otherwise the appearance becomes general. *Smith v. Smith*, 15 Pa. Super. Ct. 366.

In *New Jersey* it was held, in *Hervey v. Hervey*, 56 N. J. Eq. 166, that the more correct practice seems to be to require, as a condition to granting leave to enter a special appearance for the purpose of applying to set aside service of subpoena, that there be inserted in the order an undertaking or stipulation that the defendant will submit without further process to the orders of the court if the point should be decided against him.

621. 1. W. E. Caldwell Co. v. Burton Lumber Co., 10 Ohio Dec. 412, 7 Ohio N. P. 525; *Evans v. Breneman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 80; *Noonan v. Delaware, etc., R. Co.*, 68 Fed. Rep. 1.

2. San Diego Sav. Bank v. Goodsell, 137 Cal. 420; *Epps v. Buckmaster*, 104 Ga. 698; *Deering v. Venne*, 7 N. Dak.

576; *State v. Thacker Coal, etc., Co.*, 49 W. Va. 140; *Blair v. Henderson*, 49 W. Va. 282.

An Appearance by a Foreign Corporation solely for the purpose of moving to set aside service of summons and to stay proceedings does not waive the objection that prior to service of summons the corporation had ceased to do business in the state and had no property within the jurisdiction of the court. *De Castro v. Compagnie Francaise*, 76 Fed. Rep. 425.

Not Waiver of Legal Process. — *Goldey v. Morning News*, 156 U. S. 518; *Ellsworth Trust Co. v. Parramore*, 48 C. C. A. 132, 108 Fed. Rep. 906.

Defects in Process. — The appearance of a defendant before the magistrate at the proper time shows that he has notice, and though he appears specially, if the appearance is not for the purpose of setting aside the service of the summons, which would have raised the question of jurisdiction, but for the purpose of raising a question as to the omission in the summons served, no question of jurisdiction is raised. *Grant v. Clinton Cotton Mills*, 56 S. Car. 554.

Joining in Motion to Set Aside Service of Process. — Parties not served with process do not submit to the jurisdiction by joining with a defendant served with process, in a motion to set aside service. *Beck, etc., Lithographing Co. v. Wacker, etc., Brewing, etc., Co.*, 76 Fed. Rep. 10, 46 U. S. App. 486, *cit- ing* 2 ENCYC. OF PL. AND PR. 621.

623. 1. Loeb v. Crow, 15 Tex. Civ. App. 537, which is to the same effect as *Grizzard v. Brown*, 2 Tex. Civ. App. 584, set out in the original note; *Landa v. Mercantile Banking Co.*, 10 Tex. Civ. App. 582, as to appearance in the District Court, for the purpose of objecting to its jurisdiction, on appeal from a judgment of a justice of the peace.

Objection to Venue. — Where, before service of citation, the defendant files a sworn plea setting up that his residence is in another county and claiming the privilege of being sued there, the question presented is one of venue

624. Iowa. — See note 1.

625. 4. How to Make Special Appearance — Under Code. — See notes 1, 2.

5. When Special Appearance Is Converted into General One — Introductory. — See note 3.

627. Where Defendant Becomes Actor. — See note 1.

Attorney's Signature. — See note 2.

628. Want of Jurisdiction and Want of Equity. — See note 1.

Attacking Complaint or Entering Into Trial. — See note 3.

and not of jurisdiction, and the privilege cannot be waived by claiming it too soon. *Callhan v. Pemberton*, (Tex. Civ. App. 1896) 38 S. W. Rep. 227. (York v. State, 73 Tex. 651, cited in the original note, and cases in line with it do not militate against this ruling.)

On the other hand an exception to the manner of citation is not such a submission to the jurisdiction as to preclude the party from pleading to the venue. Texas, etc., *R. Co. v. Childs*, (Tex. Civ. App. 1897) 40 S. W. Rep. 41.

Pennsylvania. — See *Pain's Pyro-Spectacle Co. v. Lincoln Park, etc.*, Co., 19 Pa. Co. Ct. 23, 6 Pa. Dist. 93; *Ruhland v. Alexander*, 19 Pa. Co. Ct. 577.

624. 1. *Teller v. Equitable Mut. L. Assoc.*, 108 Iowa 17; *Moffitt v. Chicago Chronicle Co.*, 107 Iowa 407; *Locke v. Chicago Chronicle Co.*, 107 Iowa 390; *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 101 Iowa 514.

625. 1. *Blair v. Henderson*, 49 W. Va. 282; *Baltimore, etc., R. Co. v. Freeman*, 50 C. C. A. 211, 112 Fed. Rep. 237, as to practice in Ohio. See also *infra*, XV. 5. *When Special Appearance Is Converted into General One — Technical Forms Not Considered*.

2. *Belden v. Wilkinson*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 659. See also *Banker's L. Assoc. v. Shelton*, 84 Mo. App. 634.

3. *Security L. & T. Co. v. Boston, etc., Fruit Co.*, 126 Cal. 418; *Nicholes v. People*, 165 Ill. 502, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 625. See also the following cases:

Colorado. — *Paul v. Rooks*, 16 Colo. App. 44.

Indiana. — *McCoy v. Stockman*, 146 Ind. 668.

Kansas. — *Frazier v. Douglass*, 57 Kan. 809.

Minnesota. — *Farmer's Nat. Bank v. Backus*, 64 Minn. 43.

Missouri. — *Banker's L. Assoc. v. Shelton*, 84 Mo. App. 634.

Nebraska. — *Bankers L. Ins. Co. v. Robbins*, 59 Neb. 170.

New York. — *Grant v. Birrell*, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 768; *Mack v. American Express Co.*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 215.

Oklahoma. — *Raymond v. Nix*, 5 Okla. 656.

Pennsylvania. — *Jeannette v. Roehme*, 9 Pa. Super. Ct. 33, 29 Pittsb. Leg. J. N. S. (Pa.) 218, 43 W. N. C. (Pa.) 221.

South Dakota. — *In re Taber*, 13 S. Dak. 62.

Wyoming. — *Chadron Bank v. Anderson*, 6 Wyo. 518.

United States. — *Crawford v. Foster*, 84 Fed. Rep. 939, 56 U. S. App. 231; *Caskey v. Chenoweth*, 62 Fed. Rep. 712, 23 U. S. App. 384.

Test. — *Deming Invest. Co. v. Ely*, 21 Wash. 102.

Designating Purpose. — *Stone v. Smith*, (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 1106.

Waiving Plea in Abatement. — By answering to the merits without awaiting disposition of his plea in abatement previously interposed, the defendant waives the latter and enters a general appearance to the action. *Winfield Nat. Bank v. McWilliams*, 9 Okla. 493. See also ABATEMENT IN PLEADING.

627. 1. *Chandler v. Citizens Nat. Bank*, 149 Ind. 601, quoting 2 ENCYC. OF PL. AND PR. 625-627.

Vacating Judgment. — *Henry v. Henry*, 15 S. Dak. 80.

2. *Reedy v. Howard*, 11 S. Dak. 160.

628. 1. See *Edgell v. Felder*, 84 Fed. Rep. 69, 52 U. S. App. 417.

3. *In re Clarke*, 125 Cal. 388 [citing 2 ENCYC. OF PL. AND PR. 625]; *Chicago, etc., R. Co. v. Kenney*, (Ind. 1901) 62 N. E. Rep. 26; *Ward v. Western Horse, etc., Ins. Co.*, 42 Neb. 374; *Rosamond v. Earle*, 46 S. Car. 9; *Lowry v. Tile, etc., Assoc.*, 98 Fed. Rep. 817.

629. Technical Forms Not Considered. — See note 1.

630. 6. Waiver of Special Appearance. — See note 1.
Care Must Be Taken. — See note 2.

631. Cases Holding that Special Appearance Is Waived. — See note 3.

632. XVI. GENERAL APPEARANCE, WHAT IS — 1. Introductory.
— See note 1.

629. 1. *In re Clarke*, 125 Cal. 388 [citing 2 ENCYC. OF PL. AND PR. 625]; *South Omaha Nat. Bank v. Farmers, etc.*, Nat. Bank, 45 Neb. 29; *Reedy v. Howard*, 11 S. Dak. 160; *Houser v. Nolting*, 11 S. Dak. 483; *Kingsley v. Great Northern R. Co.*, 91 Wis. 380.

An Unverified Motion to Dismiss the suit is not the proper method of raising objection to the jurisdiction of the person, but the objection should be raised by motion to quash the service or other appropriate proceedings. *Dudley v. White*, (Fla. 1902) 31 So. Rep. 830.

630. 1. *Mortgage Trust Co. v. Norris*, 8 Kan. App. 699, quoting 2 ENCYC. OF PL. AND PR. 629, 630. See also the following cases:

Indiana. — *Chandler v. Citizens Nat. Bank*, 149 Ind. 601.

Minnesota. — *Perkins v. Mellicke*, 66 Minn. 409.

New York. — *Baird v. Helfer*, 12 N. Y. App. Div. 23.

North Carolina. — *Graham v. O'Bryan*, 120 N. Car. 463.

Oklahoma. — *Chicago Bldg., etc., Co. v. Pewthers*, 10 Okla. 724; *Jones v. Chicago Bldg., etc., Co.*, 10 Okla. 628.

Washington. — *Woodbury v. Henningsen*, 11 Wash. 12. But where after overruling his objection the defendant asks for further time to plead and stipulates to answer to the merits, and time to plead is given to him, the jurisdictional objection is waived. *Walters v. Field*, 29 Wash. 558.

United States. — *Baltimore, etc., R. Co. v. Freeman*, 112 Fed. Rep. 237, 50 C. C. A. 211.

Compare *Benoit v. Revoir*, 8 N. Dak. 226, wherein the judges did not agree as to the construction of the decision in *Miner v. Francis*, 3 N. Dak. 549, cited in the original article, a majority of the court holding that where the defendant attempted to appear specially and moved to dismiss for want of jurisdiction of the person and because there was no security for costs, and after his motion was overruled made other motions and participated in the trial on

the merits, he waived his objection to the jurisdiction.

Filing Counterclaim or Cross-complaint is a submission to the jurisdiction. *Chandler v. Citizens Nat. Bank*, 149 Ind. 601; *Thompson v. Greer*, 62 Kan. 522 [both of which cases cited 2 ENCYC. OF PL. AND PR. 625-627]; *Lower v. Wilson*, 9 S. Dak. 252.

Plea in Abatement and Motion Distinguished. — Upon overruling a motion to quash service, subsequent pleading to the merits waives the objection, and the reason for holding differently when the pleading over is after sustaining a demurrer to a plea in abatement and interlocutory judgment *quod respondeat oster* does not apply, because in the case of the motion there is no such interlocutory judgment. *Franklin L. Ins. Co. v. Hickson*, 57 Ill. App. 387.

2. *Chandler v. Hill*, 13 S. Dak. 176. See also *Moody v. Moody*, 118 N. Car. 926; *Kelly-Goodfellow Shoe Co. v. Todd*, 5 Okla. 360.

631. 3. *Chesapeake, etc., R. Co. v. Wright*, 50 W. Va. 653 [citing 2 ENCYC. OF PL. AND PR. 631]; *Franklin L. Ins. Co. v. Hickson*, 197 Ill. 117; *Kinsella v. Cahn*, 185 Ill. 208; *Morris v. Miller*, (Idaho 1895) 40 Pac. Rep. 60; *Kauter v. Fritz*, 5 Kan. App. 756; *Audretsch v. Hurst*, 126 Mich. 301.

Compare *American Mut. L. Ins. Co. v. Mason*, (Ind. 1902) 64 N. E. Rep. 525.

Improper Revival. — If the defendant pleads to the merits and goes to trial after a motion to quash a *scire facias*, based on the ground that the suit could not be revived, has been overruled, he is in court for all purposes. *Memphis, etc., R. Co. v. Glover*, 78 Miss. 467.

632. 1. *Epps v. Buckmaster*, 104 Ga. 698; *Nicholes v. People*, 165 Ill. 502; *Neosho Valley Invest. Co. v. Cornell*, 60 Kan. 282; *Frank v. Zeigler*, 46 W. Va. 614, each of which cases cited 2 ENCYC. OF PL. AND PR. 632. See also the following cases:

Illinois. — *McChesney v. People*, 178 Ill. 542.

Kansas. — *Abercrombie v. Abercrombie*, 64 Kan. 29; *Burnham v. Lewis*, (Kan. 1902) 70 Pac. Rep. 337.

632. Presumption. — See note 2.

633. Intention. — See note 1.

Physical Presence. — See note 2.

2. Procuring or Consenting to Continuance. — See notes

3, 4.

634. See note 1.

3. Service of Notice of Appearance. — See note 2.

Missouri. — Bankers' L. Assoc. v. Shelton, 84 Mo. App. 634.

Nebraska. — South Omaha Nat. Bank v. Farmers', etc., Nat. Bank, 45 Neb. 29; Bankers L. Ins. Co. v. Robbins, 59 Neb. 170.

United States. — Caskey v. Chenoweth, 62 Fed. Rep. 712, 23 U. S. App. 384.

A Disclaimer is not a special appearance for the purpose of challenging the jurisdiction of the court over the person, but is a mode of defense requiring action by the court to determine whether the person disclaiming is a necessary or proper party, and amounts to a general appearance. Fowler v. Brown, 51 Neb. 414.

632. 2. Dunphy v. Gilliam Mfg. Co., 11 Ohio Cir. Dec. 822, 21 Ohio Cir. Ct. 696. But see Springfield Metallic Casket Co. v. Wielar, (Supm. Ct. App. T.) 59 N. Y. Supp. 1115, affirming Cohen v. Levy, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 330.

Appearance to Equalize Assessment, in a proceeding before a County Court, will be presumed to have been a general appearance by the taxpayer. Godfrey v. Douglas County, 28 Oregon 446.

633. 1. Shown by Record. — Newton v. Pence, 10 Ind. App. 672.

Appearance in Writing. — There can be no more formal or effectual way of signifying an intention to appear in a case than by filing a written statement with the record in court to the effect that the defendant enters his appearance, and this will be sufficient as a general appearance. Epps v. Buckmaster, 104 Ga. 698.

Appearance for Several Defendants. — Solicitors filed a direction to the clerk to "enter defendants' appearance in foregoing suit," and signed it as "Defendants' Solrs." In the heading or title of the paper, which purported to identify the cause, only two of the three defendants were specifically named as defendants, their names being followed by the words "*et al.*" It was held that this was a general appear-

ance for all the defendants, and that the one not specifically named in the title to the above paper was included in the abbreviated *et alius*. Seedhouse v. Broward, 34 Fla. 509.

2. Epps v. Buckmaster, 104 Ga. 698.

3. Seay v. Sanders, 88 Mo. App. 478, as to the effect of continuance upon some of several counts after trial of the others; Texas, etc., R. Co. v. McCarty, (Tex. Civ. App. 1902) 69 S. W. Rep. 229; Landa v. Mercantile Banking Co., 10 Tex. Civ. App. 582.

4. McCormick Harvesting Mach. Co. v. Scott, (Neb. 1902) 89 N. W. Rep. 410.

Application by Letter. — In an action before a justice of the peace, an application by letter for a continuance, made by the defendant on the return day, amounts to an appearance. Paul v. Rooks, 16 Colo. App. 44.

634. 1. New River Mineral Co. v. Painter, 100 Va. 507. See also Waldron v. Palmer, 104 Mich. 556.

Adjournment "Without Pleading or Prejudice." — Where the parties appear and by mutual consent the suit is adjourned "without pleadings or prejudice to either party," this is not such an appearance as waives defective service of process. Tunningly v. Butcher, 106 Mich. 35.

2. **Written Appearance Attached to Summons.** — Under the code provision that "a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him," etc., a written acknowledgment of service of summons and what purports to be an entry of appearance for the defendant, signed by his attorney and attached to the summons, constitutes an appearance. Cornell University v. Denny Hotel Co., 15 Wash. 433.

Stipulation as to Place of Trial. — Where the defendants joined in a stipulation with the attorneys for the plaintiff and the attorney for another defendant that the cause might be tried in another county, this constituted an

- 635.** 5. Filing Demurrer. — See note 1.
636. 6. Pleading to Merits. — See note 1.
637. 7. Obtaining Extension of Time to Plead. — See note 1.
 8. Making Motions. — See note 2.

appearance under a statute providing that "a defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance," as in order to constitute a written notice it is not necessary that the writing should recite that the defendant appeared. *Jones v. Wolverton*, 15 Wash. 590.

635. 1. *Keyser v. Pollock*, 20 Utah 371, citing 2 ENCYC. OF PL. AND PR. 644. See also the following cases:

California. — *McDonald v. Agnew*, 122 Cal. 448, holding that under the statute a demurrer is an appearance, and the effect is not changed by prefacing the demurrer with a statement that the defendant does not submit to the jurisdiction of the court, or waive any of his rights, etc.

Georgia. — *Southern R. Co. v. Cook*, 106 Ga. 450; *Savannah, etc., R. Co. v. Atkinson*, 94 Ga. 780.

Idaho. — *Willman v. Friedman*, (Idaho 1894) 38 Pac. Rep. 937.

Illinois. — *Franklin L. Ins. Co. v. Hickson*, 97 Ill. App. 387, 197 Ill. 117.

Kansas. — *Kauter v. Entz*, 8 Kan. App. 788.

Kentucky. — *Fleming v. Sinclair*, 22 Ky. L. Rep. 499, 58 S. W. Rep. 370; *Standard Furniture Co. v. Stanley* (Ky. 1899) 51 S. W. Rep. 611.

Oklahoma. — *Fitzgerald v. Foster*, 11 Okla. 558.

Oregon. — *Smith v. Day*, 39 Oregon 531.

South Carolina. — *Rosamond v. Earle*, 46 S. Car. 9.

Texas. — *Seley v. Whitfield*, 24 Tex. Civ. App. 56.

West Virginia. — *Totten v. Nighbert*, 41 W. Va. 800.

A Motion to Dismiss the Bill is in the nature of a demurrer and operates as a submission of the person to the jurisdiction. *Van Dyke v. Van Dyke*, (N. J. 1901) 49 Atl. Rep. 1116; *Albert v. Clarendon Land Invest., etc., Co.*, 53 N. J. Eq. 623.

Demurrer to Counterclaim After Removal to and Remand by Federal Court. — *Talbot v. Planters Oil Co.*, 12 Tex. Civ. App. 49.

636. 1. *Memphis, etc., R. Co. v.*

Glover, 78 Miss. 467; *McClure v. Paducah Iron Co.*, 90 Mo. App. 567; *Jones v. St. Louis, etc., R. Co.*, 89 Mo. App. 653; *Mankameyer v. Egelhoff*, 161 Mo. 200; *Baker v. Irvine*, 62 S. Car. 293; *Coskery v. Wood*, 52 S. Car. 516; *Rosamond v. Earle*, 46 S. Car. 9; *Pollock v. Pollock*, 9 S. Dak. 48.

What Is Pleading to the Merits. — A plea of misjoinder of parties is not a plea to the merits and does not waive service of process. *Howard v. Levering*, 4 Ohio Cir. Dec. 236, 8 Ohio Cir. Ct. 614.

A Plea of Not Guilty, under a Warrant of Arrest, for theft, together with a claim of ownership of the property alleged to have been stolen, cannot be said to be a voluntary appearance by the party, so as to authorize a personal judgment against him as in a pending suit. *Ramsay v. Robinson*, 86 Hun (N. Y.) 511.

Foreign Corporation. — *Compare Farber v. National Forge, etc., Co.*, 50 Ill. App. 503.

An Answer in the Nature of a Cross-bill, seeking affirmative relief as well as defending against liability, is such an appearance as confers jurisdiction. *Campbell v. Mercer*, 108 Ga. 103.

After a Judgment by Default Has Been Set Aside, pleading to the merits waives all irregularity in bringing the defendant into court. *Morotock Ins. Co. v. Pankey*, 91 Va. 259.

637. 1. *Hupfeld v. Automaton Piano Co.*, 66 Fed. Rep. 788.

Service of Answer by Another Attorney. — Under the Code provision that the defendant's appearance must be made by serving a notice of appearance or a copy of a demurrer or answer on the plaintiff's attorney, an attorney who asks for an extension of time to answer on behalf of the defendant does not thereby work a general appearance for the defendant so as to preclude service of answer by another attorney within the period of extension. *Benedict v. Arnoux*, 1 N. Y. Ann. Cas. 407; *Paine Lumber Co. v. Galbraith*, 38 N. Y. App. Div. 68.

2. *Frank v. Zeigler*, 46 W. Va. 614 [citing 2 ENCYC. OF PL. AND PR. 637]; *State v. Oliver*, 163 Mo. 679; *Long v.*

638. 9. Stipulations. — See note 2.

639. 10. Waiver of Process — Admission of Service. — See note 1. Agreement. — See note 2.

11. Taking Part in Proceedings. — See note 3.

Newhouse, 57 Ohio St. 348; Ruhland v. Alexander, 19 Pa. Co. Ct. 577. See also *supra*, XV. 5. *When Special Provision Is Converted into General One — Want of Jurisdiction and Want of Equity.*

To Dismiss Suit. — Dudley v. White, (Fla. 1902) 31 So. Rep. 830; Blair v. Henderson, 49 W. Va. 282.

Security for Costs. — See also Benoit v. Revoir, 8 N. Dak. 226, where the defendant moved to dismiss for want of jurisdiction and at the same time because there was no security for costs, etc.

To Correct Record. — Sun Mut. Ins. Co. v. Crist, (Ky. 1897) 39 S. W. Rep. 837.

New York. — Notice of a motion is not an appearance. Springfield Metallic Casket Co. v. Wielar, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 863.

638. 2. Time to Plead. — If no further steps are taken by the defendant within the extended time the plaintiff is entitled to a judgment by default. Cook v. American Exch. Bank, 129 N. Car. 149.

A Stipulation for Adjournment before a justice of the peace is a general appearance. Deering v. Venne, 7 N. Dak. 576.

Agreement to Reinstate Motion Attacking Jurisdiction. — Where a motion to dismiss solely for lack of jurisdiction over the defendant's person was inadvertently overruled pending the taking of testimony upon it, an agreement signed by the parties for reinstatement of the motion does not amount to a general appearance of the defendant so as to preclude the court from thereafter hearing the motion. Evansville Grain Co. v. Mackler, 88 Mo. App. 186.

639. 1. See Russell v. Craig, 10 Colo. App. 428.

2. Written Entry of Appearance and waiver of service of process, whether filed with the petition or afterwards (Salina Nat. Bank v. Prescott, 60 Kan. 490), or the indorsement on a defective summons of acceptance of service and entry of appearance, will constitute a submission to the jurisdiction. Russell v. Craig, 10 Colo. App. 428.

Verbal Authority to Enter Judgment. —

In *California* it has been held under a statute that a mere oral statement by the defendant to the plaintiff that he may enter judgment is not an appearance so as to excuse service of process within the statutory time from the commencement of the action. Siskiyou County Bank v. Hoyt, 132 Cal. 81.

3. Introducing Evidence. — Schafer v. Moe, 72 Ill. App. 50.

Appearing as a Witness is not an appearance to the action. Commercial State Bank v. Rowley, (Neb. 1902) 89 N. W. Rep. 765.

The Defendant's Presence at the Taking of Depositions does not commit him, he not having been personally served with process, to the jurisdiction of the court. Anderson v. Anderson, 55 Mo. App. 268.

Procuring a Copy of the Complaint and having costs taxed against the plaintiff is the exercise of a right which the code gives only to a party, and operates as an appearance to the action. Brockway v. W. & T. Smith Co., (Colo. App. 1901) 66 Pac. Rep. 1073.

Participating in Insolvency Proceedings. — Where a creditor appeared in insolvency proceedings, filed his claim, and later, voluntarily or in response to some notice, again appeared and filed opposition to the granting of the insolvent's discharge, he was held to have made a general appearance. *In re Yoell*, 131 Cal. 581.

Appearance After Judgment and Sale. — *By Exception to a Report of Sale* and appeal after a decree *pro confesso* a nonresident defendant enters an appearance. Except under special circumstances the entry of an appearance is necessarily an appearance for all purposes. Akin v. Watson, (Tenn. Ch. 1899) 52 S. W. Rep. 905, *citing* 2 ENCYC. OF PL. AND PR. 639.

A Motion to Redeem land from a lien fixed upon it by the judgment operates as an appearance. Baker v. Agricultural Land Co., 62 Kan. 79.

An Objection to Appraisement and Confirmation will constitute a general appearance. Nebraska L. & T. Co. v. Kroener, (Neb. 1901) 88 N. W. Rep. 499; Nelson v. Nebraska L. & T. Co., 62 Neb. 549.

639. XVII. EFFECT OF GENERAL APPEARANCE — 1. Jurisdiction Over Person. — See note 4. See also JURISDICTION.

642. Nonresidents. — See note 1.

Foreign Corporations. — See note 2.

643. Makes One a Party. — See note 2.

639. 4. Epps v. Buckmaster, 104 Ga. 698; American Mut. L. Ins. Co. v. Mason, (Ind. 1902) 64 N. E. Rep. 525; Graham v. Cass Circuit Judge, 108 Mich. 425, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 639. See also the following cases:

Colorado. — *Clemes v. Fox*, 25 Colo. 39.

Georgia. — *Stamps v. Hardigree*, 100 Ga. 160.

Illinois. — *Martin v. Martin*, 74 Ill. App. 215; *Crews v. Chase*, 66 Ill. App. 344.

Kansas. — *Burnham v. Lewis*, (Kan. 1902) 70 Pac. Rep. 337; *State Bank v. Gruver*, 7 Kan. App. 695.

Massachusetts. — *Rothschild v. Knight*, 176 Mass. 48; *Conefy v. Holland*, 175 Mass. 469.

Michigan. — *Dunlap v. Byers*, 110 Mich. 109.

Missouri. — *McClure v. Paducah Iron Co.*, 90 Mo. App. 567; *Jones v. St. Louis, etc., R. Co.*, 89 Mo. App. 653; *Miller-Arthur Drug Co. v. Curtis*, (Mo. App. 1902) 67 S. W. Rep. 712.

Nebraska. — *Ragan v. Morrill*, 43 Neb. 361; *Shabata v. Johnston*, 53 Neb. 12.

New Jersey. — *Albert v. Clarendon Land Invest., etc., Co.*, 53 N. J. Eq. 623.

South Carolina. — *Cone v. Cone*, 61 S. Car. 512; *Ex p. Keeler*, 45 S. Car. 537.

South Dakota. — *Pollock v. Pollock*, 9 S. Dak. 48.

New Cause of Action. — Although by pleading the party enters an appearance, he does not thereby convert the statement of a new cause of action in an amended petition into a mere amendment, and if the amendment is in reality a distinct cause of action it is open to all defenses which attached to it at the time it was pleaded. *Bernard v. Mott*, 89 Mo. App. 403.

After Loss of Jurisdiction by an Unauthorized Adjournment a general appearance will operate as a submission to the jurisdiction of the justice. *Gilmore v. Lichtenberg*, (Mich. 1902) 88 N. W. Rep. 629; *Benoit v. Revoir*, 8 N. Dak. 226.

642. 1. Epps v. Buckmaster, 104 Ga. 698 citing 2 ENCYC. OF PL. AND PR. 640-642; New Albany Mfg. Co. v. Sulzer, (Ind. App. 1902) 63 N. E. Rep. 873; Flint v. Comly, 95 Me. 251 [citing 2 ENCYC. OF PL. AND PR. 639, holding that the principle is equally applicable to causes in equity as to actions at law]; Akin v. Watson, (Tenn. Ch. 1899) 52 S. W. Rep. 905.

Rule Restricted. — In *Hay v. Tuttle*, 67 Minn. 56, it was held by a majority of the court that where a defendant was compelled to appear in order to protect his property from attachment in an action ostensibly for conversion, it would be a constructive fraud upon him, amounting to a breach of comity, to allow the plaintiff to change front and avail himself of the defendant's appearance for the purposes of an action to set aside a transfer and for the return of the property, in which the courts of that state could never have obtained jurisdiction of the defendant except by voluntary appearance.

Actual Presence of Nonresident. — If a nonresident defendant is in the state of his residence when he signs an entry of appearance, this will nevertheless operate as an appearance. He need not be present within the territorial jurisdiction of the court at the time he appears. *Epps v. Buckmaster*, 104 Ga. 698.

2. Townes v. Augusta, 46 S. Car. 15.

Conducting Defense for Actual Defendant under Contract. — Where a nonresident corporation which cannot be served with process and does not intend to become a party defends for the actual defendant, in accordance with a contract, it does not thereby voluntarily appear so as to justify the court in making it a party to the record. *Bidwell v. Toledo Consol. St. R. Co.*, 72 Fed. Rep. 10.

643. 2. Benson v. Shines, 107 Ga. 406; Farmers' Nat. Bank v. Backus, 64 Minn. 43; Nelson v. Nebraska L. & T. Co., 62 Neb. 549. Compare Frank v. Zeigler, 46 W. Va. 614.

Error in Order. — *Denver, etc., R. Co. v. Loveland*, 16 Colo. App. 146; *John-*

644. 2. Waives Process. — See note 1.

645. Notices. — See note 1.

son L. & T. Co. v. Burr, 7 Kan. App. 703.

So where a proceeding is continued against the successor in office of the first defendant, failure to bring in the successor by process is cured by his appearance. Parks v. Hays, 11 Colo. App. 415.

A New Party by Amendment Brought in by Alias Summons cannot, after appearing and pleading, object that he was not a party and bound by the proceedings. Miller v. Allentown, etc., Rapid Transit R. Co., 181 Pa. St. 622.

Parties Who Have No Interest cannot by intervening give life to a proceeding in which, by reason of fatal defects in the process, the court has acquired no jurisdiction of the subject-matter or of the real party in interest. State v. Manitowoc, 92 Wis. 546.

Objection to Remedy. — In an action to establish an interest in a mining lease there was judgment in favor of the plaintiff and the court allowed the defendant to make sales of ore. Sales were made and the purchaser thereafter, on petition by the plaintiff filed in the original action, was required to file an account. It was held that such purchaser, by filing its account and paying into court the petitioner's share of the proceeds of ore purchased by it, submitted to the jurisdiction and could not be heard to say that a separate action should have been brought against it. Boston, etc., Smelting Co. v. Reed, 23 Colo. 523.

644. 1. Frank v. Zeigler, 46 W. Va. 614, citing 2 ENCYC. OF PL. AND PR. 632-637. See also the following cases:

Alabama. — Tyson v. Chestnut, 118 Ala. 387.

Georgia. — Savanah, etc., R. Co. v. Atkinson, 94 Ga. 780.

Idaho. — Willman v. Friedman, (Idaho 1894) 38 Pac. Rep. 937.

Illinois. — McMurray v. Thede, 86 Ill. App. 555; Meilinger v. People, 83 Ill. App. 436; Udell v. Slocum, 56 Ill. App. 216.

Iowa. — Willenburg v. Hersey, 104 Iowa 699.

Kentucky. — Cavanaugh v. Willson, (Ky. 1896) 35 N. W. Rep. 918.

Missouri. — Marx v. Hart, 166 Mo. 503; Mankameyer v. Egelhoff, 161 Mo. 200.

Nebraska. — State v. Smith, 57 Neb. 41; Merchants Sav. Bank v. Noll, 50 Neb. 615.

New York. — Matter of Post, (Surrogate Ct.) 30 Misc. (N. Y.) 551, as to waiver of issue and service of citation in a proceeding begun before the enactment of Code Civ. Pro. N. Y., § 2528, authorizing such waiver only by an instrument in writing.

North Carolina. — Webb v. Hicks, 125 N. Car. 201.

North Dakota. — In Deering v. Venne, 7 N. Dak. 576, it was objected that under a statute providing that "an appearance for any purpose (except to interpose or maintain an objection to the jurisdiction assumed under the process) is a voluntary appearance," no action could be commenced unless the parties plead as well as appear and hence no appearance could be made so as to waive jurisdictional objections. The court held that the contention would be correct only when no summons was issued, as by statute in such a case the legislature permitted litigants to institute an action by voluntary appearance before the magistrate, followed by pleadings on both sides, but that the contention was not correct in an action already begun by summons.

Oklahoma. — Fitzgerald v. Foster, 11 Okla. 558.

West Virginia. — Chilhowie Lumter Co. v. Lance, 50 W. Va. 636; Totten v. Nighbert, 41 W. Va. 800.

Equivalent to Service as of Date of Appearance. — Voluntary appearance is equivalent to personal service on the day when notice of appearance is served. Eleventh Ward Bank v. Powers, 43 N. Y. App. Div. 178.

645. 1. *Illinois.* — Taylor v. Taylor, 52 Ill. App. 527.

Indian Territory. — Shapleigh Hardware Co. v. Perry, 2 Indian Ter. 238.

Iowa. — Kilmer v. Gallaher, (Iowa 1902) 88 N. W. Rep. 959.

Kentucky. — Fleming v. Sinclair, 22 Ky. L. Rep. 499, 58 S. W. Rep. 370; Miller v. Cavanaugh, 99 Ky. 377.

Minnesota. — Hurst v. Martinsburg, 80 Minn. 40.

Missouri. — King v. King, 73 Mo. App. 78.

Nebraska. — Scarborough v. Myrick, 47 Neb. 794.

646. 3. Defects in Process. — See note 3.

647. Misnomer. — See note 1. See also NAMES.

Utah. — *Wells v. Kelley*, 12 Utah 437.

United States. — *Crawford v. Foster*, 83 Fed. Rep. 975, 53 U. S. App. 669.

Contest of Election. — *State v. Spencer*, 164 Mo. 48.

Probate Court. — See also *Dredla v. Baache*, 60 Neb. 655.

Tax and Condemnation Proceedings. — *Tax Proceedings.* — *McChesney v. People*, 178 Ill. 542; *Nicholes v. People*, 165 Ill. 502; *Zeigler v. People*, 164 Ill. 531; *Cairo, etc., R. Co. v. Mathews*, 152 Ill. 153.

Citation or Notice on Amendment is waived by appearance. *Turner v. Houston*, 21 Tex. Civ. App. 214; *Hinchman v. Herring*, (Tex. Civ. App. 1896) 37 S. W. Rep. 184.

Supplemental Proceedings. — Appearance before the clerk, in supplemental proceedings, waives insufficiency of the service of notice. *Hinsdale v. Underwood*, 116 N. Car. 593.

Objection to Service of Order to Show Cause. — *Foley v. Foley*, 120 Cal. 33.

Conditional Order of Revivor should be served in the same manner as a summons, but failure in this regard is waived by voluntary general appearance. *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

Objection by Codefendant. — Objection by one defendant that process was not issued for or served upon another defendant is of no avail, the latter party having appeared and defended by counsel. *Tew v. Henderson*, 116 Ala. 545.

Presence of Attorney. — Where, after judgment is paid and satisfied, a motion is made to retax costs, the mere presence of the attorney of the opposite party in the courtroom when the ruling on the motion is entered will not constitute an appearance. *Iowa Sav., etc., Assoc. v. Chase*, (Iowa 1902) 91 N. W. Rep. 807.

646. 3. Arizona. — *Clark v. Morrison*, (Ariz. 1898) 52 Pac. Rep. 985, decided under a statute providing that an answer shall constitute an appearance and dispense with the issuance of summons.

Colorado. — *Paul v. Rooks*, 16 Colo. App. 44; *People v. Weiss-Chapman Drug Co.*, 10 Colo. App. 507; *Parks v. Hays*, 11 Colo. App. 415.

Connecticut. — *Danbury Sav. Bank*

v. Downs, 74 Conn. 87, as to irregularity in signing a scire facias by an assistant clerk.

Florida. — *Parkhurst v. Stone*, 36 Fla. 456.

Idaho. — *Morris v. Miller*, (Idaho 1895) 40 Pac. Rep. 60.

Illinois. — *Franklin L. Ins. Co. v. Hickson*, 197 Ill. 117; *Kinsella v. Cahn*, 185 Ill. 208.

Kansas. — *Newton First Nat. Bank v. Briggs*, 6 Kan. App. 684, as to defective notice

Maryland. — *Harrison v. Morton*, 87 Md. 671.

Michigan. — *Fisher v. Hardwood Mfg. Co.*, 120 Mich. 490.

Montana. — *State v. Napton*, 24 Mont. 450.

Nebraska. — *McCormick Harvesting Mach. Co. v. Scott*, (Neb. 1902) 89 N. W. Rep. 410; *Omaha L. & T. Co. Sav. Bank v. Knight*, 50 Neb. 342.

New York. — *Layton v. McConnell*, 61 N. Y. App. Div. 447; *McKey v. Lockner*, 43 N. Y. App. Div. 43; *Patrick v. Williamson*, 19 N. Y. App. Div. 451; *Springfield Metallic Casket Co. v. Wielar*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 863.

Pennsylvania. — *Beltzhoover v. Beltzhoover*, 173 Pa. St. 213; *Brinton v. Hogue*, 172 Pa. St. 366.

South Carolina. — *Baker v. Irvine*, 62 S. Car. 293.

South Dakota. — *In re Taber*, 13 S. Dak. 62.

Texas. — *Texas, etc., R. Co. v. McCarty*, (Tex. Civ. App. 1902) 69 S. W. Rep. 229. See also *Edinburgh American Land Mortg. Co. v. Briggs*, (Tex. Civ. App. 1897) 41 S. W. Rep. 1036.

Utah. — *Keyser v. Pollock*, 20 Utah 371.

Virginia. — *New River Mineral Co. v. Painter*, 100 Va. 507.

West Virginia. — *Groves v. Grant County Ct.*, 42 W. Va. 587; *Blair v. Henderson*, 49 W. Va. 282; *State v. Thacker Coal, etc., Co.*, 49 W. Va. 140.

Appearance by an Agent of a Corporation, in a justice's court, cures defective service of summons on the agent. *Behan v. Phelps County Ct.*, 27 Misc. (N. Y.) 718.

647. 1. Whitcomb v. Hooper, 81 Fed. Rep. 946, 53 U. S. App. 410, as to the effect of answering to the merits by correct name.

648. Time. — See note 1.

Served by Unauthorized Person. — See note 2.

Prescribed Form. — See note 4.

649. Variance. — See note 1.

Void and Illegal. — See note 2.

650. Publication. — See note 2.

651. 4. Other Matters — Remedy at Law. — See note 2.

Irregularities in Inferior Courts. — See note 3.

653. XVIII. VALIDATING VOID JUDGMENT BY SUBSEQUENT APPEARANCE — 1. Special Appearance to Vacate Judgment. — See note 2.

654. 2. What Is Such Special Appearance. — See note 1.

648. 1. *Smith v. Smith*, 13 Colo. App. 295; *Gallagher v. Maclean*, 7 Pa. Super. Ct. 408, 42 W. N. C. (Pa.) 172.

Before Justice of the Peace. — Where a summons of a justice of the peace requires appearance within less time than is provided by the statute, the defendant waives the defect by appearing and answering and demurring to the merits. *Rosamond v. Earle*, 46 S. Car. 9.

2. *Seedhouse v. Broward*, 34 Fla. 509; *Griswold v. Nichols*, 111 Wis. 344, as to service, when a sheriff is a party, by a coroner instead of by a constable.

Writ of Replevin. — *Abington v. Steinberg*, 86 Mo. App. 639, as to the objection that the writ of replevin was served by one as deputy constable who had not, in fact, been appointed to that position.

4. *Russell v. Craig*, 10 Colo. App. 428; *Thorhill v. Stephany*, 66 N. J. L. 171; *Johnson v. Algor*, 65 N. J. L. 363.

Defects Made Apparent by Complaint. — Where the defendant is compelled to appear to demand a copy of the complaint in an action in which the summons, though otherwise sufficient in form, does not show the nature of the action, service of a general notice of retainer will not preclude a motion to set aside a summons which does not show that the action is for a penalty, under a statute requiring such showing, as the defect appears only upon the service of the complaint. *Farmers', etc., State Bank v. Stringer*, 75 N. Y. App. Div. 127.

649. 1. **Between Summons and Copy.** — *Frazier v. Douglass*, 57 Kan. 809.

2. **Service of Habeas Corpus on Sunday** is not waived by appearance and pleading, as the proceeding is void. *People v. Dewey*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 267.

650. 2. *San Diego Sav. Bank v. Goodsell*, 137 Cal. 420; *In re Yoell*, 131 Cal. 581 (as to waiver, by a creditor who appeared in insolvency proceedings, of objection to proof of publication of notices); *In re Brooks*, 110 Mich. 8; *Spencer v. Wolfe*, 49 Neb. 8; *Chadron Bank v. Anderson*, 6 Wyo. 518.

651. 2. **Contra.** — *Syracuse Rapid Transit R. Co. v. Salt Springs Nat. Bank*, (Supm. Ct.) 28 Misc. (N. Y.) 619.

3. *Barker v. Smith*, 90 Ill. App. 595; *Hendrickson v. Trenton Nat. Bank*, 81 Mo. App. 332.

Failure to Note the Place to Which a Case Is Adjourned is cured by general appearance. *Fulton v. State*, 103 Wis. 238.

Failure to File a Petition when the Action Is Commenced is waived by appearing and answering. *Herkimer v. Keeler*, 109 Iowa 680.

653. 2. *Wren v. Johnson*, 62 S. Car. 533.

Setting Aside Judgment. — *Southern Bldg., etc., Assoc. v. Hallum*, 59 Ark. 583; *Abrams v. Fine*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 533; *Greene v. Woodland Ave., etc., R. Co.*, 62 Ohio St 67.

Arrest of Judgment. — Where a motion to set aside default judgment, made on the ground that the defendant was not served with a copy of the complaint, is denied and a motion in arrest of judgment is then granted, after which the defendant answers, he submits himself to the jurisdiction of the court. *Springston v. Wheeler*, 3 Indian Ter. 388.

654. 1. **Application to Set Aside Pro Confesso.** — In *Mark Twain Lumber Co. v. Lieberman*, 106 Tenn 153, it was held that an application to set aside a decree *pro confesso* for want of jurisdiction

655. 3. When Appearance Becomes General. — See note 1.

4. Effect of General Appearance. — See note 2.

656. See note 1.

657. XIX. JURISDICTION OF SUBJECT-MATTER. — See note 4.
See also JURISDICTION.

659. XXI. COURTS OF LIMITED JURISDICTION — 1. Introductory. — See note 3.

660. Statutes Prescribing Counties. — See notes 1, 2.

tion and for permission to plead in abatement, or if such plea could not be considered, then for permission to file an answer, was not a submission to the jurisdiction, but was an appearance for the purpose of contesting the jurisdiction.

655. 1. *Henry v. Henry*, 15 S. Dak. 80; *Gilbert-Arnold Land Co. v. O'Hara*, 93 Wis. 194. See also *Jeanette v. Roehme*, 197 Pa. St. 230 [quoting 2 ENCYC. OF PL. AND PR. 654-657]; *Scarborough v. Myrick*, 47 Neb. 794.

In *Nebraska* an application, under the statute, to vacate a deficiency judgment on the ground of irregularity in obtaining it admits jurisdiction of the parties as to all proceedings in the case, but this fact does not militate against the authority of the court to hear the application. *Fisk v. Thorp*, 60 Neb. 713.

2. *Certiorari* to review the proceedings of a board of supervisors, directed to the county clerk instead of to the board, confers no jurisdiction of the person or the subject-matter. The attempted appearance of the board after judgment will not aid the judgment, and this without questioning the effect of an appearance by a natural person, in his own right, after judgment, in an ordinary action. *State v. Manitowoc*, 92 Wis. 546.

656. 1. *Wickham v. South Shore Lumber Co.*, 89 Wis. 23; *Pfister v. Smith*, 95 Wis. 51.

Motion to Set Aside Judgment. — *Thompson v. Alford*, 135 Cal. 52; *Barra v. People*, (Colo. App. 1902) 69 Pac. Rep. 1074; *Moses v. Hoffmaster*, 64 Kan. 142; *Neosho Valley Invest. Co. v. Cornell*, 60 Kan. 282; *Johnson L. & T. Co. v. Burr*, 7 Kan. App. 703.

Motion to Vacate, Not on Jurisdictional Grounds but to be let in to answer, waives all irregularities in the service of process. *Mayer v. Mayer*, 27 Oregon 133.

657. 4. *Cort v. Newman*, 6 Colo. App. 154; *Danbury Sav. Bank v.*

Downs, 74 Conn. 87; *White v. Missouri, etc.*, R. Co., 72 Mo. App. 400; *Rochepot Bank v. Doak*, 75 Mo. App. 332; *Collier v. Wilson*, 56 Mo. App. 420; *Strauss v. Jacobs*, 10 Ohio Dec. 132, 7 Ohio N. P. 258; *Ballou v. Farnsworth*, 4 Ohio Dec. (Reprint) 88, 1 Cleve. L. Rec. 17; *Richardson's Guardianship*, 39 Oregon 246; *Chadron Bank v. Anderson*, 6 Wyo. 518.

Raised on Appeal. — Appearance on appeal cannot confer jurisdiction of the subject-matter, as the appellate court has only such jurisdiction as the lower tribunal possessed. *Stenberg v. State*, 48 Neb. 299. See also EXCEPTIONS AND OBJECTIONS.

Corporation. — *Seiser Bros. Co. v. Potter Produce Co.*, (Supm. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 348.

Justice of the Peace. — Appearance before a justice of the peace in an action for trespass will not confer jurisdiction in the absence of the affidavit required by statute. *Breeding v. Adams*, 2 Marv. (Del.) 378.

659. 3. *Fosha v. Western Union Tel. Co.*, 114 Fed. Rep. 701 [citing 2 ENCYC. OF PL. AND PR. 639]; *Hicks v. Steel*, 126 Mich. 408; *Southern Rock Island Plow Co. v. Pitluk*, (Tex. Civ. App. 1901) 63 S. W. Rep. 354; *Seley v. Whitfield*, 24 Tex. Civ. App. 56; *Seley v. Parker*, (Tex. Civ. App. 1898) 45 S. W. Rep. 1026 (as to waiver of privilege by appearing and consenting to continuance); *Edgell v. Felder*, 84 Fed. Rep. 69 52 U. S. App. 417; *Whitcomb v. Hooper*, 81 Fed. Rep. 946, 53 U. S. App. 410. See also *supra*, XV. 3. *States Where Special Appearance Is Inhibited.*

660. 1. **Defense by Answer.** — In *Nebraska* if the defendant is for any reason privileged from suit in the county where or at the time when he is sued, he may set up the want of jurisdiction by answer along with other defenses, but he must plead such want of jurisdiction as soon as he is called upon to answer, and cannot set it up in an

665. XXII. BY WHOM APPEARANCE CAN BE MADE — 1. Appearance in Person. — See note 2.

666. 2. Plaintiff Entering Defendant's Appearance. — See note 1.

668. 3. Partners — Partnership Treated as Entity. — See note 3.

669. 4. Husband and Wife. — See note 2.

5. Corporations. — See note 5.

671. 6. Infants. — See note 1.

673. 7. Agents. — See notes 1, 2.

8. Insane Persons. — See note 5.

674. 9. Executors and Administrators. — See note 1.

675. XXIII. APPEARANCE BY ATTORNEYS AT LAW — 1. Introductory — Warrant of Attorney. — See note 3.

amended answer after he has pleaded to the merits. *Baker v. Union Stock Yards Nat. Bank*, (Neb. 1902) 89 N. W. Rep. 269.

660. 2. After Refusal of Application to Change the Venue, if the defendant enters a general appearance to the action he waives the right to object to the jurisdiction over his person. *Peabody v. Oleson*, 15 Colo. App. 346.

665. 2. In Person or by Attorney — Defendant May Appear in Person or by Attorney. — *Epps v. Buckmaster*, 104 Ga. 698; *Rothschild v. Knight*, 176 Mass. 48; *Groves v. Grant County Ct.*, 42 W. Va. 587.

666. 1. State v. Union Nat. Bank, 145 Ind. 537, wherein the attempted appearance was by the filing, by the plaintiff's attorney, of an answer signed by one who professed to be the defendant's attorney and who lived in another state.

668. 3. Appearance by an Attorney for a Partnership is not an appearance for the individual members. *Ralya Market Co. v. Armour*, 102 Fed. Rep. 530.

669. 2. Taylor v. Welslager, 90 Md. 414, holding that under a statute giving to a married woman power to make a contract jointly with her husband and making her liable thereon, and providing that she "may employ counsel and defend such action or suit separately or jointly with her husband," the admission of service of summons and the appearance by an attorney employed by her husband without her authority do not bind her and are a nullity.

5. An Agent of a Foreign Corporation, under a statute requiring a foreign corporation doing business in the jurisdiction to appoint an agent upon whom

process may be served, may, it has been held, appear for his principal, and if the principal does not seasonably object it may estop itself. *Alliance Assur. Co. v. Bartlett*, 9 N. Mex. 554.

671. 1. Lang v. Belloff, 53 N. J. Eq. 298.

673. 1. Ward v. White, 66 Ill. App. 155. But see *Kanape v. Reeves*, 127 Ala. 216.

Before Board of Equalization. — See *supra*, XIV. *Appearance Before Boards, Councils, Commissioners, Etc.*

2. Municipal Corporations. — Notwithstanding the service of process upon a municipal corporation may be made, under the statute, upon the chairman of the board of trustees, etc., such officer is not therefore empowered to waive issuance and service of process and to enter an appearance for the corporation, and a judgment based on such appearance is void. *Chicago, etc., R. Co. v. Hitchcock County*, 60 Neb. 722.

5. See also Mullen v. Dunn, 134 Cal. 247.

By Guardian and Attorney. — *Stoner v. Riggs*, 128 Mich. 129, where the appearance was by a guardian, who was also an attorney and who appeared in both capacities.

674. 1. Appearance by an Administrator After Revivor waives objection by him to want of jurisdiction over the person of the decedent. *Moses v. Hoffmaster*, 64 Kan. 142.

675. 3. Appearance by One Attorney in Name of Another Attorney. — Where an attorney who was also a defendant, and authorized to appear for his codefendant, had the appearance entered in the name of another attorney, there was no delegation of discretion or authority.

678. 2. Authority to Appear Questioned by Opposite Party. — See note 2.

679. Presumption. — See note 1.

680. How to Question Attorney's Authority. — See note 2.

682. 3. Power to Bind Those for Whom They Make Unauthorized Appearance — *a.* PRESUMPTION. — See note 1.

685. *c.* DOMESTIC JUDGMENTS — Authorities Holding that Judgment Is Valid; Remedy Against Attorney. — See note 1.

689. See note 2.

690. Authorities Holding that Judgment Resting on Unauthorized Appearance Is Nullity. — See note 2.

692. Party May Estop Himself. — See note 3.

and having conducted the case himself, that he did so in the name of another attorney is a difference of form and not of substance. *Swartz v. Morgan*, 163 Pa. St. 195.

Authority Signed After Rule Obtained.

— An order to show cause why judgment against the defendants should not be set aside was based upon affidavits of an attorney who had appeared and answered for the defendants in the action, one of the defendants, and another attorney, the latter stating in his affidavit that he was one of the defendants' attorneys and made the affidavit for the purpose of setting aside the judgment and also producing at the hearing written authority to appear for the defendants, executed five days after the order to show cause was procured. It was held that an order discharging the rule on the ground that no authorized attorney had appeared for the defendants on the motion was erroneous. *Olmstead v. Firth*, 60 Minn. 126.

678. 2. *Colorado Coal, etc., Co. v. Carpita*, 6 Colo. App. 248.

679. 1. *California*. — *Matter of Meade*, (Cal. 1897) 49 Pac. Rep. 5.

Illinois. — *Ferriss v. Commercial Nat. Bank*, 55 Ill. App. 218.

Maine. — *Flint v. Comly*, 95 Me. 251.

Maryland. — *Harrison v. Morton*, 87 Md. 671.

Nebraska. — *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

New York. — *People v. Lamb*, 85 Hun (N. Y.) 171.

Texas. — See *Texas, etc., R. Co. v. McCarty*, (Tex. Civ. App. 1902) 69 S. W. Rep. 229.

But Appearance, as Amicus Curiae, of the attorney of a corporation to object to the service of a writ on a person whose agency for the corporation is

denied is not an appearance by the corporation. *International, etc., R. Co. v. Moore*, (Tex. Civ. App. 1895) 32 S. W. Rep. 379.

680. 2. *Motion Before Trial*. — An objection relating to the right of the plaintiff's attorney to appear for the plaintiff is, as a general rule, a matter for motion before trial, and not an issue to be disposed of at the trial. *People v. Lamb*, 85 Hun (N. Y.) 171.

682. 1. *Famous Mfg. Co. v. Wilcox*, 180 Ill. 246.

How Long Attorney's Authority Continues. — Where, after an authorized appearance by an attorney, the client dies, and the attorney suggests the death, waives process against the heirs, and has the cause revived, judgment obtained against the heirs will bind them. But it is otherwise if an attorney attempts to enter an appearance in the first instance for a dead man, and in such a case the subsequent steps of the attorney do not bind the heirs. *Maury v. Fitzwater*, 88 Fed. Rep. 768.

685. 1. *General Appearance under Authority to Appear Specially* is held to bind the client. *Kramer v. Gerlach*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 525.

689. 2. *Myers v. Prefontaine*, 40 N. Y. App. Div. 603. See also *Mortgage Trust Co. v. Cowles*, 3 Kan. App. 660.

690. 2. *Taylor v. Welslager*, 90 Md. 414.

692. 3. *Robb v. Vos*, 155 U. S. 13.

Though a tutrix did not know the name of the particular attorney who conducted succession proceedings in her name, and did not herself employ him nor authorize his employment, the proceedings taken through such attorney are not necessarily void and must

- 693.** How to Raise Question of Nullity. — See note 2.
694. Laches. — See note 1.
695. XXIV. WITHDRAWAL OF APPEARANCE — 1. Must Have Leave of Court. — See note 1.
 2. When Leave Granted. — See notes 2, 3.
696. 3. Effect of Withdrawal. — See note 1.
697. Special Withdrawal. — See note 2.
 Attorney's Appearance Withdrawn. — See note 3.

stand if with her consent "an" attorney had been employed and she had acted upon the proceedings taken by him in her name. *Simonin v. Czarnowski*, 47 La. Ann. 1334.

693. 2. Motion. — *Du Bois v. Clark*, 12 Colo. App. 220; *Taylor v. Welslager*, 90 Md. 414. See also *Douglas v. Hoffman*, 72 Ill. App. 110.

A Petition to Strike Off Judgment is not proper where the judgment is regular on its face and the objection that the appearance was unauthorized is not admitted, but the judgment can only be opened and the disputed fact sent to the jury. *Swartz v. Morgan*, 163 Pa. St. 201.

694. 1. *Abbett v. Blohm*, 54 N. Y. App. Div. 422.

695. 1. *Famous Mfg. Co. v. Wilcox*, 180 Ill. 246, holding that a party whose general appearance has been entered in a cause is no more entitled to withdraw from the case than one who has been regularly served with process.

2. Waiver of Objection. — Although as a rule a nonresident defendant in attachment submits himself to the jurisdiction of the court by appearing and pleading to the merits, yet where, after he so pleads, he obtains without objection an order granting leave to withdraw his answer and refile it subject to a demurrer and motion to dismiss, he is placed in the attitude of appearing solely to insist upon his motion and demurrer. *Associated Press v. United Press*, 104 Ga. 51.

3. Who May Apply for Withdrawal. — One who, through his attorney, enters

an appearance for another has no standing to make an individual application to withdraw such appearance on the ground that it was made through a mistake of the attorney. *Woods v. American Pet-Dog Club*, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 797.

696. 1. Form of Service. — In *Jenkins v. York Cliffs Imp. Co.*, 110 Fed. Rep. 807, it was held that where in a suit in equity the court, exercising its equitable power in that regard, grants an application of an attorney to strike out an appearance made by him through misapprehension, the parties are relieved from unintended waivers of fundamental questions as to jurisdiction, but that an appearance having been entered it follows that the party for whom the appearance was entered must, impliedly, have received notice of the cause, and consequently the mere matter of form of service cannot be reopened.

Effect upon Cross-complaint. — No notice to the plaintiff, in respect to a cross-complaint, is necessary, and if, after the filing of such cross-complaint, the original complaint is dismissed by the attorney of the plaintiff and his appearance is withdrawn, this will not carry with it the cross-complaint, and judgment by default rendered against the plaintiff is not void. *Judd v. Gray*, 156 Ind. 278.

697. 2. *White v. Ewing*, 69 Fed. Rep. 451, 37 U. S. App. 365.

3. *Famous Mfg. Co. v. Wilcox*, 180 Ill. 246, citing 2 ENCYC. OF PL. AND PR. 697.

ARGUMENTS OF COUNSEL.

699. I. RIGHT TO BE HEARD BY COUNSEL. — See note 1.

700. See note 1.

701. II. REGULATING TIME, NUMBER, AND ORDER OF ARGUMENTS. — 1. Limiting Time — Power to Limit Time. — See note 1.

702. Matter of Discretion. — See note 1.

In Criminal Cases. — See notes 3, 4, 6.

699. 1. *Wiggins v. State*, 101 Ga. 1898) 47 S. W. Rep. 373. See also *Peagler v. State*, 110 Ala. 11.

In Massachusetts a defendant may address the jury. *Com. v. McConnell*, 162 Mass. 499.

Texas Constitution. — In *Spangler v. State*, (Tex. Crim. 1900) 61 S. W. Rep. 314, it was held that under the Texas Bill of Rights, § 10, it is reversible error to refuse to permit the defendant's counsel to argue on the testimony.

Field of Argument. — In *Suhr v. Hoover*, 8 Ohio Cir. Dec. 738, it was held that the field of argument may be limited to the subject circumscribed by the horizon of the case.

700. 1. *Kintz v. Starkey*, 70 Ill. App. 53; *Lanan v. Hibbard*, 63 Ill. App. 54.

Not Matter of Discretion. — *Schneider v. North Chicago St. R. Co.*, 80 Ill. App. 306.

Immaterial that Docket Is Crowded. — *Wilken v. Exterkamp*, 102 Ky. 143.

Arguing Case and Testifying as Witnesses. — A rule of court providing that if an attorney gives evidence on the merits he shall not, without permission, argue the case, may be enforced where an attorney does not explain his position before testifying, and ask permission to argue the case. *State v. Gleim*, 17 Mont. 17.

Effect of Statements by Counsel. — Statements made by counsel at the trial are as binding as statements in the pleadings. *Lyman v. Kansas City, etc., R. Co.*, 101 Fed. Rep. 636.

701. 1. *Waters v. State*, 117 Ala. 108; *Crawford v. State*, 112 Ala. 23. But counsel may apportion and limit the time. *Bryant v. State*, (Tex. Crim.

1898) 47 S. W. Rep. 373. See also

Peagler v. State, 110 Ala. 11.

702. 1. *Crawford v. State*, 112 Ala. 23; *Rockwell Stock, etc., Co. v. Castroni*, 6 Colo. App. 521; *People's Casualty Claim Adjustment Co. v. Darrow*, 172 Ill. 62; *Pease v. Barkowsky*, 67 Ill. App. 274; *Cromer v. State*, 21 Ind. App. 502; *Combs v. Com.*, 97 Ky. 24; *People v. Smith*, 122 Mich. 284; *State v. Baker*, 136 Mo. 74; *Murphy v. Colton*, 4 Okla. 181; *Taylor v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 285; *Huntly v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 923.

Trial for Felony — Rule in Georgia. — See *Chance v. State*, 97 Ga. 346.

Where Sufficient Time Is Not Allowed to Counsel, he should consume the time allowed, and then if he has not finished his argument, and the court refuses to allow further time, he can take his exception. *American Surety Co. v. U. S.*, 77 Ill. App. 106.

3. *Combs v. Com.*, 97 Ky. 24.

Four Hours. — *Smith v. Com.*, 100 Ky. 133.

4. *Bryant v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 373; *Bailey v. State*, 37 Tex. Crim. 579, where there were several counsel and the limit was fixed without objection before argument.

6. *Crawford v. State*, 112 Ala. 23; *Cromer v. State*, 21 Ind. App. 502, which was a prosecution for obstructing a highway; *Dixon v. State*, 46 Neb. 298, wherein the state was limited to forty-five minutes in its opening and fifty minutes in closing, one counsel for the defense being limited to sixty minutes, and the other to forty; *Taylor v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 285, which was a prosecution for larceny.

703. See notes 2, 3.

704. See note 2.

In Civil Cases. — See notes 7, 8, 9, 10.

705. 3. Regulating Order. — See notes 3, 4. See also OPEN AND CLOSE.

703. 2. State v. Baker, 136 Mo. 74, citing 2 ENCYC OF PL. AND PR. 703.

Fifty Minutes. — An order requiring the defendant's counsel, after having occupied forty-five minutes, to close his argument in five minutes, will not be held prejudicial where it does not appear that the time allowed is insufficient in which to complete the argument. *Scott v. State*, (Tex. Crim. 1896) 36 S. W. Rep. 276.

3. Thirty-five Minutes. — In *People v. Smith*, 122 Mich. 284, it was held, under a rule providing that counsel should be allowed at least half an hour and not more than two hours, that it was not an abuse of discretion to limit counsel to thirty-five minutes.

704. 2. Huntly v. State, (Tex. Crim. 1896) 34 S. W. Rep. 923.

7. Thirty Minutes. — In *May v. Hahn*, 22 Tex. Civ. App. 365, which was an action for personal injuries, it was held that limiting counsel for the plaintiff to thirty minutes might have been hurtful in causing the jury to think that the court regarded the plaintiff's claim as being of light consequence.

8. Rockwell Stock, etc., Co. v. Castroni, 6 Colo. App. 521.

Fifteen Minutes. — In *Murphy v. Colton*, 4 Okla. 181, an action to foreclose a lien, fifteen minutes on a side was held to be sufficient time. See also *Schneider v. North Chicago St. R. Co.*, 80 Ill. App. 306; *Pease v. Barkowsky*, 67 Ill. App. 274; *Seymour v. Phillips*, 61 Neb. 282.

9. Seven Minutes. — In *People's Casualty Claim Adjustment Co. v. Darrow*, 70 Ill. App. 22, affirmed 172 Ill. 62, seven minutes on a side was held to be sufficient time.

10. Contra. — *Zweltusch v. Lowry*, 57 Ill. App. 106.

Six Minutes. — In *American Surety Co. v. U. S.*, 77 Ill. App. 106, six minutes was allowed, and it was held that there was no error.

705. 3. Scott v. Wheeler, 99 Ga. 326; *Samples v. Carnahan*, 21 Ind. App. 55; *Brower v. Nellis*, 16 Ind. App. 183; *Fitch v. Parker*, (Ky. 1898) 47 S. W. Rep. 627; *Tarvin v. Timberlake*, (Ky. 1897) 38 S. W. Rep. 491.

Where the Verdict Must Be for the Defendant if No Evidence Is Adduced, the plaintiff is entitled to open and close the testimony and arguments. *Weish v. Burr*, 56 Neb. 361.

Kentucky Statute. — Under Bullitt's Civ. Code Ky. (1895), § 526, providing that "the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side," in an action for the balance of salary due, where the plaintiff alleges that he has served the defendant to the best of his ability, which fact is denied by the defendant, the burden of proof is on the plaintiff, and he is entitled to the concluding argument. *Monarch v. Carter*, (Ky. 1899) 49 S. W. Rep. 953.

Waiving Right to Conclude. — Where the party upon whom the burden of proof rests permits the other party to introduce his evidence first, he waives his right to the concluding argument. *Frey v. Mathias*, (Ky. 1897) 38 S. W. Rep. 871.

Contributory Negligence. — The plea of contributory negligence places upon the defendant the burden of proof and entitles him to the concluding argument. *Bush v. Wathen*, 104 Ky. 548.

Negating Exception. — The plaintiff cannot, by negating an exception in a statute which he is not required to negative, take upon himself the burden of proof and obtain the right to the closing argument. *Bush v. Wathen*, 104 Ky. 548.

4. Idaho. — Under Rev. Stat. Idaho (1887), § 7855, subdiv. 5 (Pen. Code Idaho 1901, § 5448, subdiv. 5), it is within the discretion of the district attorney whether he shall make the closing argument in the case, and it is reversible error to compel him to close the argument in person. *State v. Williams*, (Idaho 1895) 42 Pac. Rep. 511.

Illinois. — *Pennsylvania Co. v. Greso*, 79 Ill. App. 127; *Sands v. Potter*, 165 Ill. 397.

Iowa. — *Milwaukee Harvesting Co. v. Crabtree*, 101 Iowa 526.

North Carolina. — In North Carolina it is a matter of discretion. *Morehead Banking Co. v. Walker*, 121 N. Car. 115.

706. III. OPENING ARGUMENTS. — See notes 2, 3.

707. Anticipation of Defense. — See note 2.

Noticing All Evidence. — See notes 3, 4.

Topics Not Pertinent. — See note 5.

Where One Party Declines to Argue. — Where, in summing up, the defendant's attorney refuses to reply to the plaintiff's argument, it is within the discretion of the court to permit the second argument by the plaintiff, but when such argument is permitted the defendant is entitled to reply to it. *New York, etc., R. Co. v. Garrity*, 63 N. J. L. 50. See also *Nemaha County v. Allbert*, 6 Kan. App. 165.

706. 2. Hall v. Needles, 1 Indian Ter. 146.

3. Com. v. McConnell, 162 Mass. 499.

Reading Authorities to Court. — In *Hughes v. General Electric Light, etc., Co.*, (Ky. 1900) 54 S. W. Rep. 723, it was held to be improper to allow counsel for the plaintiff to read from a reported case after his opening argument had been made, and after the close of the statement by the defendant's attorney.

Statement of Evidence by Prosecuting Attorney — Arkansas. — In *McFalls v. State*, 66 Ark. 16, it was held that reference in the opening argument of the prosecuting attorney to matters not put in evidence was not cause for reversal in the absence of any objection by the defendant's counsel, and where the jury could see that the evidence was clearly different from that which the prosecutor expected it to be.

Kentucky. — Under Bullitt's Crim. Code Ky. (1895), § 220, providing that "the attorney for the commonwealth may then state to the jury the nature of the charge against the defendant and the law and evidence upon which he relies in support of it," the commonwealth's attorney is not required to make such a statement. *Hendrickson v. Com.*, (Ky. 1901) 64 S. W. Rep. 954.

Michigan. — On the trial of a woman for poisoning her husband, it is not reversible error for the prosecuting attorney in his opening statement to say that the defendant had insurance policies transferred to her, though the evidence shows that she was the beneficiary of such policies. *People v. Pope*, 108 Mich. 361.

Appealing to Responsibility of Jurors. — In *Arnold v. Com.*, (Ky. 1900) 55 S. W. Rep. 894, it was held to be not im-

proper for the county attorney to appeal to the responsibility of the jurors and urge them to perform their full duty.

Comments on Plaintiff's Evidence. — In opening the case for the defense counsel have no right to review the testimony on the part of the state for the purpose of showing that it does not warrant a conviction. *Emery v. State*, 92 Wis. 146.

Reasons for Not Producing Witness. — It is proper for the plaintiff's counsel to say in his opening that he cannot produce a certain witness, and to give the reason therefor. *Phillips v. U. S. Benevolent Soc.*, 120 Mich. 142.

Variance Between Statement and Evidence. — Evidence of an agreement that the services of an attorney should be paid for at the rate of ten dollars per day is not at variance with an opening statement that there was an agreement that a reasonable fee should be paid. *Meade v. Bowles*, 123 Mich. 606.

707. 2. State v. Ryan, 113 Iowa 536. See also *R. Barney*, 71 Vt. 217.

In an action for libel it was held to be not improper for the plaintiff's counsel, in his opening argument, to state that the plaintiff was a man of good character. *Jacquelin v. Morning Journal Assoc.*, 39 N. Y. App. Div. 515.

Discretion of Court. — Whether counsel for the plaintiff shall, in his opening argument, anticipate the defense, rests largely within the discretion of the court. *Reed v. State*, 147 Ind. 41.

3. Noble v. Frack, 5 Kan. App. 786; *Hinkle v. Com.*, (Ky. 1902) 66 S. W. Rep. 1020; *Garrison v. McCullough*, 28 N. Y. App. Div. 467. See also *R. Barney*, 71 Vt. 217.

Statement Precluding Recovery. — An opening statement which shows that the defendants are not liable entitles them to a dismissal. *Noble v. Frack*, 5 Kan. App. 786 [*distinguishing* *Missouri Pac. R. Co. v. Hartman*, 5 Kan. App. 581]; *Denenfeld v. Baumann*, 40 N. Y. App. Div. 502; *Garrison v. McCullough*, 28 N. Y. App. Div. 467; *Scott v. New York*, 27 N. Y. App. Div. 240.

4. De Wane v. Hansow, 56 Ill. App. 575; *Sheehan v. Rosen*, 12 Pa. Super. Ct. 298.

5. Falkenau v. Abrahamson, 66 Ill.

708. Good Faith of Officers of Proof. — See note 2.

IV. CONCLUDING ARGUMENTS. — See note 4.

709. See note 1.

V. READING OR ARGUING LAW TO JURY — 1. In Civil Cases. — See notes 2, 3.

710. Reading Facts or Amount of Verdicts. — See notes 1, 2, 3.

App. 352; *State v. Westlake*, 159 Mo. 669.

Improper Comments in Opening. — *Stratton v. Nye*, 45 Neb. 619, wherein the judgment was reversed.

In *Dehler v. State*, 22 Ind. App. 383, a bastardy case, it was held to be improper for the prosecuting attorney to say in his opening statement: "We will show you that the defendant seduced the relatrix." See also *Gulf, etc., R. Co. v. Duvall*, 12 Tex. Civ. App. 348; *Hecht v. Metzler*, 14 Utah 408.

708. 2. *People v. Gleason*, 127 Cal. 323; *People v. Molina*, 126 Cal. 505; *People v. Lewis*, 124 Cal. 551; *People v. Searcey*, 121 Cal. 1; *State v. Todd*, 110 Iowa 631; *State v. Allen*, 100 Iowa 7; *State v. Tippet*, 94 Iowa 646; *People v. Fowler*, 104 Mich. 449. See also *Hall v. Needles*, 1 Indian Ter. 146.

Cured by Instructions. — *People v. Pope*, 108 Mich. 361; *McFadden v. Morning Journal Assoc.*, 28 N. Y. App. Div. 508. See also *Bell v. Day*, 9 Kan. App. 111; *Hoffman v. Adams*, 106 Mich. 111; *State v. Stubblefield*, 157 Mo. 360.

Evidence in Disproof of Argument. — Letters and *ex parte* affidavits are not admissible to rebut statements made by counsel in his opening argument where such evidence is not relevant to the issues made by the pleadings. *Nunn v. Mayes*, 9 Tex. Civ. App. 366.

4. Defendant's Failure to Prove Statements. — It is not improper for the state's attorney to call attention to the fact that the defendant has not proved that which his counsel in his opening statement declared he would prove. *State v. Boyce*, 24 Wash. 514.

709. 1. *Denison v. Lewis*, 5 App. Cas. (D. C.) 328; *Chezum v. Parker*, 19 Wash. 645.

2. Illinois. — *Chicago, etc., R. Co. v. Smedley*, 65 Ill. App. 644.

Missouri. — In *Heller v. Pulitzer Pub. Co.*, 153 Mo. 205, it was held that counsel cannot read law books to the jury in any kind of case. See also *St. Louis Clothing Co. v. J. D. Hail Dry Goods Co.*, 156 Mo. 393.

Counsel may make reference to facts given in reported cases for the purpose of comparison, but he has no right to state any legal conclusions drawn therefrom. *State v. Jones*, 153 Mo. 457.

Discrediting Decision of Supreme Court. — In *Martin v. Courtney*, 81 Minn. 112, the judgment was reversed because counsel was permitted to say that "the decision of the Supreme Court in this case was as rotten as hell itself."

3. *Stratton v. Dole*, 45 Neb. 472; *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579; *Boltz v. Sullivan*, 101 Wis. 608. See also *Dow v. Electric Co.*, 68 N. H. 59.

Stating What Law Is Claimed to Be. — Counsel for the defendant cannot state his views of the law in the case in his opening argument. *Giffen v. Lewiston*, (Idaho 1898) 55 Pac. Rep. 545.

Cautioning Jury Against Finding "Quotient" Verdict. — It is not error to permit the plaintiff's attorney to instruct the jury as to the impropriety of a "quotient" or "gambling" verdict. *Missouri, etc., R. Co. v. Steinberger*, 6 Kan. App. 585.

Reading Statutes. — In *Hollenbeck v. Missouri Pac. R. Co.*, 141 Mo. 97, which was an action for personal injuries, it was held to be not prejudicial for counsel to read two sections of a statute, the first of which he withdrew, and the other of which pertained to the common law.

710. 1. *Watson v. Southern Oregon Co.*, 39 Oregon 481; *Houston, etc., R. Co. v. Gee*, (Tex. Civ. App. 1901) 66 S. W. Rep. 78; *Davis v. John V. Farwell Co.*, (Tex. Civ. App. 1899) 49 S. W. Rep. 658.

2. *Bagully v. Morning Journal Assoc.*, 38 N. Y. App. Div. 522; *Davis v. John V. Farwell Co.*, (Tex. Civ. App. 1899) 49 S. W. Rep. 658; *Houston, etc., R. Co. v. Gee*, (Tex. Civ. App. 1901) 66 S. W. Rep. 78.

3. *State v. Dickey*, 48 W. Va. 325 [citing 2 ENCYC. OF PL. AND PR. 709]; *Houston, etc., R. Co. v. Gee*, (Tex. Civ. App. 1901) 66 S. W. Rep. 78.

710. Reading or Arguing Bad Law. — See note 5.

711. See note 1.

Arguing to Court in Presence of Jury. — See note 2.

2. In Criminal Cases. — See note 3.

710. 5. *Hughes v. General Electric Light, etc., Co.*, (Ky. 1900) 54 S. W. Rep. 723.

Wrong Measure of Damages. — See *Alabama G. S. R. Co. v. Carroll*, (C. C. A.) 84 Fed. Rep. 772. But see *Dill v. State*, 106 Ga. 683, where instructions of the court cured the error.

711. 1. *Dill v. State*, 106 Ga. 683.

Commenting on Instructions — Indiana. — The statute (Burns's Annot. Stat. Ind. 1894, § 543; Horner's Stat. Ind. 1901, § 534), in civil cases, permits the reading to the jury of instructions which have been prepared by the court before argument, and of the discussion of the evidence in relation to such instructions. No comments, however, should be made upon the law as given. *Humbarger v. Carey*, 145 Ind. 324, per Howard, J.

Texas. — Where the record failed to show that there was an aggravated assault, it was held to be not error to permit the district attorney to say: "Our Court of Criminal Appeals has reversed cases on mere technicalities, * * * and in order to prevent the possibility of such a thing in this case I am willing for the court to give you a charge on aggravated assault prepared by counsel for the defendant." *Jones v. State*, (Tex. Crim. 1898) 46 S. W. Rep. 933.

Virginia. — Counsel are not permitted to argue in line with an instruction that the court has refused to give. *Alleghany Iron Co. v. Teaford*, 96 Va. 372.

2. *Denison v. Lewis*, 5 App. Cas. (D. C.) 328; *Watson v. Southern Oregon Co.*, 39 Oregon 481. Compare *Patterson v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 557.

Abuse of Discretion. — In *Houston, etc., R. Co. v. Gee*, (Tex. Civ. App. 1901) 66 S. W. Rep. 78, where the evident intention had been to get the facts and circumstances of certain cases before the jury by reading the opinions to the court, it was held to be an abuse of discretion to permit such reading.

3. In *California* and *South Dakota* the court may refuse such permission.

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People v. Godwin, 123 Cal. 374; *State v. Church*, 6 S. Dak. 89.

In *Texas* it is a matter of discretion. *Ogden v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1018; *Willis v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 495; *Williams v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 859; *Cannon v. State*, 41 Tex. Crim. 467; *Morrison v. State*, 40 Tex. Crim. 473; *Forbes v. State*, 35 Tex. Crim. 24.

Utah. — In a prosecution for rape the defendant's counsel cannot read law to the jury. *State v. Neel*, 23 Utah 541.

When the Correctness of a Proposition Is Conceded it is not erroneous to refuse to allow an argument upon it. *Sparks v. State*, 111 Ga. 830.

After Close of Argument. — It is not error to refuse to permit the defendant's counsel to read additional law after the closing of the argument of the state. *Vincent v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 819.

Cases on Circumstantial Evidence. — In *Jackson v. Com.*, 100 Ky. 239, it was held to be not improper to refer to the Webster-Parkman case and to the Durrant case, as merely historical allusions to celebrated cases of circumstantial evidence. See also *Oden v. State*, (Miss. 1900) 27 So. Rep. 992.

Reading from American and English Encyclopædia of Law. — Where, before the defendant's counsel had made his argument, the prosecuting attorney handed to him a list of authorities from which he expected to read, containing a reference to 9 Am. and Eng. Encyc. of Law (1st ed.), it was held that the court properly permitted him to read from such volume. *Morrison v. State*, 40 Tex. Crim. 473.

Curtailling Argument of Law. — In *Florida*, except in cases of murder in the first degree, trial juries have no concern whatever with the penalties to be imposed for crime, and it is therefore proper to refuse to permit counsel to discuss such penalties in their arguments to the jury. *Eggart v. State*, 40 Fla. 527.

A Misstatement of the Law in a criminal case can be corrected by instruction, but not by a motion to strike out. *State v. O'Keefe*, 23 Nev. 127.

712. Where Juries Are Judges of Law. — See note 1.

713. VI. LEGITIMATE DEBATE — Comments on Facts Proved or Disputed. — See notes 1, 2.

714. See note 1.

712. 1. Statements Contradicting Instructions. — Where the comments of the state's attorney upon instructions convey a meaning manifestly different from the meaning evidently intended to be conveyed, the court should, on objection, check such argument. *Elder v. State*, 69 Ark. 648. See also *People v. Schmitt*, 106 Cal. 48.

Arguing upon Defendant's Right of Appeal. — See also *State v. Biggerstaff*, 17 Mont. 510.

713. 1. Kansas City, etc., R. Co. v. Sokal, 61 Ark. 137; *Lewis v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 240.

Personal Allusion to Juror. — *State v. Shelton*, 6 Kan. App. 662. See also *Aud v. State*, 36 Tex. Crim. 76.

Addressing Juror by Name. — See *Texas, etc., R. Co. v. Rea*, (Tex. Civ. App. 1901) 65 S. W. Rep. 1115.

Stenographer's Notes. — See *Palmer v. State*, 114 Ga. 517, *McConkie v. Babcock*, 101 Iowa 126.

Reading Special Interrogatories. — *Schlesinger v. Rogers*, 80 Ill. App. 420; *Stacy v. Cook*, 62 Kan. 50; *Demelman v. Burton*, 176 Mass. 363. But see *Chestnut v. Southern Indiana R. Co.*, 157 Ind. 509.

Matters Not In Issue. — In *Hunstock v. Roberts*, (Tex. Civ. App. 1901) 65 S. W. Rep. 675, the judgment was reversed because the defendant's counsel was permitted to comment on matters in evidence that had nothing to do with the issue. See also *Chicago, etc., R. Co. v. Anderson*, 166 Ill. 572; *Chicago, etc., R. Co. v. Langston*, 92 Tex. 709; *Clark v. Bohms*, (Tex. Civ. App. 1896) 37 S. W. Rep. 347; *Hacker v. Heiney*, 111 Wis. 313.

Making Argument in Foreign Language. — It was not error to refuse to permit counsel for the defendant to make his argument to the jury in a foreign language, on the ground that that was the mother tongue of the jurors, they and all the witnesses having been examined in the English language. *State v. Cancienne*, 50 La. Ann. 1324.

Counsel Stating His Understanding of Case. — Counsel may make a statement of his understanding as an attorney of what the case is. *Blaisdell v. Davis*, 72 Vt. 295. See also *Dunlop v. U. S.*, 165 U. S. 486.

Commenting on Lease. — Where the defendants offer a lease in evidence, it is error to permit the plaintiff's counsel to say, over objection, that the lease is a self-serving document made for the purpose of concealing the agency of the pretended tenant. *Oriental Invest. Co. v. Barclay*, (Tex. Civ. App. 1901) 64 S. W. Rep. 80.

Disclaimer. — It is not error to permit counsel for intervenors to comment on the fact that one of the plaintiffs who has testified against them filed a disclaimer, and that the plaintiff's and the defendant's counsel have acted in harmony in the trial and compromised their differences. *Cook v. Carroll Land, etc., Co.*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1006.

Change of Venue. — In a criminal case change of venue is not a legitimate subject of discussion. *Wall v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 1062.

Motion for Severance. — Where the defendant took the stand in his own behalf and testified that one J. had made a motion for a severance so that the defendant could be first tried, that J. was the party guilty, and that he (the defendant) knew nothing of the transaction but received some of the stolen property from J., it was not error for the prosecuting attorney to refer to the motion for a severance and say that J. would have been tried first had he not said under oath that he believed that this defendant could clear him. *Hargrove v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1124.

2. Mitchell v. State, 114 Ala. 4; *Magnuson v. State*, 13 Ind. App. 303; *Cincinnati Times-Star Co. v. France*, (Ky. 1901) 61 S. W. Rep. 18; *Montmorency County v. Putnam*, 122 Mich. 581; *Spangler v. State*, (Tex. Crim. 1900) 61 S. W. Rep. 314; *Texas Tel., etc., Co. v. Seiders*, 9 Tex. Civ. App. 431.

714. 1. Appealing to Responsibility of Jurors. — *Johnson v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 343; *State v. Mooney*, 49 W. Va. 712; *Ross v. State*, 8 Wyo. 351.

"Side-bar Remarks" are improper. *Mutual L. Ins. Co. v. Mellott*, (Tex. Civ. App. 1900) 57 S. W. Rep. 887.

"Tears have always been considered

714. Comment on Absence of Witnesses. — See note 2.

715. See note 1.

Conduct, Motives, and Credibility. — See note 2.

legitimate arguments." *Ferguson v. Moore*, 98 Tenn. 342, *per Wilkes, J.*

Dramatic Action. — Counsel may lie upon the floor and hollo at the top of his voice. *Owens v. Com.*, (Ky. 1900) 58 S. W. Rep. 422. See also *People v. Vann*, 129 Cal. 118; *Strutton v. Com.*, (Ky. 1901) 62 S. W. Rep. 875; *Herron v. Com.*, (Ky. 1901) 64 S. W. Rep. 432; *Chapman v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1098.

By Witnesses During Argument. — Where, in a trial for murder, four little children of the deceased had been brought from the audience and placed in front of and about five feet from the jury and allowed to remain there, sobbing and crying, during the entire address of the district attorney, it was held that such sensational display should never be permitted. *Furlow v. State*, 41 Tex. Crim. 12.

Inviting Defendant to Put on Mask. — Where the evidence showed that the deceased was shot and killed by a man whose face was covered by a red handkerchief, it was improper, but under the instructions of the court not prejudicial, for counsel, in referring to the mask, to say: "And I invite him to put it on." *State v. Mooney*, 49 W. Va. 712.

Illustrations. — It is not improper to allow counsel to use a desk, in addition to other furniture in the court room, to illustrate how his client received the injury. *Louisville, etc., R. Co. v. Ray*, 101 Tenn. 1. See also *People v. Durrant*, 116 Cal. 179; *Little v. State*, 39 Tex. Crim. 654.

A Personal Allusion to Opposing Counsel as a good man and as being influential with the jurors, and a minute description of his attitude and gestures before the jury, were held to be not prejudicial. *State v. Taylor*, 134 Mo. 109.

714. 2. *Roberson v. State*, 123 Ala. 55; *Crawford v. State*, 112 Ala. 23; *Western, etc., R. Co. v. Morrison*, 102 Ga. 319. See also *Hersey v. Hutchins*, 70 N. H. 130; *In re McCabe*, 73 Vt. 175. But see *Hundley v. Chadick*, 109 Ala. 579.

Laying Foundation for Comment. — In an action for injuries received by falling slate in a coal mine on account of such slate having been improperly

timbered, it was proper for counsel for the plaintiff to comment on the fact that the timberman was not placed on the stand to testify as to notice to him of the condition of the roof, which fact had been proved by the plaintiff by two witnesses. *Consolidated Coal Co. v. Scheiber*, 65 Ill. App. 304, *affirmed* 167 Ill. 539. See also *McKim v. Foley*, 170 Mass. 426; *Wood v. Agostines*, 72 Vt. 51.

Effect of Rebuke and Instructions to Disregard. — In *Cullar v. Missouri, etc., R. Co.*, 84 Mo. App. 340, comment on failure to produce a witness was held to be cured by rebuke and instructions to disregard.

Deposition Not Put in Evidence. — It is error to permit counsel to read from a deposition not put in evidence. *Dew v. Reid*, 52 Ohio St. 519.

Failure to Call Physician in Personal Injury Case. — *Warsaw v. Fisher*, 24 Ind. App. 49, *quoting* 2 ENCYC. OF PL. AND PR. 714.

Where Witnesses Were Unnecessary. — See *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 126 Ala. 95.

Letters Not Put in Evidence. — Counsel for the defendant is not justified in commenting on the fact that the plaintiffs have not offered in evidence three inadmissible letters which he had passed to the other side, expressing a desire to have them in the case. *Blaisdell v. Davis*, 72 Vt. 295.

715. 1. *Story v. Concord, etc., R. Co.*, 70 N. H. 364.

2. *Florence Cotton, etc., Co. v. Field*, 104 Ala. 471. See also *People v. Smith*, 134 Cal. 453; *People v. Amaya*, 134 Cal. 531; *Illinois Cent. R. Co. v. Beebe*, 174 Ill. 13; *Wimber v. Iowa Cent. R. Co.*, 114 Iowa 551; *Smith v. Jennings*, 121 Mich. 393; *Thomson v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 837; *Amsden v. Atwood*, 69 Vt. 527; *Ross v. State*, 8 Wyo. 351.

Form of Interrogatories. — *Pape v. Hartwig*, 23 Ind. App. 333.

An Allusion to Circumstances to Contradict Witnesses is proper where the evidence tends to warrant it. *Anderson v. State*, 147 Ind. 445.

Interested Witnesses. — Counsel may argue that a servant charged with negligence, making his master liable,

716. Arguing Conclusions from Testimony. — See note 1.

would probably be discharged if he had admitted the negligent act. *International, etc., R. Co. v. Rhoades*, 21 Tex. Civ. App. 459. See also *Wimber v. Iowa Cent. R. Co.*, 114 Iowa 551.

Disparaging Evidence as It Comes In. — Unless sworn as a witness, counsel has no right to contradict a witness as to his previous testimony. *Johnson v. State*, 41 Tex. Crim. 9. But see *Perkins v. Roberge*, 69 N. H. 171.

Failure to Produce Garment. — Where the prosecutrix in a rape case testified that soon after the alleged rape she noticed blood on her undergarment, and the counsel for the defense challenged the prosecution to produce the garment, the court properly interrupted such argument. *Roberts v. State*, 122 Ala. 47.

Unsworn Statement of Defendant. — Where the defendant made an unsworn statement but did not testify, it was held to be legitimate argument for the prosecuting attorney to comment upon the weight to be given to his statement. *Com. v. McConnell*, 162 Mass. 499.

Personal Appearance of Witness. — On a trial of one for assault on his wife, it is not error to refuse to permit the defendant's counsel to say that "from the appearance of the prosecutrix, her disposition, the looks of her eyes, her conduct, her demeanor, and manner of testifying, it is shown that she is not a woman of private or domestic habits, but a woman of worldly experience, of heartless feelings, devoid of modesty, and a reckless and adventurous character." *Meyer v. State*, (Tex. Crim. 1897) 41 S. W. Rep. 632.

When Fraud Is Involved a wide latitude is allowed in argument. *Wheeler v. Detroit Electric R. Co.*, 128 Mich. 656; *Berry v. State*, (Miss. 1897) 22 So. Rep. 826.

Unfriendly Witness. — Where counsel calls a witness he may not impeach the witness's general reputation for truth, but he may comment on the untruthfulness of such witness's testimony. *State v. Mims*, 36 Oregon 315.

Charging Perjury and Bribery. — See *Ex p. Snodgrass*, (Tex. Crim. 1901) 65 S. W. Rep. 1061.

Charging Witness with Receiving Stolen Goods. — *Tatum v. State*, 61 Neb. 229, wherein it was held that the remarks were proper.

716. 1. Alabama. — *Roberts v. State*, 122 Ala. 47; *Cunningham v. State*, 17 Ala. 63.

California. — *People v. Smith*, 134 Cal. 453.

Georgia. — *Milam v. State*, 108 Ga. 29; *Smalls v. State*, 105 Ga. 669.

Iowa. — *State v. Newhouse*, (Iowa 1901) 88 N. W. Rep. 353; *Kimball v. Deere*, 108 Iowa 676.

Kentucky. — See *Massie v. Com.*, (Ky. 1896) 36 S. W. Rep. 550, where it was held that the comments were proper.

Massachusetts. — *Koplan v. Boston Gas Light Co.*, 177 Mass. 15. See also *Com. v. Barrows*, 176 Mass. 17.

Michigan. — *People v. Barnes*, 113 Mich. 213; *Warren v. Halley*, 107 Mich. 120. See also *Leach v. Detroit Electric R. Co.*, (Mich. 1902) 88 N. W. Rep. 635.

Missouri. — *Gidionsen v. Union Depot R. Co.*, 129 Mo. 392.

Nebraska. — See *Dinsmore v. State*, 61 Neb. 418, holding that the defendant's conduct may be criticised.

New Hampshire. — *Story v. Concord, etc., R. Co.*, 70 N. H. 364; *Liscomb v. Manchester, etc., R. Co.*, 70 N. H. 312; *Shute v. Exeter Mfg. Co.*, 69 N. H. 210.

Ohio. — *Hayes v. Smith*, 8 Ohio Cir. Dec. 92.

Oregon. — *State v. Mims*, 36 Oregon 315; *State v. Birchard*, 35 Oregon 484.

Texas. — *Missouri, etc., R. Co. v. Nordell*, 20 Tex. Civ. App. 362; *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93; *Texas Tel., etc., Co. v. Seiders*, 9 Tex. Civ. App. 431; *Southern Cotton Oil Co. v. Wallace*, 23 Tex. Civ. App. 12; *Logan v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 694.

Vermont. — *In re McCabe*, 70 Vt. 155; *Morrill v. Palmer*, 68 Vt. 1.

Wisconsin. — *Fertig v. State*, 100 Wis. 301.

Wyoming. — *Ross v. State*, 8 Wyo. 351.

Claim as to What Testimony Was. — In *Ray v. Com.*, (Ky. 1897) 43 S. W. Rep. 221, it was held that although counsel in argument is mistaken in his claim as to certain testimony, the verdict will not be set aside if it is apparent that no other could have been rendered.

Irrelevant Facts. — Where suit for damages is brought against one for selling intoxicating liquors to another,

717. Illogical Argument. — See note 3.

VII. USE OF PLEADINGS. — See notes 5, 6.

718. Amended Pleading. — See note 1.

Pleading Withdrawn. — See note 2.

719. VIII. COMMENTS ON FAILURE OF ACCUSED TO TESTIFY IN CRIMINAL CASE — 1. General Scope and Effect of Statutory Provisions. — See note 1.

mere reference to a fact tending to show that the saloon of the defendant was run illegally is not ground for reversal. *Shull v. Arle*, 113 Iowa 170.

Depositions. — Where depositions are admitted in evidence, it is error for counsel to state that they are false and not properly certified. *State v. Wright*, 134 Mo. 404.

Comments on Notice to Employee. — It is improper for the plaintiff's counsel to refer to a notice of the pendency of the action sent by the defendants to an employee of a railroad company and to state that the company sent the notice because it knew that a judgment stared it in the face. *Shaw v. Chicago, etc., R. Co.*, 123 Mich. 629.

Probability of Rape. — Where there is no expert testimony on the subject, it is proper to restrain counsel from arguing that where there is conception there is no rape. *State v. Lingle*, 128 Mo. 528.

Conclusions Drawn from Will. — In a suit to set aside a will on the ground of undue influence and unsoundness of mind, it is not error to refuse to permit counsel for the plaintiff to argue to the jury that the will in question contains inherent evidence of the mental incapacity of the testatrix. *Bradley v. Palmer*, 103 Ill. 15.

717. 3. *Mitchell v. State*, (Fla. 1901) 31 So. Rep. 242; *Milam v. State*, 108 Ga. 29; *Gidionsen v. Union Depot R. Co.*, 129 Mo. 392; *Hayes v. Smith*, 8 Ohio Cir. Dec. 92; *Texas Tel., etc., Co. v. Seiders*, 9 Tex. Civ. App. 431; *In re McCabe*, 70 Vt. 155.

5. *McBride v. Macon Tel. Pub. Co.*, 102 Ga. 422. See also *Driver v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 528.

6. *Wald v. Hobson*, (Colo. App. 1901) 67 Pac. Rep. 176.

Comment on Written Instruments. — The admission of written instruments in evidence carries with it the right to comment on them. *Home-Riverside Coal Min. Co. v. Fores*, 64 Kan. 39.

It is not improper for counsel for the defendant to comment on the fact that counsel for the plaintiff objected to the

omission of a writing signed by one of the plaintiff's witnesses. *Baxter v. Detroit R. Co.*, 116 Mich. 188.

Explaining Pleadings to Jury. — It is improper for attorneys to address the jury concerning their reasons for filing or not filing certain pleadings, such reasons not appearing of record. *Illinois Cent. R. Co. v. Weiland*, 179 Ill. 609.

In *Coyne v. Avery*, 189 Ill. 379, it was held that it is not error to permit the plaintiff's attorney to read special pleas to the jury.

Reading Affidavit. — It is not error to refuse to allow the defendant's attorney to read from an affidavit filed with the pleadings as to the amount due, when there is no contest as to the amount. *Howard v. Tedford*, 70 Ill. App. 660.

718. 1. *Leach v. Hill*, 97 Iowa 81. In *Demelman v. Burton*, 176 Mass. 363, it was held that counsel had no right to comment upon allegations in the amended answer, nor upon the time of its filing, as having any bearing whatever upon the argument he was making to the effect that the opposing counsel's client had deceived him as to the facts in the case.

Ad Damnum. — It is not improper for counsel to state the *ad damnum* to the jury, *West Chicago St. R. Co. v. Dedloff*, 92 Ill. App. 547; but it is improper for counsel to comment upon a change in the *ad damnum* made after the first trial, *Illinois Cent. R. Co. v. Souders*, 79 Ill. App. 41, reversed 178 Ill. 588, the case turning upon improper comments by the court.

2. Reading Pleading to Which Exceptions Have Been Sustained. — See *North American R. Constr. Co. v. Patry*, 10 Kan. App. 55.

719 1. *Indiana.* — *Blume v. State*, 154 Ind. 343. See *infra*, VIII. 4. *Effect of Improper Comments*, note 1.

Iowa. — *State v. Trauger*, (Iowa 1898) 77 N. W. Rep. 336, wherein it was held that the language used was in violation of the statute.

Kansas. — In *State v. Deves*, 9 Kan.

721. Comments in Advance. — See note 1.

722. Where Defendant Elects to Testify. — See notes 1, 2.

Defendant's Failure to Produce Witnesses. — See note 3.

App. 886, 61 Pac. Rep. 511, it was held that under the statute any reference by the prosecuting attorney to the fact that the defendant has neglected, failed, or refused to testify constitutes misconduct, and that a challenge to the defendant in such case to impeach the prosecuting witness is ground for a new trial. *Compare State v. Shelton*, 6 Kan. App. 662.

Kentucky. — Where the defendant was asked why he did not testify on the examining trial, it was held not to be a violation of Crim. Code Ky., § 223, providing that a defendant's failure to testify "shall not be commented upon or be allowed to create any presumption against him," the court saying that this provision is restricted to the trial and tribunal in which the failure to testify occurs. *Taylor v. Com.*, (Ky. 1896) 34 S. W. Rep. 227.

Mississippi. — In *Bunckley v. State*, 77 Miss. 540, it was held to be prejudicial and violative of the statute for the district attorney to call the attention of the jury to the fact that on the preliminary hearing the defendant did not take the witness stand.

Missouri. — Where the defendant and two others were indicted for murder, it was held to be not in violation of the statute for the state to refer to the fact that the codefendants did not testify in the defendant's behalf. *State v. Weaver*, 165 Mo. 1.

New Jersey. — The fact that the defendant does not testify may be commented upon. *Parker v. State*, 61 N. J. L. 308.

Oklahoma. — *Wilson v. Territory*, 9 Okla. 331, wherein it was held that the comments were prejudicial.

South Dakota. — *State v. Williams*, 11 S. Dak. 64, wherein it was held that such comments are prejudicial.

Texas. — *McCandless v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 745, wherein it was held that the comments were prejudicial.

721. 1. *Strutton v. Com.*, (Ky. 1901) 62 S. W. Rep. 875.

722. 1. *Maloy v. State*, 39 Fla. 432.
2. *Alexander v. State*, 40 Tex. Crim. 395. But see *People v. Sanders*, 114 Cal. 216.

Where one is charged with having circulated an indecent picture, and

takes the witness stand but does not testify because the questions asked him are not admitted, it is not prejudicial for the state's counsel to refer to the defendant's offer to testify and to the fact that he did not deny knowledge of the indecency of the picture. *State v. Ulsemer*, 24 Wash. 657.

Failure to Testify on Former Trial. — In *Bradburn v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 519, it was held that where the defendant takes the stand it is error to permit the state to examine him as to his failure to testify on the former trial, and to comment on such fact.

3. *Lee v. State*, 156 Ind. 548 [citing 2 ENCYC. OF PL. AND PR. 714]; *Ethridge v. State*, 124 Ala. 106; *People v. Benc*, 130 Cal. 159; *Consolidated Coal Co. v. Scheiber*, 167 Ill. 539; *State v. Bloor*, 20 Mont. 574; *State v. Costner*, 127 N. Car. 566; *Johnson v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 901; *Armstrong v. State*, 34 Tex. Crim. 248; *State v. Hawkins*, 27 Wash. 375; *U. S. v. Candler*, 65 Fed. Rep. 308. *Compare People v. Smith*, 121 Cal. 355; *State v. O'Keefe*, 23 Nev. 127; *State v. Harper*, 33 Oregon 524.

When the Testimony Is Equally Accessible to Both Parties the rule is otherwise. *Crawford v. State*, 12 Ala. 23; *State v. Fitzgerald*, 68 Vt. 125. See also *Broch v. State*, 123 Ala. 24.

Instruction to Disregard Argument. — Where comments as to the failure of the defendant to produce certain evidence are legitimate, it is proper to deny an instruction to disregard them. *Drye v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 65.

Failure to Call Codefendant. — In *Texas* it is error to permit the district attorney to comment on the defendant's failure to have the testimony of a codefendant, since by statute the codefendant cannot be a witness. *Landers v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 557.

Comment upon Defendant's Suppression of Paper. — In a trial for the theft of one head of cattle, where the defendant had testified to the sale to him of the animal by a written instrument and declined to introduce the bill of sale, it was not error for the district attorney to comment on the fact that the

723. 2. What Constitutes Improper Comment. — See notes 1, 2, 3, 4.

3. What Allusions Are Too Remote. — See note 6.

724. 4. Effect of Improper Comments. — See notes 1, 2.

725. IX. COMMENT ON DEFENDANT'S OMISSION TO CALL HIS WIFE. — See notes 3, 4.

defendant had suppressed such bill of sale, counsel for the defendant having referred to the same matter. *Ray v. State*, 35 Tex. Crim. 354.

723. 1. *State v. Shelton*, 6 Kan. App. 662. See also *Burks v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 824.

2. *Bruce v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 867; *Davis v. State*, 39 Tex. Crim. 681. See also *State v. Deves*, 9 Kan. App. 886, 61 Pac. Rep. 511; *State v. Boyd*, 5 Kan. App. 802. Compare *Nite v. State*, 41 Tex. Crim. 340, where it was held that it was not error for the prosecuting attorney to allude to the fact that the defendant did not explain where he was at the time the alleged crime was committed.

3. *McCandless v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 745.

4. *Wilson v. Territory*, 9 Okla. 331.

In *Texas* a bare allusion to the failure of the defendant to testify will not authorize a reversal. *McCandless v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 745; *Henry v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 592; *Bruce v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 867. So in *Wright v. U. S.*, (C. C. A.) 108 Fed. Rep. 805.

6. *Cope v. Com.*, (Ky. 1898) 47 S. W. Rep. 436; *Barnes v. Com.*, 101 Ky. 556; *State v. Schmidt*, 137 Mo. 266.

Implied Reference. — A statement and question by the prosecuting attorney that the "defendant told me he sold the whiskey, * * * and if it is not true why did they not put some one on the stand to disprove it?" are not a violation of the rule. *Bruce v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 867. See also *Green v. State*, (Tex. Crim. 1895) 31 S. W. Rep. 386.

A Statement that the Defendant Has Introduced No Evidence is not a reference to his failure to testify. *Henry v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 592. See also *State v. Griswold*, 73 Conn. 95; *Price v. U. S.*, 14 App. Cas. (D. C.) 391; *State v. Davis*, 110 Iowa 746; *Cope v. Com.*, (Ky. 1898) 47 S. W. Rep. 436; *Tudor v. Com.*, (Ky. 1897) 43 S. W. Rep. 187; *Johnson v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 968;

McGlothlin v. State, (Tex. Crim. 1899) 53 S. W. Rep. 869; *Arnold v. State*, 38 Tex. Crim. 5; *Wilkerson v. State*, (Tex. Crim. 1899) 57 S. W. Rep. 956; *Jackson v. U. S.*, (C. C. A.) 102 Fed. Rep. 473. See also *Com. v. McConnell*, 162 Mass. 499.

724. 1. *Indiana*. — The rule is relaxed in *Indiana*. *Blume v. State*, 154 Ind. 343.

Kansas. — In *State v. Boyd*, 5 Kan. App. 802, a new trial was granted because the prosecuting attorney, in his closing argument to the jury, said: "If the defendant did not make these sales, why did he not go on the stand and deny it?"

South Dakota. — A reprimand by the court and instructions to disregard cannot cure the error. *State v. Williams*, 11 S. Dak. 64.

Texas. — In a prosecution for aggravated assault such comments are not rendered harmless by rebuke and instructions to disregard them. *Good v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1099. But see *Parker v. State*, 39 Tex. Crim. 262.

2. *Kentucky.* — Where the prosecuting attorney stated that the defendant, after his arrest, had never yet said a word, the effect of his remark was cured by an instruction to disregard it. *Barnes v. Com.*, 101 Ky. 556.

Louisiana. — Where the district attorney withdrew the remarks the prejudice was held to have been cured. *State v. Chevis*, 48 La. Ann. 575.

Defendant's Remedy. — *State v. Chevis*, 48 La. Ann. 575, where it was held that the remedy is to ask for special instructions.

725. 3. In *Cole v. State*, 75 Miss. 142, the judgment was reversed because the district attorney was permitted to draw inferences unfavorable to the defendant from the latter's failure to call his wife as a witness.

In *Oregon*, under Hill's Code Oregon, § 1366 (Bellinger's Annot. Code Oregon 1902, § 1401), which provides that a wife cannot be compelled to become a witness for her husband, where the record fails to show whether she con-

726. XI. PROSECUTING ATTORNEY'S EXPRESSION OF PERSONAL BELIEF — When Based on Evidence. — See note 2.

727. Opinion Based on Something Outside Evidence. — See note 1.

XII. COMMENTS ON MATTERS NOT IN EVIDENCE — 1. In General. — See note 2.

sented to testify it is reversible error for the prosecuting attorney to argue that the failure of the defendant to call his wife raises the presumption that her testimony would have been unfavorable to him. *State v. Hatcher*, 29 Oregon 309.

725. 4. Georgia. — In a criminal case it is not erroneous for the court to prevent counsel from stating what could be proved by the wife of the defendant, she being incompetent for any purpose in such case. *Perry v. State*, 102 Ga. 365.

Iowa. — Such comments do not constitute ground for a new trial. *State v. Millmeier*, 102 Iowa 692.

Michigan. — In *People v. Fowler*, 104 Mich. 449, it was held that a prosecuting attorney has no right to refer to the fact that the wife of a complainant in a prosecution for adultery has not been called.

Missouri. — In *State v. Taylor*, 134 Mo. 109, such comment was held to be improper but not prejudicial.

Texas. — *Smith v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 186; *Harris v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 643.

726. 2. People v. Louie Foo, 112 Cal. 17; *Gray v. State*, 42 Fla. 174; *State v. Millmeier*, 102 Iowa 692; *State v. Cater*, 100 Iowa 501; *Spangler v. State*, (Tex. Crim. 1900) 61 S. W. Rep. 314; *Henry v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 802.

Implied Belief. — The district attorney, on an indictment for manslaughter, may say that "the defendant, upon these facts, might well have been indicted for the crime of murder." *Com. v. Crowley*, 168 Mass. 121. See also *Miller v. State*, 35 Tex. Crim. 209; *Morrison v. State*, 40 Tex. Crim. 473; *Ross v. State*, 8 Wyo. 351.

No Prejudice unless Objection Is Made. — *State v. Spencer*, 15 Utah 149. But see *contra Gawn v. State*, 7 Ohio Cir. Dec. 19.

727. 1. Howard v. Com., (Ky. 1901) 61 S. W. Rep. 756 [citing 2 ENCYC. OF PL. AND PR. 727]; *Broznack v. State*, 109 Ga. 514.

2. Alabama. — *Birmingham Nat.*

Bank v. Bradley, 116 Ala. 142; *Scott v. State*, 110 Ala. 48.

Arkansas. — *Kansas City, etc., R. Co. v. Sokal*, 61 Ark. 137.

District of Columbia. — *Funk v. U. S.*, 16 App. Cas. (D. C.) 478.

Florida. — *Bradham v. State*, 41 Fla. 541; *Jenkins v. State*, 35 Fla. 737.

Illinois. — *Illinois Cent. R. Co. v. Souders*, 178 Ill. 585.

Kansas. — *Bell v. Day*, 9 Kan. App. 111; *Fish-Keck Co. v. Redlon*, 7 Kan. App. 93; *Surface v. Douglas*, 1 Kan. App. 78.

Kentucky. — *Rhodes v. Com.*, (Ky. 1899) 54 S. W. Rep. 170; *Wilson v. Com.*, (Ky. 1900) 54 S. W. Rep. 946. See also *McHenry Coal Co. v. Sneddon*, 98 Ky. 684.

Louisiana. — *State v. Thompson*, 106 La. 366.

Michigan. — *People v. Luders*, 126 Mich. 440; *Pringle v. Miller*, 111 Mich. 663. See also *Atherton v. Defreeze*, (Mich. 1902) 88 N. W. Rep. 886.

Missouri. — *Killoren v. Meehan*, 68 Mo. App. 212.

New Hampshire. — *Heald v. Concord, etc., R. Co.*, 68 N. H. 49.

Oregon. — *State v. Birchard*, 35 Oregon 484.

Tennessee. — *Hamilton v. State*, 97 Tenn. 452.

Texas. — *Miles v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 912; *Halsey v. Bell*, (Tex. Civ. App. 1901) 62 S. W. Rep. 1088; *Seals v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 1006; *Greenville Oil, etc., Co. v. Davenport*, (Tex. Civ. App. 1896) 37 S. W. Rep. 624; *Bitterman v. Hearn*, (Tex. Civ. App. 1895) 32 S. W. Rep. 341; *Bice v. State*, 37 Tex. Crim. 38; *Trinity, etc., R. Co. v. O'Brien*, 18 Tex. Civ. App. 690.

Vermont. — *Blaisdell v. Davis*, 72 Vt. 295; *Wood v. Agostinea*, 72 Vt. 51.

Wisconsin. — *Shaw v. Gilbert*, 111 Wis. 165; *Schaidler v. Chicago, etc., R. Co.*, 102 Wis. 564; *Scott v. State*, 91 Wis. 552.

United States. — *Jackson v. U. S.*, (C. C. A.) 102 Fed. Rep. 473.

Facts Coming to Knowledge of Jury. — It is held, however, that where the statements are so trivial that they are

729. See note 1.

730. See note 1.

At What Stage of Case. — See note 2.

Result of Such Irregularities. — See note 4.

not prejudicial, the error is not ground for reversal. *Sullivan v. Nicoulin*, 113 Iowa 76; *Baxter v. Detroit R. Co.*, 116 Mich. 188.

Plaintiff's Attorney Commenting on Defendant's Influence. — A statement by the plaintiff's counsel that "you can see the working of the hand of this street-railroad company; you see it over in the city hall and all through the court house," is prejudicial. *Cleveland City R. Co. v. Roebuck*, 12 Ohio Cir. Dec. 262.

Commenting on Defendant's Other Offenses. — It is reversible error to permit the prosecuting attorney to comment on the defendant's other offenses. *People v. Valliere*, 127 Cal. 65; *Morrison v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 511; *Williams v. U. S.*, 168 U. S. 382. See also *Gossett v. State*, 65 Ark. 389; *State v. Stevenson*, 26 Mont. 332. But see *Pittsburg, etc., R. Co. v. Lewis*, (Ky. 1896) 38 S. W. Rep. 482, where the error was cured by the court's instructions to disregard.

Why Physician Was Not Called. — Where the defendant had no right to require the plaintiff to submit to an examination by his physicians it was held to be improper, but not ground for reversal, for the plaintiff's counsel to say: "J. tells you that this woman is suffering from common female troubles. If J. believes this, why did he not have Dr. Booth and Dr. Bogle examine this woman?" *Gulf, etc., R. Co. v. Curb*, (C. C. A.) 66 Fed. Rep. 519. Compare *Wilkins v. Flint*, 128 Mich. 262.

Statements Irrelevant but Prejudicial. — In an action against a railroad company for the destruction by fire of goods stored in its depot, it is error to permit counsel for the plaintiff to contend for the liability of the company as to a *pro rata* of the insurance money upon the contents of the depot, there being no evidence that the goods of the defendant had any insurance upon them. *Georgia, etc., R. Co. v. Pound*, 111 Ga. 6. See also *Gilbert v. Com.*, 106 Ky. 919.

Comments on Poverty or Wealth of Parties — Plaintiff's Poverty. — It is improper for counsel to comment upon

the wealth of the defendants and the poverty of the plaintiff, and to state that the reason the plaintiff brought his suit for only two thousand dollars was to prevent a transfer of the case to the federal courts, with its attendant expenses. *Illinois Cent. R. Co. v. Whittaker*, (Ky. 1900) 57 S. W. Rep. 465. See also *Surface v. Douglas*, 1 Kan. App. 78. Compare *Louden v. Vinton*, 108 Mich. 313.

Contrasting Condition of Parties. — In *Killoren v. Meehan*, 68 Mo. App. 212, the judgment was reversed because counsel was allowed to insinuate that the plaintiff was poor and that the defendant was a "pawnbroker" and a "capitalist." See also *Taylor v. Harris*, 68 Ill. App. 92; *Bitterman v. Hearn*, (Tex. Civ. App. 1895) 32 S. W. Rep. 341.

Physical Examination of Plaintiff. — Where there is no evidence that the plaintiff declined to submit her injuries to the examination of a physician appointed by the court, it is not error to refuse to permit the defendant's counsel to comment on such refusal. *Missouri, etc., R. Co. v. Walden*, (Tex. Civ. App. 1898) 46 S. W. Rep. 87.

729. 1. *Redd v. State*, 65 Ark. 476; *Cammon v. Dent*, 105 Ga. 483; *Southern R. Co. v. Barlow*, 104 Ga. 213; *Perry v. State*, 102 Ga. 365; *State v. Dunning*, 14 S. Dak. 316; *Davis v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 340; *Warthan v. State*, 41 Tex. Crim. 385; *Wilson v. State*, 41 Tex. Crim. 179.

730. 1. *Dunmore v. State*, 115 Ala. 69; *Wabash R. Co. v. Mahoney*, 79 Ill. App. 53; *Rabbermann v. Pierce*, 77 Ill. App. 405; *Long v. Evening News Assoc.*, 113 Mich. 261; *Warren v. Halley*, 107 Mich. 120; *Jones v. Murray*, 167 Mo. 25; *Shelp v. U. S.*, (C. C. A.) 81 Fed. Rep. 694.

2. *People v. Durrant*, 116 Cal. 179.

4. *Conley v. Redwine*, 109 Ga. 640; *State v. Rice*, (Idaho 1901) 66 Pac. Rep. 87; *Bell v. Dav*, 9 Kan. App. 111; *Yontz v. Com.*, (Ky. 1902) 66 S. W. Rep. 383; *Illinois Cent. R. Co. v. West*, (Ky. 1901) 60 S. W. Rep. 290; *Miller v. Pryse*, (Ky. 1899) 49 S. W. Rep. 776; *Ray v. Com.*, (Ky. 1897) 43 S. W. Rep.

732. 2. Retaliatory Statements — Replies to Improper Remarks. —
See note 1.

221; *People v. Roat*, 117 Mich. 578; *State v. Furgerson*, 152 Mo. 92; *Sherman v. J. W. Bishop Co.*, (R. I. 1901) 49 Atl. Rep. 39; *Warthan v. State*, 41 Tex. Crim. 385; *Bagley v. Mason*, 69 Vt. 175.

In *Schaidler v. Chicago, etc., R. Co.*, 102 Wis. 564, improper remarks concerning matters in evidence were held to be prejudicial where they were not excluded from the jury. See also *Arnold v. Com.*, (Ky. 1900) 55 S. W. Rep. 894.

Cured by Instructions to Disregard. — *People v. Putman*, 126 Cal. 258; *Miller v. Pryse*, (Ky. 1899) 49 S. W. Rep. 776; *Tunnicliffe v. Bay Cities Consol. R. Co.*, 107 Mich. 261; *Warren v. Halley*, 107 Mich. 120; *Hoover v. State*, 48 Neb. 184; *McFadden v. Morning Journal Assoc.*, 28 N. Y. App. Div. 508; *Dudley v. State*, 40 Tex. Crim. 31; *Barczynski v. State*, 91 Wis. 415.

In *James Smith Woolen Mach. Co. v. Holden*, 73 Vt. 396, citing 2 ENCYC. OF PL. AND PR. 730, note 4, the court said that the great weight of authority holds that the mischief is cured when the offending counsel withdraws his statement or the court instructs the jury not to consider it.

Presumption of Prejudice. — In *State v. Thompson*, 106 La. 366, the court, quoting with approval 2 ENCYC. OF PL. AND PR. 727 *et seq.*, held that where the district attorney, in his closing argument in a felony case, referred to the fatherless children of the deceased, although there was no evidence in the case that there were any children, and the statement was not withdrawn nor the jury instructed to disregard it, such action was reversible error.

High Standing of Counsel as Augmenting Prejudice. — In *Wilson v. Com.*, (Ky. 1900) 54 S. W. Rep. 946, it was held that the prejudice of improper remarks was augmented by the high standing and official position of the commonwealth's attorney. See also *Perry v. Western North Carolina R. Co.*, 128 N. Car. 471.

Harmless Statements. — In *Oglesby v. Missouri Pac. R. Co.*, 150 Mo. 137, it was held not to be prejudicial for the plaintiff's counsel to say that he thought that the judgment ought to be for twelve thousand dollars.

In *State v. Taylor*, 134 Mo. 109, it was held that it was not error for assistant counsel for the state to say: "I am here * * * representing M. and our people as best I can without the pay of one dollar; simply doing my duty; a duty I owe to my people up there and a duty I owe to you." See also *Kohman v. Baldwin*, (Tex. Civ. App. 1898) 46 S. W. Rep. 396.

732. 1. Indulgence to Retorts. — Remarks which would not be primarily legitimate may be entirely within the bounds as answers to statements or arguments of opposing counsel.

Alabama. — *Downey v. State*, 115 Ala. 108.

Arkansas. — *Kansas City, etc., R. Co. v. Sokal*, 61 Ark. 137.

Colorado. — *Heller v. People*, 22 Colo. 11.

District of Columbia. — *Washington, etc., R. Co. v. Patterson*, 9 App. Cas. (D. C.) 423.

Georgia. — *Bowens v. State*, 106 Ga. 760.

Idaho. — *State v. Haverly*, (Idaho 1895) 42 Pac. Rep. 506.

Illinois. — *North Chicago St. R. Co. v. Leonard*, 167 Ill. 618; *Lyon v. Hammond, etc., R. Co.*, 167 Ill. 527; *Illinois Cent. R. Co. v. Beebe*, 69 Ill. App. 363, affirmed 174 Ill. 13.

Iowa. — *Patton v. Lund*, 114 Iowa 201; *Mackerall v. Omaha, etc., R. Co.*, 111 Iowa 547; *Kimball v. Deere*, 108 Iowa 676.

Kentucky. — *Delancy v. Com.*, (Ky. 1896) 35 S. W. Rep. 1037.

Michigan. — *People v. Higgins*, 127 Mich. 291; *People v. Smith*, 106 Mich. 431; *People v. Oblaser*, 104 Mich. 579; *Hammond v. Pullman*, (Mich. 1902) 89 N. W. Rep. 358; *Wilkins v. Flint*, 128 Mich. 262.

Missouri. — *State v. Hyland*, 144 Mo. 302; *State v. Goodman*, 78 Mo. App. 224.

New Hampshire. — *Hersey v. Hutchins*, 70 N. H. 130.

Ohio. — *Champion v. State*, 6 Ohio Cir. Dec. 777.

Texas. — *Cleland v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 189; *Wilborn v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1058; *Holcomb v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 892; *Wilkinson v. State*, (Tex. Crim. 1899) 57 S. W. Rep. 956; *Belknap v. Groover*, (Tex.

- 733.** Where Attorney for Losing Party Is Aggressor. — See note 1.
 Statements Not Confined to Pertinent Replies. — See note 2.
 3. Accusations of Tampering with Witnesses. — See note 4.
734. 4. Comments on Result of Former Trials. — See note 2.

Civ. App. 1900) 56 S. W. Rep. 249; International, etc., R. Co. v. Dalwigh, (Tex. Civ. App. 1900) 56 S. W. Rep. 136; Vincent v. State, (Tex. Crim. 1900) 55 S. W. Rep. 819; Gaines v. State, (Tex. Crim. 1896) 37 S. W. Rep. 331; Texas, etc., R. Co. v. Beckworth, (Tex. Civ. App. 1895) 32 S. W. Rep. 809; St. Louis, etc., R. Co. v. Daugherty, (Tex. Civ. App. 1895) 31 S. W. Rep. 705; Martin v. State, 41 Tex. Crim. 242; Barkman v. State, 41 Tex. Crim. 105; Furlow v. State, 41 Tex. Crim. 12; Kelly v. State, 37 Tex. Crim. 641; Campbell v. State, 35 Tex. Crim. 160; Washington v. State, 35 Tex. Crim. 154; Sinclair v. State, 35 Tex. Crim. 130; Chalk v. State, 35 Tex. Crim. 116; Ray v. State, 35 Tex. Crim. 354; San Antonio, etc., R. Co. v. Barnett, 2 Tex. Civ. App. 321.

Vermont. — McMullin v. Erwin, 69 Vt. 338.

West Virginia. — State v. Allen, 45 W. Va. 65.

United States. — Kellogg v. U. S., (C. A.) 103 Fed. Rep. 200; Gulf, etc., R. Co. v. Curb, (C. C. A.) 66 Fed. Rep. 519.

Counsel, before objecting to remarks of opposing counsel, should repudiate their own improper statements. Atchison, etc., R. Co. v. Dickerson, 4 Kan. App. 345.

Discussing Change of Venue. — In St. Louis, etc., R. Co. v. Warren, 65 Ark. 619, a reversal was had on account of comments of counsel for the plaintiff on the defendant's changes of venue and motions for continuances. See also Union Compress Co. v. Wolf, 63 Ark. 174; Kansas City, etc., R. Co. v. Sokal, 61 Ark. 137.

Commenting on Continuances. — It is error for counsel to state what appeared in affidavits for a continuance filed at a previous term. Blaisdell v. Davis, 72 Vt. 295.

733. 1. Washington, etc., R. Co. v. Patterson, 9 App. Cas. (D. C.) 423; Wimber v. Iowa Cent. R. Co., 114 Iowa 551; Stratton v. Dole, 45 Neb. 472; St. Louis, etc., R. Co. v. Daugherty, (Tex. Civ. App. 1895) 31 S. W. Rep. 705; State v. Marsh, 70 Vt. 288; State

v. Slamon, 73 Vt. 212; Barczynski v. State, 91 Wis. 415.

2. State v. Hatcher, 29 Oregon 309.

A party may be estopped from complaining by himself going out of the record, but this estoppel arises only when he is followed out of the record by the party undertaking to reply. St. Louis Southwestern R. Co. v. Dickens, (Tex. Civ. App. 1900) 56 S. W. Rep. 124.

Explaining Absence of Witness. — In Cunningham v. Speagle, 106 Ky. 278, it was held to be error to permit the plaintiff's attorney to say, in reply to the comments of the opposing counsel on the fact that the plaintiff did not bring the family of a certain witness to court to prove his signature: "I will say that this was originally a chancery case, and in such cases depositions are allowable; and I took the deposition of U., who was A.'s father-in-law, to prove his signature, but the court would not allow it read." See also Wilson v. State, 41 Tex. Crim. 179.

Stating Testimony of Absent Witnesses. — Comment by the defendant's counsel on the fact that a witness for the plaintiff who has been sworn has not testified does not justify a reply that it was unnecessary to examine such witness because, if examined, he would have sworn to a certain material fact, stating the fact to the jury. Morris v. Maddox, 97 Ga. 578.

4. Chicago City R. Co. v. Barron, 57 Ill. App. 469; Sutton v. Chicago, etc., R. Co., 98 Wis. 157.

734. 2. People v. Rodley, 131 Cal. 240; Rhodes v. Com., (Ky. 1899) 54 S. W. Rep. 184; Berry v. State, (Miss. 1897) 22 So. Rep. 826; Jenkins v. Hankins, 98 Tenn. 545; Ac Barney, 71 Vt. 217; Hocks v. Sprangers, 113 Wis. 123; Hoffman v. State, 97 Wis. 571.

Texas Statute. — Gann v. State, (Tex. Crim. 1900) 59 S. W. Rep. 896; Johnson v. State, (Tex. Crim. 1900) 59 S. W. Rep. 898; Pickett v. State, (Tex. Crim. 1899) 51 S. W. Rep. 374; Hamilton v. State, 40 Tex. Crim. 464. Compare Holcomb v. State, (Tex. Crim. 1900) 59 S. W. Rep. 892, wherein it was held

735. When Not Ground for Reversal. — See notes 1, 2.

5. Stating or Commenting on Excluded Evidence — Before and After Exclusion. — See note 3.

736. See notes 1, 2.

that the statute was not violated because the statement of the prosecutor was not justified by the testimony and a reference made to the former conviction by the defendant's counsel.

Statement as to How Former Jury Stood. — Chicago, etc., R. Co. v. Smedley, 65 Ill. App. 644.

Former Recovery on Same Evidence. — Western Union Tel. Co. v. Burgess, (Tex. Civ. App. 1901) 60 S. W. Rep. 1023.

Instructions to Disregard. — Such statements may be cured by instructions of the court to disregard them. Harrison v. Langston, 100 Ga. 394; Richmond, etc., R. Co. v. Mitchell, 95 Ga. 78; Smiley v. Scott, 77 Ill. App. 555, affirmed 179 Ill. 142; Taylor v. Mallory, 96 Va. 18.

735. 1. Smiley v. Scott, 179 Ill. 142; Clukey v. Seattle Electric Co., 27 Wash. 70.

Harmless Statements. — Where the counsel for the plaintiff, in arguing to the jury, referred to the fact that the justice of the peace, having heard the evidence, gave judgment in favor of the plaintiff, it was held not to be improper argument, but if counsel had stated what the judgment below was, such statement would have been improper. Rothwell v. Elliott, 2 Marr. (Del.) 151. See also Miller v. Boone County, 95 Iowa 5.

2. People v. Kamaunu, 110 Cal. 609, where such references were held to be not prejudicial. See also Ficken v. State, 97 Ga. 813; Frazier v. Malcolm, (Ky. 1901) 62 S. W. Rep. 13; Baines v. State, (Tex. Crim. 1902) 66 S. W. Rep. 847; Wilborn v. State, (Tex. Crim. 1901) 64 S. W. Rep. 1058.

3. Offers of Proof. — Where an objection to a question is sustained, it is not error to permit counsel to state in the presence of the jury what he expects to prove. French Live Stock Co. v. Springer, 35 Oregon 312. But see Pape v. Hartwig, 23 Ind. App. 333.

Counsel should not offer, in the presence of the jury, testimony which they know is incompetent. Phillips v. U. S. Benevolent Soc., 120 Mich. 142; People v. Abell, 113 Mich. 80; State v. Robinson, 106 Tenn. 204. See also

Illinois Cent. R. Co. v. Treat, 179 Ill. 576; Lisonbee v. Monroe Irrigation Co. 18 Utah 343; Bagley v. Mason, 69 Vt. 175.

Sending Jury Out During Argument. — In Birmingham Nat. Bank v. Bradley, 108 Ala. 208, it was held that the jury may be excused during the argument as to the admissibility of evidence.

Questions Addressed to Witness. —

"The wilful asking of an incompetent question may be so prejudicial that even an instruction by the court to disregard the same may not cure the evil." Beaman v. Martha Washington Min. Co., 23 Utah 139, per Hart, J. See also as to improper questions, Henshaw v. State, 67 Ark. 365; People v. Phelan, 123 Cal. 551; Heller v. People, 22 Colo. 11; Spiro v. Nitkin, 72 Conn. 202; Hine's Appeal, 68 Conn. 551; O'Neill Mfg. Co. v. Pruitt, 110 Ga. 577; Maxwell v. Habel, 92 Ill. App. 510; Hollenbeck v. Missouri Pac. R. Co., 141 Mo. 97; Cannon v. State, 41 Tex. Crim. 467; Mutual L. Ins. Co. v. Mellott, (Tex. Civ. App. 1900) 57 S. W. Rep. 887; McDonald v. Webster, 71 Vt. 392; Baker v. Sherman, 71 Vt. 439; Bagley v. Mason, 69 Vt. 175.

Reading Questions from Written Statement. — Where, on objection, the court excludes a written statement purporting to have been made by the accused at the examining trial, it is not error to permit the prosecuting attorney to read questions from such statement. Wilborn v. State, (Tex. Crim. 1901) 64 S. W. Rep. 1058.

Evidence Offered and Withdrawn. — Counsel for the plaintiff undertook to show that if a verdict was rendered against the defendant company, an insurance company would pay the verdict, and on objection withdrew the question, but referred to the fact in the argument. Such argument was held to be highly improper, and had the defendant in the court below made a motion for a mistrial, such motion should have been granted. O'Neill Mfg. Co. v. Pruitt, 110 Ga. 577.

736. 1. Osborn v. State, 125 Ala. 106; Newby v. People, 28 Colo. 16; Chicago, etc., R. Co. v. Mochell, 193

736. Evidence Admitted for One Purpose Only. — See note 3.

6. Facts of General or Local History — Matters of General Knowledge. — See note 4.

737. Matters of Local Nature. — See note 1.

738. 7. Comments on Character or Credibility of Parties or Witnesses. — See note 1.

Ill. 208; *Peerless Stone Co. v. Wray*, 142 Ind. 27; *People v. Smith*, 106 Mich. 431.

Comments on Incompetent Testimony Received. — Counsel may properly comment upon evidence given before an objection is interposed. *In re McCabe*, 70 Vt. 155. See also *State v. Bokien*, 14 Wash. 403.

It Is Reversible Error to permit comments on evidence improperly admitted. *Houston, etc., R. Co. v. Patterson*, (Tex. Civ. App. 1900) 57 S. W. Rep. 675. See also *Oldham v. Com.*, (Ky. 1900) 58 S. W. Rep. 418; *Warren v. Com.*, 99 Ky. 370; *State v. Punshon*, 133 Mo. 44; *Goldstein v. State*, (Tex. Crim. 1896) 35 S. W. Rep. 289.

Stating Substance of Rejected Testimony. — *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205.

Affidavits Admitted as Evidence. — Where the defendant's affidavit had been admitted as the deposition of certain witnesses, it was held to be reversible error for the court to permit the commonwealth's attorney to say: "When a defendant is brought to trial for horse stealing, he always has an affidavit as to what two or three mythical witnesses will state that nobody knows." *Gilbert v. Com.*, 106 Ky. 919. See also *Lindle v. Com.*, (Ky. 1901) 64 S. W. Rep. 986; *Johnson v. Com.*, (Ky. 1901) 61 S. W. Rep. 1005; *Redmond v. Com.*, (Ky. 1899) 51 S. W. Rep. 565; *Lee v. State*, 75 Miss. 625.

736. 2. *McHenry Coal Co. v. Sneddon*, 98 Ky. 684; *Miller v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 673; *Southern R. Co. v. Shaw*, (C. C. A.) 86 Fed. Rep. 865. Compare *Sigua Iron Co. v. Greene*, (C. C. A.) 104 Fed. Rep. 854.

Where there Was No Prejudice. — Where, in a suit for personal injuries, reference was made to an accident-insurance policy, supposed to have been held by the defendant company on the life of its employees, including the plaintiff, it was held not to be a cause for discharging the jury, though the evidence on that subject had been excluded. *Belle of Nelson Distilling Co. v. Riggs*, 104 Ky. 1. See also *Morris*

v. State, (Tex. Crim. 1901) 65 S. W. Rep. 531; *Gonzales v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 667; *Bunce v. McMahon*, 6 Wyo. 24.

Commenting on Sustained Objections. — Where the defendant objected to a witness's testimony on the ground that he had been convicted of a felony, it was harmless error for the prosecuting attorney to say that the defendant did not want the facts in the case. *Jackson v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 430.

3. *Ragland v. State*, 125 Ala. 12; *Keesler v. State*, 154 Ind. 242; *Bradburn v. U. S.*, (Indian Ter. 1901) 64 S. W. Rep. 550; *State v. Hogan*, (Iowa 1902) 88 N. W. Rep. 1074; *State v. Trauger*, (Iowa 1898) 77 N. W. Rep. 336; *State v. Fourchy*, 51 La. Ann. 228; *Wells v. Wells*, 144 Mo. 198; *State v. Punshon*, 133 Mo. 44; *Dow v. Wear*, 68 N. H. 345; *Naverrele v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 791; *Exon v. State*, (Tex. Crim. 1895) 33 S. W. Rep. 336.

4. In *People v. Barthleman*, 120 Cal. 7, it was held that the district attorney, by way of illustration, may refer to well-known historical incidents.

Prevalence of Crime. — In a prosecution for murder it is proper for the prosecuting attorney to say that "crimes of this character are becoming too frequent." *State v. Hyland*, 144 Mo. 302. See also *Warren v. Com.*, 99 Ky. 370; *Franklin v. State*, 41 Tex. Crim. 21.

737. 1. *Perry v. Western North Carolina R. Co.*, 128 N. Car. 471.

738. 1. *Alabama.* — *Carter v. State*, 107 Ala. 146.

Colorado. — *Newby v. People*, 28 Colo. 16.

Georgia. — *Maddox v. Morris*, 110 Ga. 309.

Illinois. — *Chicago City R. Co. v. Barron*, 57 Ill. App. 469.

Kentucky. — *Louisville, etc., R. Co. v. Com.*, (Ky. 1902) 66 S. W. Rep. 505; *Wilson v. Com.*, (Ky. 1900) 54 S. W. Rep. 946; *Anderson v. Com.*, (Ky. 1896) 35 S. W. Rep. 542.

Michigan. — *People v. Gotshall*, 123 Mich. 474; *Marvin v. Ruhmohr*, 115

739. 8. Reading from Books — Medical Works. — See note 2.

Mich. 687; *People v. Wirth*, 108 Mich. 307.

Missouri. — *State v. Prendible*, 165 Mo. 329.

Tennessee. — *Jenkins v. Hankins*, 98 Tenn. 545.

Texas. — *Warthan v. State*, 41 Tex. Crim. 385; *Missouri*, etc., R. Co. v. *Huggins*, (Tex. Civ. App. 1901) 61 S. W. Rep. 976; *Webb v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 82; *Whitesides v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1016.

Wisconsin. — *Sullivan v. Collins*, 107 Wis. 291; *Davis v. Chicago*, etc., R. Co., 93 Wis. 470.

United States. — *Shelp v. U. S.*, (C. A.) 81 Fed. Rep. 694.

A statement by the plaintiff's counsel that he would like to try the case before a jury of parties with whom the defendant had dealt, where there was no evidence of any misdealing of the defendant, was held to be cause for setting aside the verdict in *Greenfield v. Kennett*, 69 N. H. 419.

Private Life of Opposite Party. — Where the plaintiff proceeds to state matters not called for by the question put to him, it is not reversible error for the defendant's counsel to say: "You are not the innocent Abigail you pretend to be. I can tell about the old man for a good many years." *Knopke v. Germantown Farmers' Mut. Ins. Co.*, 99 Wis. 289, *distinguishing* *Sutton v. Chicago*, etc., R. Co., 98 Wis. 157.

Counsel Testifying to Good Character. — In *Cutler v. Skeels*, 69 Vt. 154, the judgment was reversed because counsel said that he had known the plaintiffs for many years and knew of their previous good character and reputation, and that their character and reputation was the best kind of evidence in their behalf. See also *Bell v. State*, 100 Ga. 78; *Johnson v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 105; *Alexander v. State*, 40 Tex. Crim. 395.

Character Not in Issue. — In *State v. McCann*, 16 Wash. 249, it was held that a remark by the district attorney to the effect that the defendants did not dare to have their reputation put at issue was improper, but not sufficient to require reversal where the court was not called upon to act in any way. See also *State v. Davis*, (Del. 1901) 50 Atl. Rep. 99; *Pringle v. Miller*,

111 Mich. 663; *Turner v. State*, 39 Tex. Crim. 322.

Character in Issue. — Where testimony as to a former conviction for felony has been admitted for the purpose of impeaching the defendant as a witness, it is not error to permit the prosecuting attorney to say: "Defendant does not come before you unsullied as a witness, but comes before you with his character and credibility all besmirched with a former conviction to the penitentiary." *Gass v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 73. See also *Bleiler v. Moore*, 99 Wis. 486.

Failure to Produce Documents. — In an action for services rendered to the deceased, it is improper for the plaintiff's counsel to state that no book or memorandum has been introduced to show payment and that such books are in the possession of the executors and administrators, where there is no evidence to support such statements. *Ryans v. Hospes*, 167 Mo. 342.

Based on Evidence. — Where the comments are based on the evidence an exception will not be sustained. *Birmingham Nat. Bank v. Bradley*, 116 Ala. 142; *Downey v. State*, 115 Ala. 112; *Guiltinan v. Metropolitan L. Ins. Co.*, 69 Vt. 469.

Refusal to Answer Incriminating Questions. — Where the defendant's guilt is conclusively shown, the verdict will not be disturbed on account of the statement by the prosecuting attorney that "the best test in this matter is when a man takes the witness stand and refuses to answer because it might incriminate himself." *State v. Phillips*, 160 Mo. 503.

Comments on Appearance of One Not Witness. — In *Gulf*, etc., R. Co. v. *Copeland*, 17 Tex. Civ. App. 55, it was held to be reversible error to permit the plaintiff's counsel to comment on the personal appearance of one who did not testify.

Curing Prejudice by Rebuke of Court. — To the effect that such remarks may be cured by a rebuke from the court, see *Anderson v. Com.*, (Ky. 1896) 35 S. W. Rep. 542; *Glazier v. Ypsilanti*, 127 Mich. 674; *Alexander v. State*, 40 Tex. Crim. 395; *Turner v. State*, 39 Tex. Crim. 322.

739. 9. Insanity. — In *Texas* counsel cannot read excerpts from standard works on medical jurispru-

741. 10. Use of Papers, Diagrams, Maps, and Almanacs. — See notes 2, 3.

742. XIII. APPEALS TO SYMPATHY AND PREJUDICE — 1. Appeals to Sympathy. — See note 3.

2. Appeals to Local, National, or Religious Prejudice — Local Prejudices. — See note 4.

dence and the disease of insanity, either as evidence or in explanation and elaboration of his argument. *Burt v. State*, 38 Tex. Crim. 397.

Cross-examination of Expert. — It is not error to permit counsel, while cross-examining an expert as to a certain rule, to read from an authorized work. *Clukey v. Seattle Electric Co.*, 27 Wash. 70. See also *Byers v. Nashville, etc., R. Co.*, 94 Tenn. 345.

741. 2. Using Reporter's Stenographic Notes. — *Reed v. State*, 147 Ind. 41.

Exhibiting and Reading Papers. — It is prejudicial error to permit counsel to exhibit checks to the jury which have not been introduced in evidence, and to refer to them for the purpose of refreshing his recollection as to dates and amounts. *Cohen v. Drake*, 13 Wash. 102. See also *People v. Phelan*, 123 Cal. 551.

3. *Clibby v. Mobile, etc., R. Co.*, 78 Miss. 937.

Exhibiting Deed. — Where there is no defect in a deed, it may, during argument, be exhibited to the jury. *Riley v. Hall*, 119 N. Car. 406. See also *Britt v. Burghart*, 16 Tex. Civ. App. 78.

Alluding to Club. — In *People v. Amaya*, 134 Cal. 531, it was held that the district attorney might refer to a blood-stained club, proved to have been found in the saloon where the deceased was killed, where the testimony showed that the defendant struck and wounded the deceased with a club, though it was not placed in evidence as an exhibit.

Affidavit for Continuance. — It is error to permit counsel to read and comment upon a defendant's affidavit for continuance which is not in evidence, but where such affidavit contains substantially the same facts to which the defendant testified, the error is harmless. *State v. Morse*, 35 Oregon 462.

742. 3. Client — Poor Widow. — In *Conley v. Redwine*, 109 Ga. 640, it was held not to be an abuse of discretion for the court to require counsel for the defendant to refrain from making certain remarks of a pathetic nature in

reference to the widow of C., she being present in court, as a reply to the vigorous assault which had been made on the life and character of C. by the opposing counsel. See also *Alabama G. S. R. Co. v. Carroll*, (C. C. A.) 84 Fed. Rep. 772, where, in an action for personal injuries, an appeal to sympathy was held to be prejudicial.

Client Poor. — In *West Chicago St. R. Co. v. Musa*, 80 Ill. App. 223, an attorney's statement to the jury that he had sworn that he would "never refuse a case for a poor man" was held to be improper. See also *Mahner v. Linck*, 70 Mo. App. 380.

"Starving Children." — In *Ruth v. Chicago, etc., R. Co.*, 70 Mo. App. 190, it was held that while reference by the plaintiff's counsel in an action for personal injuries to the plaintiff's starving children and a statement that he had been trying for eighteen months to get the defendant before a jury were improper, yet, under instructions of the court to disregard them, they were not prejudicial.

"Fatherless Little Children." — In a murder trial it was held to be proper for counsel for the state to say, "Nothing can restore the once loving hands and kind affections of Herman Zahn to his fatherless little children." *Rhea v. State*, (Neb. 1902) 88 N. W. Rep. 789.

4. In *Smith v. Jennings*, 121 Mich. 393, the judgment was set aside on account of appeals to local prejudice. See also *Ivey v. State*, 113 Ga. 1062.

Self-interest. — *Cleveland, etc., R. Co. v. Newlin*, 74 Ill. App. 638, wherein it was held that an appeal to the self-interest of the jurors was ground for reversal.

Public Opinion. — In *Pearl v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 1013, it was held not to be prejudicial for the district attorney to say that a verdict against the defendant would be approved by the good citizens of the county. See also *State v. Boyce*, 24 Wash. 514. Compare *Hudson v. State*, 101 Ga. 520; *Pigg v. State*, 145 Ind. 560; *Arnold v. Com.*, (Ky. 1900) 55 S.

743. Nationality or Religion. — See notes I, 2.

744. 3. Appeals to Prejudice Against Corporations. — See note I.

W. Rep. 894; *Hanna v. Gulf, etc.*, R. Co., (Tex. Civ. App. 1901) 65 S. W. Rep. 493.

743. 1. In Territory v. Chamberlain, 8 N. Mex. 538, it was held to be not prejudicial for the district attorney to say: "Gentlemen, you are all Americans, the defendant is an American, the victim a poor Mexican sheep herder—but I do not believe that because the victim was a Mexican that you will fail to do your duty."

Prejudice Against Physicians. — In an action for malpractice, a remark by the plaintiff's counsel that the title ought to read as an action of a lot of doctors against a poor girl was held to be harmless error under the court's rebuke and instructions. *Kiekhoefer v. Hidershide*, 113 Wis. 280.

2. Denouncing Jews. — In *Garritty v. Rankin*, (Tex. Civ. App. 1900) 55 S. W. Rep. 367, a remark by counsel that some of the parties were Jews was held to be prejudicial.

Chinese Witnesses. — In *People v. Louie Foo*, 112 Cal. 17, a statement by the prosecuting attorney that the testimony of Chinese witnesses as to an alibi unsupported by white witnesses should not be believed, followed by a statement that "you are the sole judges of the sufficiency of the evidence and the credibility of the witnesses," was held to be not ground for reversal.

Negroes. — *Hoxie v. State*, 114 Ga. 19 wherein it was held that a remark that negroes disregard the marriage relation was improper, but under the circumstances of the case was not reversible error.

744. 1. St. Louis, etc., R. Co. v. *Waren*, 65 Ark. 619; *Swift v. Rutkowski*, 82 Ill. App. 108, *affirmed* 182 Ill. 18; *Gulf, etc.*, R. Co. v. *Hamilton*, 17 Tex. Civ. App. 76.

Comments Not Prejudicial. — In a prosecution for violating the local-option law, where the sale was made by the accused as an agent for a corporation, it was held to be not improper for the prosecuting attorney to say that the corporation could not be convicted. *Bogel v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 830.

Influencing Legislation. — In an action

for injuries received by falling through an elevator opening, it was held to be not prejudicial for the plaintiff's attorney to say: "Whenever the law-makers tried to pass laws protecting the employees, corporations were up in arms against the law. If the law-making bodies pass laws providing for fire escapes, they kick; when they pass laws to put up fences around elevators, they kick." *Wendler v. People's House Furnishing Co.*, 165 Mo. 527.

Allusion to Vanderbilt. — In *Chamberlain v. Lake Shore, etc.*, R. Co., 122 Mich. 477, which was an action for the wrongful ejectment of the plaintiff from the defendant's train, an allusion to Mr. Vanderbilt and his alleged exclamation "the public be damned," accompanied by other improper comments, was condemned but was held to be not prejudicial, since the verdict was small and the circumstances under which the plaintiff was ejected were aggravated.

Salaries of Corporation Attorneys. — In *Washington, etc.*, R. Co. v. *Patterson*, 9 App. Cas. (D. C.) 423, the language "hired by this rich corporation to defeat every claim that it brought against them," unsupported by the evidence, was held to be improper as applied by an attorney to counsel for the opposing railroad company.

Corporations as Persistent Litigants. — In *Denver, etc.*, R. Co. v. *Nye*, 9 Colo. App. 94, counsel for the plaintiff said: "The defendant can have but one object, and that is to annoy and harass this plaintiff and make the prosecution of this case so expensive that the very idea will defeat him, overwhelm him, subdue him, drive him home, and compel him to suffer any injury rather than come into court and ask for damages. They don't expect anything in this case before this jury. They have simply laid the foundation to take the case to a higher court, where with the aid of a fifty-thousand-dollar library, and the counsel of the United States senator, they may defeat justice." It was held that this line of argument having been stopped on objection, there was no ground for error. See also *Ranchau v. Rutland R. Co.*, 71 Vt. 142.

745. See note 1.

745. 1. *Palmer Mfg. Co. v. Drewry*, 113 Ga. 366.

Prejudicial Comments. — In an action for injuries received in a collision at a railroad crossing, it was held to be error for the plaintiff's attorney to state to the jury facts based on his own observation, or to argue as proof that the plaintiff stopped before he attempted to cross the railroad, that his counsel would not have commenced the action if he had not stopped. *Britton v. Michigan Cent. R. Co.*, 118 Mich. 491.

Where counsel for the plaintiff said that the name "Union" of the defendant implied that it had bought up all the compresses in the state and was a monopoly, there being no evidence to warrant such a conclusion, it was held that such remarks constituted reversible error, as the court failed to instruct the jury to disregard them and the evidence was closely balanced. *Union Compress Co. v. Wolf*, 63 Ark. 174.

In a suit against a corporation for salary alleged to be due, it was held to be prejudicial for the plaintiff's counsel to say: "They came down here, a party of rich northern capitalists wanting to speculate on our property, and are now trying to rob an elegant, chivalrous Southern gentleman of his justly and hard-earned salary." *Florence Cotton, etc., Co. v. Field*, 104 Ala. 471.

Rich and Powerful. — Where the counsel in his argument, referring to the opposing counsel and to the appellants, said: "He is trying to cobweb things to go in, to trouble men, not to do justice but to heap a wrong against a fellow citizen in the interests of his clients, because, forsooth, they are rich and powerful and can fight and pay," such remarks were held to be prejudicial, as they were not justified by anything in the record and the evidence was conflicting. *Chicago, etc., R. Co. v. Garner*, 83 Ill. App. 118.

Insolvency of Agent. — Where the question is whether the defendant or its agent is liable, it is reversible error to permit counsel for the plaintiff to urge a verdict on the ground that the agent is insolvent and that the defendant can reimburse itself from him, he being in its employ. *Daggett v. Champlain Mfg. Co.*, 71 Vt. 370.

Conduct of Railroad Companies. —

Where general corporate powers and their abuses are not on trial they should not be projected into the case by arguments in any manner calculated to "arouse the passions, create prejudice, and warp the judgment of men." *Chicago, etc., R. Co. v. Pelligreen*, 59 Ill. App. 558, *per Sample*, J.

"I have no fault to find with the railroad company, except they will murder people — will kill innocent women and children sometimes," was held in *Pittsburg, etc., R. Co. v. Story*, 63 Ill. App. 239, to be improper language on the part of counsel for the plaintiff. See also *Pittsburgh, etc., R. Co. v. Warren*, 64 Ill. App. 584, where the judgment was reversed on account of improper remarks directed by counsel towards the railroad company.

In *Galveston, etc., R. Co. v. Nicholson*, (Tex. Civ. App. 1900) 57 S. W. Rep. 693, an action against a railroad company, it was held to be harmless error to permit the plaintiff's counsel, in referring to the absence of switch lights at the place of the accident, to say that it was the defendant's duty "to keep everything that would possibly prevent danger." See also *Ft. Worth, etc., R. Co. v. Burton*, (Tex. Civ. App. 1901) 60 S. W. Rep. 316; *Texas, etc., R. Co. v. Beckworth*, (Tex. Civ. App. 1895) 32 S. W. Rep. 809.

Witnesses Suborned. — *Ashland Land, etc., Co. v. May*, 51 Neb. 474, where the judgment was reversed because counsel for the plaintiff was permitted to say that a witness had been "fixed" by the defendants, and to make other like statements unsupported by evidence. See also *Gidionsen v. Union Depot R. Co.*, 129 Mo. 392; *Masterson v. Chicago, etc., R. Co.*, 102 Wis. 571.

Witnesses Intimidated. — In an action against a railroad company it is improper for the plaintiff's counsel to go beyond the evidence and say that employees of the company will be discharged if they refuse to testify as the company desires. *Mackerall v. Omaha, etc., R. Co.*, 111 Iowa 547. See also *Perry v. Western North Carolina R. Co.*, 128 N. Car. 471, where the judgment was reversed on account of prejudicial statements outside the evidence as to the conduct of railroad companies towards their employees as

747. 4. Invective and Abuse — Justified by Evidences. — See note I.

witnesses. And see *Chicago, etc., R. Co. v. Kellogg*, 54 Neb. 127; *St. Louis Southwestern R. Co. v. Dickens*, (Tex. Civ. App. 1900) 56 S. W. Rep. 124; *MacCarthy v. Whitcomb*, 110 Wis. 113.

As to harmless statements, see *Illinois Cent. R. Co. v. Beebe*, 69 Ill. App. 363, *affirmed* 174 Ill. 13; *Chicago, etc., R. Co. v. Pounds*, 1 Indian Ter. 51; *Louisville, etc., R. Co. v. Morgan*, (Ky. 1901) 62 S. W. Rep. 736; *Gulf, etc., R. Co. v. Perry*, (Tex. Civ. App. 1895) 30 S. W. Rep. 709; *Werner v. Chicago, etc., R. Co.*, 105 Wis. 300.

Denouncing Banks. — It is prejudicial to permit counsel to misstate evidence and to denounce banks in general, and to say that in all failures they have perpetrated fraud upon honest creditors. *Baum v. Sanger*, (Tex. Civ. App. 1898) 49 S. W. Rep. 650.

747. 1. Birmingham R., etc., Co. v. James, 121 Ala. 120; *Gaines v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 331.

"Whore." — A statement by the prosecuting attorney that the defendant is a whore is justified by testimony that she was living in open adultery at the time of the killing for which she is on trial. *Johnson v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 105.

"Tramps." — Where the evidence tends to show that the appellants or the witnesses are of the character indicated, it is not improper for the prosecuting attorney to refer to them as tramps. *Anderson v. State*, 147 Ind. 445; *State v. Hudson*, 110 Iowa 663; *Murphy v. State*, 108 Wis. 111.

Assassin. — In *Fertig v. State*, 100 Wis. 301, it was held that the evidence warranted the use of the word "assassin."

"Fiend and Demon." — In *Brown v. State* 121 Ala. 9, where, in his argument in a charge of attempt at rape on a ten-year-old girl, the prosecuting attorney referred to the defendant as a "fiend and a demon having a foul heart," it was held that such language is not prejudicial where it is deducible from the evidence.

"Self-confessed Thief." — In *Haupt v. State*, 108 Ga. 53, the defendant was on trial for forging a check against a church, and a witness testified that the defendant had acknowledged that he was under arrest on account of some transaction he had had with a certain

church, and that he was short of that fund to the amount of eleven hundred dollars. It was held to be no error for the court to permit the solicitor-general, in his argument to the jury, to state that the defendant was "a self-confessed thief."

"Infamous Scoundrel." — In *State v. Summar*, 143 Mo. 220, a prosecution for defiling and carnally knowing a girl under the age of eighteen, it was held to be proper for the special counsel for the state to say: "A defendant who has ruined the character of a girl, and taken from her the most precious gem, who will come into court and try and take advantage of his own wrong, is an infamous scoundrel."

"Scoundrel" and "Incarnate Fiend." — The language of counsel for the state denouncing the defendant as a "scoundrel" and an "incarnate fiend," and his defense as a lie "from beginning to end," is "objectionable for its extravagance of denunciation," yet where the evidence tends to warrant such conclusions it will not constitute prejudicial error, where counsel withdraws the remarks and the court instructs the jury that such remarks are not to be considered. *Henshaw v. State*, 67 Ark. 365.

"Wretch." — Where there was evidence that the defendant had stated that he had killed a child because she refused to promise that she would not tell her mother that he had tried to ravish her, it was held to be no error to permit the district attorney to say: "It was the lust of this wretch that caused the crime. After he had raped the poor blind child he murdered her in cold blood, and if he is permitted to go free, then God help your children and the children of the country." *Morris v. State*, 39 Tex. Crim. 371.

"Rape Fiend." — In a prosecution for larceny where the prosecuting attorney called the accused a "rape fiend" and urged the jury to punish him according to the gravity of the offense, a reversal was denied because the testimony was sufficient to sustain the evidence and no written charge was prepared and requested. *Bailey v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 708.

"Vicegerent of the Monarch of Hell." — In *Fertig v. State*, 100 Wis. 301, *dis.*

748. *Abusive Language — Discretion of Court.* — See notes 1, 2.

749. See note 1.

tinguishing Scott v. State, 91 Wis. 552, it was held to be not error to permit the district attorney to say that "there was murder in the heart of the accused as he proceeded to and effected the homicide — * * * the object of his vengeance was coming. * * * he cocked his gun, drew the bead on the deceased, and the deed was done, and a son and brother was sent to his Maker without a moment's warning, by the act of an assassin — as vile an act as ever happened on earth; so foul that it would be worthy of the vicergerent of the monarch of hell," where such language was the inevitable conclusion from the evidence.

748. 1. *People v. Rushing*, 130 Cal. 449.

"*Murderer.*" — *Bishop v. Com.*, (Ky. 1901) 60 S. W. Rep. 190. See also *Martinez v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 838.

In *Matthews v. State*, (Tex. Crim. 1896) 38 S. W. Rep. 172, which was a prosecution for burglary, it was held to be not reversible error for the prosecuting attorney to say, "A man who will commit burglary and theft will commit murder, and you should give the full penalty of the law," there having been no request for an instruction to disregard the statement.

Liar. — *Drye v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 65, wherein it was held that no reversible error was committed by inferring that the defendant was a liar.

"*Assassin, Murderer, and Vulture.*" — See *Byrd v. State*, 39 Tex. Crim. 609, wherein the language was condemned, but the judgment was not reversed.

Penitentiary Offense. — A statement that the defendant "ought to be in the penitentiary" was held in *Patterson v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 59, to be not erroneous.

Inmate of Bawdy House. — In a murder trial it was held to be proper for the prosecuting attorney to say that "the place where the killing was done was a bawdy house and the defendant an inmate of a bawdy house." *State v. Dyer*, 139 Mo. 199.

"*Hyena.*" — In *Kugadt v. State*, 38 Tex. Crim. 681, the court condemned the conduct of the district attorney in alluding to the defendant as a "hyena," there being no evidence to call

for such a statement, but held, under a withdrawal of the remark and instructions to disregard it, that there was no prejudice. See to the same effect *Patterson v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 557.

"*Thief, Embezzler, and Scoundrel.*" — *People v. Ward*, 134 Cal. 301, wherein the effect of such language was cured by instructions of the court to disregard the personal views and opinions of counsel.

Comment on Alibi. — In *State v. Phillips*, 160 Mo. 503, it was held to be improper for the prosecuting attorney to say, "This is an alibi defense, the felon's defense, the thief's defense," but not reversible error where the defendant's guilt was conclusively shown.

2. Comparing Defendant to Devil. — *Rhodes v. Com.*, (Ky. 1899) 54 S. W. Rep. 184, wherein the language was held to be prejudicial and cause for a new trial.

Calling Defendant "Thief." — In a trial for having in possession tools and implements for the purpose of stealing from buildings, rooms, safes, etc., repeated assertions by the district attorney that the defendant is a thief, followed by a ruling that such assertions are warranted by the evidence, are grounds for reversal where the evidence does not warrant such statements. *Scott v. State*, 91 Wis. 552.

Denominating Witnesses "Hirelings." — Where counsel for the plaintiff in his argument to the jury called the physicians who testified in behalf of the defendants "hirelings," and denounced one of them by the name of Arnold as "Benedict Arnold," and said that they were engaged by the defendants to do this kind of work for them, and paid from defendants' treasury, and went with passes in their pockets, it was held that such remarks constituted error. *Mott v. Detroit*, etc., R. Co., 120 Mich. 127.

749. 1. In *Bradburn v. U. S.*, (Indian Ter. 1901) 64 S. W. Rep. 550, the judgment was reversed because the attorney for the government called the defendant a cattle thief, a fighter of deputy marshals, and a dare-devil, and the court merely told him to remain within the record. See also *State v. Hibler*, 149 Mo. 478, in which case, though a rule similar to that stated in

750. XIV. INTERRUPTIONS — 1. By Court. — See note 1.

the text was declared, the judgment was not reversed.

Personal Appearance of Accused. — In a prosecution for obtaining goods under false pretenses the prosecuting attorney said: "The defense wants you to believe that this man S. put up a job on B., the defendant, looking as he does. Just look at him!" When the defendant's counsel objected, he continued: "I don't wonder they object to a statement as to how B. looks." It was held that the remarks were harmless and were probably understood by the jury as a humorous refutation of the claim of the defense that the prosecuting witness had "put up a job" on the defendant. *State v. Bokien*, 14 Wash. 403. See also *State v. Cadotte*, 17 Mont. 315; *State v. Boyce*, 24 Wash. 514.

Excessive Vituperation. — A judgment will not be reversed on account of vituperative language where the language is not more damaging than are the facts established by the evidence. *Texas Consol. Compress, etc., Assoc. v. Dublin Compress, etc., Co.*, (Tex. Civ. App. 1896) 38 S. W. Rep. 404. See also *State v. Baker*, 57 Kan. 541; *Grabowsky v. Baumgart*, 128 Mich. 267, where unwarranted vituperative arguments were held to be prejudicial. In *McDonald v. Ft. Dearborn Nat. Bank*, 72 Ill. App. 17, it was held that much latitude must be allowed in such matters.

"Infamous, Lecherous Scoundrel." — In *State v. Bobbst*, 131 Mo. 328, a prosecution for enticing away a woman, it was held to be reversible error for the prosecuting attorney to denounce the prisoner as "this infamous, lecherous scoundrel."

Old Offender. — In *Rhodes v. Com.*, (Ky. 1899) 54 S. W. Rep. 170, where the prosecuting attorney, over the objection of the appellant, said: "He is an old offender; he knows the law; he has been to the penitentiary and you should not believe him under oath;" the judgment was reversed.

750. 1. Illinois. — *Pease v. Barkowsky*, 67 Ill. App. 274; *Pittsburgh, etc., R. Co. v. Warren*, 64 Ill. App. 584.

Indian Territory. — *Chicago, etc., R. Co. v. Pounds*, 1 Indian Ter. 51.

Louisiana. — *State v. Jones*, 51 La. Ann. 103.

Michigan. — *Potter v. Detroit, etc.,*

R. Co., 122 Mich. 179; *Tunncliffe v. Bay Cities Consol. R. Co.*, 107 Mich. 261.

Mississippi. — *Cole v. State*, 75 Miss. 142. *Compare Oden v. State*, (Miss. 1900) 27 So. Rep. 992.

Missouri. — *Jones v. Murray*, 167 Mo. 25; *State v. Bobbst*, 131 Mo. 328. See also *Hollenbeck v. Missouri Pac. R. Co.*, 141 Mo. 97.

Montana. — *State v. Biggerstaff*, 17 Mont. 510.

North Carolina. — *State v. Ussery*, 118 N. Car. 1177; *State v. Surles*, 117 N. Car. 720. See also *State v. Kinsauls*, 126 N. Car. 1095.

Texas. — *Patterson v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 557; *Davis v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 340; *Jackson v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 430; *Clark v. Bohms*, (Tex. Civ. App. 1896) 37 S. W. Rep. 347; *Levine v. State*, 35 Tex. Crim. 647.

Vermont. — *Ranchau v. Rutland R. Co.*, 71 Vt. 142; *Morrill v. Palmer*, 68 Vt. 1. See also *James Smith Woolen Mach. Co. v. Holden*, 73 Vt. 396.

Wisconsin. — *Sullivan v. Collins*, 107 Wis. 291; *Masterson v. Chicago, etc., R. Co.*, 102 Wis. 571.

United States. — *Southern R. Co. v. Shaw*, (C. C. A.) 86 Fed. Rep. 865; *Shelp v. U. S.*, (C. C. A.) 81 Fed. Rep. 604.

Rule of Court. — In *Britton v. Michigan Cent. R. Co.*, 118 Mich. 491, it was held that a rule of court that forbids interruptions of counsel during argument is not safe to be applied on all occasions.

Argument Not Based on Evidence. — See *Magnuson v. State*, 13 Ind. App. 303.

Argument Must Have Been Abused. — While it is the duty of the court to see that no advantage is obtained by counsel in their remarks to or in the presence of the jury, yet within reasonable bounds of propriety counsel must be left to their own discretion. *Goldstein v. Smiley*, 168 Ill. 438. See also *Cincinnati Times-Star Co. v. France*, (Ky. 1901) 61 S. W. Rep. 18, an action for libel, where it was held to be error for the court to interrupt the appellant's counsel while commenting on the probable effect of the libelous publication upon the character of the appellee.

Addressing Individual Jurors. — In

751. See note 1.

2. By Counsel. — See note 2.

XV. NEW TRIALS FOR ABUSES OF ARGUMENT — 1. By Trial Court. — See note 3.

752. 2. By Appellate Courts. — See note 1.

State v. Pearson, 119 N. Car. 871, it was held to be not an abuse of discretion for the court to interrupt counsel while addressing some of the jury individually.

751. 1. *Kansas City, etc., R. Co. v. Sokal*, 61 Ark. 137; *People v. Ward*, 134 Cal. 301; *Newby v. People*, 28 Colo. 16; *Salem v. Webster*, 192 Ill. 369; *Chicago City R. Co. v. Barron*, 57 Ill. App. 469; *State v. Bloor*, 20 Mont. 574; *Lisonbee v. Monroe Irrigation Co.*, 18 Utah 343.

Counsel Disregarding Admonition. — In *Hocks v. Sprangers*, 113 Wis. 123, a reversal was had because counsel repeatedly disregarded the admonition of the court. See also *Blume v. State*, 154 Ind. 343; *Cullar v. Missouri, etc., R. Co.*, 84 Mo. App. 340; *State v. Moore*, 32 Oregon 65; *Lindsay v. Pettigrew*, 10 S. Dak. 228; *Rotan v. Maedgen*, 24 Tex. Civ. App. 558.

2. People v. Kramer, 117 Cal. 647; *Pittsburg, etc., R. Co. v. Story*, 63 Ill. App. 239.

Daring Counsel to Take Exceptions. — "Counsel has a right at all times during the progress of the case, in proper manner, to reserve a bill of exceptions to any action of the court or counsel deemed improper, and he has a right at all times in taking his bill of exceptions to be treated in a respectful manner." It is improper to permit the opposing counsel to say: "Yes, take a bill of exceptions to everything I say. It is all excepted to — everything I say excepted to." *Franklin v. State*, 41 Tex. Crim. 21.

3. Louisville, etc., R. Co. v. Sullivan Timber Co., 126 Ala. 95; *Olds v. North Chicago St. R. Co.*, 165 Ill. 472; *North Chicago St. R. Co. v. Leonard*, 67 Ill. App. 603, *affirmed* 167 Ill. 618; *Wendler v. People's House Furnishing Co.*, 165 Mo. 527; *Morrill v. Palmer*, 68 Vt. 1.

752. 1. *Alabama.* — *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 126 Ala. 95.

California. — *People v. Patterson*, 124 Cal. 102.

Colorado. — *Ames v. Patridge*, 13 Colo. App. 407.

Georgia. — *Hoxie v. State*, 114 Ga. 19; *Morris v. Maddox*, 97 Ga. 575.

Idaho. — *State v. Rice*, (Idaho 1901) 66 Pac. Rep. 87.

Illinois. — *West Chicago St. R. Co. v. Levy*, 182 Ill. 525; *West Chicago St. R. Co. v. Dedloff*, 92 Ill. App. 547; *Harms v. Steir*, 67 Ill. App. 634; *North Chicago St. R. Co. v. Leonard*, 67 Ill. App. 603, *affirmed* 167 Ill. 618.

Indiana. — *Roose v. Roose*, 145 Ind. 162; *Pape v. Hartwig*, 23 Ind. App. 333.

Indian Territory. — *Chicago, etc., R. Co. v. Pounds*, 1 Indian Ter. 51.

Iowa. — *State v. Hutchinson*, 95 Iowa 566.

Kentucky. — *Louisville, etc., R. Co. v. McEwan*, (Ky. 1899) 51 S. W. Rep. 619; *Hayden v. Com.*, (Ky. 1898) 45 S. W. Rep. 856; *Ray v. Com.*, (Ky. 1897) 43 S. W. Rep. 221; *Riggs v. Com.*, 103 Ky. 610.

Louisiana. — *State v. Fourchy*, 51 La. Ann. 228; *State v. Jones*, 51 La. Ann. 103; *State v. Chevis*, 48 La. Ann. 575.

Michigan. — *Cameron Lumber Co. v. Somerville*, (Mich. 1902) 89 N. W. Rep. 346; *Wilkins v. Flint*, 128 Mich. 262; *People v. Conley*, 106 Mich. 424.

Missouri. — *Hollenbeck v. Missouri Pac. R. Co.*, 141 Mo. 97; *State v. Wright*, 134 Mo. 404; *Gidionsen v. Union Depot R. Co.*, 129 Mo. 392; *Mason v. Fourteen Min. Co.*, 82 Mo. App. 367; *Sackewitz v. American Bisquit Mfg. Co.*, 78 Mo. App. 144; *Ruth v. Chicago, etc., R. Co.*, 70 Mo. App. 190; *Fink v. Lancashire Ins. Co.*, 66 Mo. App. 513.

Nebraska. — *Argabright v. State*, 62 Neb. 402; *Golder v. Lund*, 50 Neb. 867.

New Jersey. — *Christensen v. Lambert*, 66 N. J. L. 531.

Texas. — *Mutual L. Ins. Co. v. Mellett*, (Tex. Civ. App. 1900) 57 S. W. Rep. 887; *San Antonio, etc., R. Co. v. Beam*, (Tex. Civ. App. 1899) 50 S. W. Rep. 411; *Greenwood v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 177; *Galveston, etc., R. Co. v. Burnett*, (Tex. Civ. App. 1897) 42 S. W. Rep. 314; *Bitterman v. Hearn*, (Tex. Civ. App. 1895) 32 S. W. Rep. 341; *Western*

753. See note 1.

Union Tel. Co. *v.* Jobe, 6 Tex. Civ. App. 403; Chicago, etc., R. Co. *v.* Langston, 19 Tex. Civ. App. 568; Gulf, etc., R. Co. *v.* Hamilton, 17 Tex. Civ. App. 76; Gulf, etc., R. Co. *v.* Hockaday, 14 Tex. Civ. App. 613; Warthan *v.* State, 41 Tex. Crim. 385; Kugadt *v.* State, 38 Tex. Crim. 681.

Utah. — State *v.* Spencer, 15 Utah 149.

Washington. — Chezum *v.* Parker, 19 Wash. 645.

Wisconsin. — Kiekhoefer *v.* Hider-shide, 113 Wis. 280; Boltz *v.* Sullivan, 101 Wis. 608.

Wyoming. — Bunce *v.* McMahon, 6 Wyo. 24.

United States. — Gulf, etc., R. Co. *v.* Curb, (C. C. A.) 66 Fed. Rep. 519.

753. 1. Rebuke and Instructions — Georgia. — Kearney *v.* State, 101 Ga. 803.

Illinois. — West Chicago St. R. Co. *v.* Waniatta, 169 Ill. 17; Gundlach *v.* Schott, 95 Ill. App. 110, *affirmed* 192 Ill. 509.

Indiana. — Pigg *v.* State, 145 Ind. 560.

Michigan. — Glasier *v.* Ypsilanti, 127 Mich. 674; Grenier *v.* Hild, 124 Mich. 222; Hume *v.* Mason, etc., Co., 122 Mich. 346; Ford *v.* Cheever, 113 Mich. 440; People *v.* Conley, 106 Mich. 424.

Missouri. — Cullar *v.* Missouri, etc., R. Co., 84 Mo. App. 340; Ruth *v.* Chicago, etc., R. Co., 70 Mo. App. 190.

New Jersey. — Christensen *v.* Lambert, 66 N. J. L. 531.

North Carolina. — McLamb *v.* Wilmington, etc., R. Co., 122 N. Car. 862.

Texas. — Mitchell *v.* State, (Tex. Crim. 1901) 62 S. W. Rep. 572; Wilkerson *v.* State, (Tex. Crim. 1899) 57 S. W. Rep. 956; International, etc., R. Co. *v.* Dalwigh, (Tex. Civ. App. 1900) 56 S. W. Rep. 136; White *v.* State, (Tex. Crim. 1895) 29 S. W. Rep. 476; Brown *v.* Perez, 89 Tex. 283; Dudley *v.* State, 40 Tex. Crim. 31; Morris *v.* State, 39 Tex. Crim. 371.

Wisconsin. — Kiekhoefer *v.* Hider-shide, 113 Wis. 280; Barczynski *v.* State, 91 Wis. 415.

Duty to Rebuke Counsel. — Coan *v.* Brownstown Tp., 126 Mich. 626; Chamberlain *v.* Lake Shore, etc., R. Co., 122 Mich. 477; Martin *v.* Courtney, 8 Minn. 112; Killoren *v.* Meehan, 68 Mo. App. 212; Suhr *v.* Hoover, 8 Ohio Cir. Dec. 738; Morris *v.* State,

(Tex. Crim. 1901) 65 S. W. Rep. 531; Drye *v.* State, (Tex. Crim. 1900) 55 S. W. Rep. 65; Attaway *v.* State, 41 Tex. Crim. 395; Wartham *v.* State, 41 Tex. Crim. 385; Turner *v.* State, 39 Tex. Crim. 322; Sullivan *v.* Collins, 107 Wis. 291.

Prejudice Cured by Withdrawal of Remarks — District of Columbia. — Washington, etc., R. Co. *v.* Patterson, 9 App. Cas. (D. C.) 423.

Georgia. — Smalls *v.* State, 105 Ga. 669.

Illinois. — Bonardo *v.* People, 182 Ill. 411. But see Wetzel *v.* Meranger, 85 Ill. App. 457, where the court was disposed to reverse a judgment solely on account of remarks of counsel that were withdrawn, but affirmed it on condition of remittitur of part of the judgment. See also West Chicago St. R. Co. *v.* Musa, 80 Ill. App. 223, *affirmed* 180 Ill. 130.

Indiana. — Shenkenberger *v.* State, 154 Ind. 630; Reed *v.* State, 147 Ind. 41; Dehler *v.* State, 22 Ind. App. 383.

Iowa. — Westercamp *v.* Brooks, (Iowa 1901) 88 N. W. Rep. 372; Mackerrall *v.* Omaha, etc., R. Co., 111 Iowa 547.

Michigan. — Cameron Lumber Co. *v.* Somerville, (Mich. 1902) 89 N. W. Rep. 346.

New Hampshire. — Pritchard *v.* Austin, 69 N. H. 367.

Ohio. — Cleveland City R. Co. *v.* Roebuck, 12 Ohio Cir. Dec. 262.

Oregon. — State *v.* Moore, 32 Oregon 65.

Tennessee. — State *v.* Robinson, 106 Tenn. 204.

Texas. — Galveston, etc., R. Co. *v.* Nicholson, (Tex. Civ. App. 1900) 57 S. W. Rep. 693; Taylor *v.* State, (Tex. Crim. 1897) 42 S. W. Rep. 285; Patrick *v.* State, (Tex. Crim. 1896) 33 S. W. Rep. 1078; Brown *v.* Perez, (Tex. Civ. App. 1895) 32 S. W. Rep. 546; De La Vergne Refrigerating Mach. Co. *v.* Stahl, 24 Tex. Civ. App. 471.

Vermont. — Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477.

Washington. — Informing the jury that remarks are not proper is equivalent to an order withdrawing the remarks from the consideration of the jury. State *v.* Boyce, 24 Wash. 514.

Cured by Instructions — Alabama. — Hundley *v.* Chadick, 109 Ala. 579.

754. 3. Objections for Improper Remarks — Promptness Required.
— See note 1.

California. — *People v. Ward*, 134 Cal. 301.

Georgia. — *Harrison v. Langston*, 100 Ga. 394.

Idaho. — *State v. Haverly*, (Idaho 1895) 42 Pac. Rep. 506.

Indiana. — *Blume v. State*, 154 Ind. 343.

Iowa. — *State v. Davis*, 110 Iowa 746; *Taylor v. Pacific Mut. L. Ins. Co.*, 110 Iowa 621.

Kentucky. — *Delaney v. Com.*, (Ky. 1896) 35 S. W. Rep. 1037.

Michigan. — *Savlan v. Ayer*, (Mich. 1902) 89 N. W. Rep. 359; *People v. Swartz*, 118 Mich. 292; *Munroe v. Godkin*, 111 Mich. 183.

Missouri. — *State v. Fitzgerald*, 130 Mo. 407.

Montana. — *State v. Bloor*, 20 Mont. 574.

Nebraska. — *Hoover v. State*, 48 Neb. 184.

Ohio. — *Davis v. State*, 10 Ohio Cir. Dec. 738; *Pittsburg, etc., R. Co. v. Martin*, 3 Ohio Dec. 493.

Oregon. — *State v. McDaniel*, 39 Oregon 161.

South Dakota. — *Yankton v. Douglass*, 8 S. Dak. 441.

Texas. — *Morris v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 531; *Tyler Chair, etc., Works v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 350; *Williams v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 859; *Galveston, etc., R. Co. v. Burnett*, (Tex. Civ. App. 1897) 42 S. W. Rep. 314; *Houston, etc., R. Co. v. Weaver*, (Tex. Civ. App. 1897) 41 S. W. Rep. 846; *Exon v. State*, (Tex. Crim. 1895) 33 S. W. Rep. 336; *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579; *Galveston, etc., R. Co. v. Smith*, 24 Tex. Civ. App. 127; *Barkman v. State*, 41 Tex. Crim. 105; *Aud v. State*, 36 Tex. Crim. 76.

Utah. — *State v. Spencer*, 15 Utah 149.

Vermont. — *James Smith Woolen Mach. Co. v. Holden*, 73 Vt. 396, citing 2 ENCYC. OF PL. AND PR. 730, note 4.

Washington. — *State v. Hawkins*, 27 Wash. 375; *Chezum v. Parker*, 19 Wash. 645.

United States. — *Dunlop v. U. S.*, 165 U. S. 486; *Kellogg v. U. S.*, (C. C. A.) 103 Fed. Rep. 200.

As to Presumption of Prejudice, see Illi-

nois Cent. R. Co. v. Souders, 79 Ill. App. 41, reversed 178 Ill. 588, the case turning on improper comments of the court; *Robb v. State*, 144 Ind. 569; *Argabright v. State*, 62 Neb. 402; *Greenfield v. Kennett*, 69 N. H. 419.

Cured by Rebuke and Withdrawal. — *McDonald v. Webster*, 71 Vt. 392.

Curing by Remittitur. — Where the remarks merely alluded to the amount of the recovery, they may be cured by remittitur. *De La Vergne Refrigerating Mach. Co. v. Stahl*, 24 Tex. Civ. App. 471. See also *MacCarthy v. Whitcomb*, 110 Wis. 113, where the verdict was reduced twenty-five hundred dollars.

Where Court Did Not Remember Evidence. — Where, on objection to a statement of evidence, the judge merely remarked that he did not remember the evidence, it was held that a proper ruling was made. *State v. McCourry*, 128 N. Car. 594.

754. 1. California. — *People v. Shears*, 133 Cal. 154; *People v. Phelan*, 123 Cal. 551.

Colorado. — *In re Thomas*, 26 Colo. 110; *Corbin v. Dunklee*, 14 Colo. App. 337; *Schmidt v. Denver First Nat. Bank*, 10 Colo. App. 261; *Denver, etc., R. Co. v. Nye*, 9 Colo. App. 94.

Georgia. — *Kearney v. State*, 101 Ga. 803.

Illinois. — *Murray v. Doud*, 167 Ill. 368.

Indiana. — *Cromer v. State*, 21 Ind. App. 502; *Lake Erie, etc., R. Co. v. Rooker*, 13 Ind. App. 600.

Kansas. — *State v. Stockman*, 9 Kan. App. 888, 58 Pac. Rep. 1006; *Hoyt v. Carpenter*, 6 Kan. App. 305.

Kentucky. — *Alexander v. Menefee*, (Ky. 1901) 64 S. W. Rep. 855.

Louisiana. — *State v. Procella*, 105 La. 518.

Missouri. — *Norris v. Whyte*, 158 Mo. 20.

Montana. — *State v. Gay*, 18 Mont. 51; *State v. Cadotte*, 17 Mont. 315.

Nebraska. — *Chicago, etc., R. Co. v. Kellogg*, 55 Neb. 752.

New Hampshire. — *Story v. Concord, etc., R. Co.*, 70 N. H. 364.

Ohio. — *Davis v. State*, 10 Ohio Cir. Dec. 738.

Texas. — *Morris v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 531; *Spangler v. State*, (Tex. Crim. 1900) 61 S. W. Rep.

754. When Too Late. — See note 2.

755. See notes 1, 2, 4, 5.

314; *Gonzales v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 667; *Castlin v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 827; *Howell v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 835; *Wilkerson v. State*, (Tex. Crim. 1899) 57 S. W. Rep. 956; *Gulf, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1897) 42 S. W. Rep. 504; *Harvey v. State*, 35 Tex. Crim. 545.

Utah. — *State v. Spencer*, 15 Utah 149.

West Virginia. — *State v. Johnson*, 49 W. Va. 684.

United States. — *Shelp v. U. S.*, (C. C. A.) 81 Fed. Rep. 604.

Request for Instructions to Disregard — *Texas*. — *Trotter v. State*, 37 Tex. Crim. 468; *Hodge v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 242; *Wilborn v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1058; *Pearl v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 1013; *Wall v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 1062; *Tellis v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 717; *Smith v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 101; *Brown v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 131; *Robinson v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 811; *Renfro v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 1013; *Squires v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 770; *Johnson v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 105; *Logan v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 694; *Brown v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 354; *Adler v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 358; *Randolph v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 591; *Pennington v. State*, (Tex. Crim. 1898) 48 S. W. Rep. 507; *Spillman v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 150; *Greenwood v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 177; *Taylor v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 285; *Stewart v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 499; *Matthews v. State*, (Tex. Crim. 1896) 38 S. W. Rep. 172; *Gallihar v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 329; *Gaines v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 331; *Jackson v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 430; *Boutwell v. State*, (Tex. Crim. 1896) 35 S. W. Rep. 376; *Othold v. State*, (Tex. Crim. 1896) 33 S. W. Rep. 1084; *Exon v. State*, (Tex. Crim. 1895) 33 S. W. Rep. 336; *Hines v. State*, (Tex. Crim. 1895) 32 S. W. Rep. 701; *Sebastian v. State*, 41 Tex. Crim. 248;

Hamilton v. State, 41 Tex. Crim. 599; *Morrison v. State*, 40 Tex. Crim. 473; *Monticue v. State*, 40 Tex. Crim. 528; *Byrd v. State*, 39 Tex. Crim. 609; *Franklin v. State*, 38 Tex. Crim. 346; *Penn v. State*, 36 Tex. Crim. 140; *Miller v. State*, 35 Tex. Crim. 209; *Morris v. State*, 35 Tex. Crim. 313.

Written Request Necessary. — *White's Annot. Code Crim. Pro. Tex.*, § 776, subdiv. 2; *Leggett v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 516. See also *Miles v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 912; *Duckworth v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 874; *Webb v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 82; *Carroll v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 99; *Patterson v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 59; *Jones v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 585; *Bailey v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 708; *Masterson v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 279; *Hogan v. Missouri, etc., R. Co.*, 88 Tex. 679; *Warthan v. State*, 41 Tex. Crim. 385; *Levine v. State*, 35 Tex. Crim. 647.

Refusal of Instructions. — *Young v. State*, 41 Tex. Crim. 442, wherein the refusal was held to be error. But see *Clark v. State*, 40 Tex. Crim. 127, wherein there was no error.

Silence of Court on Objection Equivalent to Adverse Ruling. — *Hayes v. Smith*, 8 Ohio Cir. Dec. 92.

754. 2. *Rothwell v. Elliott*, 2 Marv. (Del.) 151; *Portland Gold Min. Co. v. Flaherty*, (C. C. A.) 111 Fed. Rep. 312. Compare *Ethridge v. State*, 124 Ala. 106.

755. 1. *State v. Spencer*, 15 Utah 149.

2. *Kearney v. State*, 101 Ga. 803.

4. *Palmer Mfg. Co. v. Drewry*, 113 Ga. 366; *Bias v. U. S.*, (Indian Ter. 1899) 53 S. W. Rep. 471; *Johnson v. Com.*, (Ky. 1900) 55 S. W. Rep. 437; *Bokenfohr v. Bush*, 117 Mich. 444; *Harvey v. State*, 35 Tex. Crim. 545; *State v. Dickey*, 48 W. Va. 325. But see *contra*, *Gawn v. State*, 7 Ohio Cir. Dec. 19.

5. *People v. Kramer*, 117 Cal. 647; *Ferguson v. Moore*, 98 Tenn. 342.

Effect of Absence of Trial Judge. — It has been held that there was no reversible error. *Rowe v. People*, 26 Colo. 542; *Schintz v. People*, 178 Ill. 320. See also *Shelbyville, etc., Turn-*

755. 4. Exceptions and Bills of Exceptions. — See note 6.

pike Co. v. Louisville, etc., R. Co., (Ky. 1899) 51 S. W. Rep. 805.

755. 8. Alabama.—Louisville, etc., R. Co. v. Sullivan Timber Co., 126 Ala. 104. See also Nuckols v. State, 109 Ala. 2.

California.—People v. Brittan, 118 Cal. 409; People v. Kramer, 117 Cal. 647.

Colorado.—Corbin v. Dunklee, 14 Colo. App. 337; Ames v. Patridge, 13 Colo. App. 407; Schmidt v. Denver First Nat. Bank, 10 Colo. App. 261.

Delaware.—Rothwell v. Elliott, 2 Marv. (Del.) 151.

Florida.—Michael v. State, 40 Fla. 265; Driggers v. State, 38 Fla. 7.

Georgia.—Ivey v. State, 113 Ga. 1062; Palmer Mfg. Co. v. Drewry, 113 Ga. 366; Herndon v. State, 111 Ga. 178; O'Neill Mfg. Co. v. Pruitt, 110 Ga. 577; Bridges v. State, 110 Ga. 246; Atlanta Consol. St. R. Co. v. Bagwell, 107 Ga. 157; Bowers v. State, 106 Ga. 760; Hudson v. State, 101 Ga. 520; Western, etc., R. Co. v. Ledbetter, 99 Ga. 318; McLean v. Camak, 97 Ga. 804. Compare Knox v. State, 112 Ga. 373.

Illinois.—Collins v. People, 194 Ill. 506; Salem v. Webster, 192 Ill. 369; Chicago, etc., R. Co. v. Cleminger, 178 Ill. 536; North Chicago St. R. Co. v. Leonard, 167 Ill. 618; Lyon v. Hammond, etc., R. Co., 167 Ill. 527; Lancashire Ins. Co. v. Corbetta, 165 Ill. 592; West Chicago St. R. Co. v. Annis, 165 Ill. 475; West Chicago St. R. Co. v. Sullivan, 165 Ill. 304; Pennsylvania Co. v. Greso, 79 Ill. App. 127; Illinois Cent. R. Co. v. Beebe, 69 Ill. App. 363, *affirmed* 174 Ill. 13; Chicago Trust, etc., Bank v. Landfield, 73 Ill. App. 173; Harms v. Steir, 67 Ill. App. 634; Chicago, etc., R. Co. v. Smedley, 65 Ill. App. 644.

Indiana.—Blume v. State, 154 Ind. 343; Robb v. State, 144 Ind. 569; Cromer v. State, 21 Ind. App. 502; Louisville, etc., R. Co. v. Norman, 17 Ind. App. 355. See also Shenkenberger v. State, 154 Ind. 630; Dehler v. State, 22 Ind. App. 383; Lake Erie, etc., R. Co. v. Rooker, 13 Ind. App. 600.

Iowa.—State v. Hutchinson, 95 Iowa 566.

Kansas.—Branner v. Nichols, 61 Kan. 356; State v. Stockman, 9 Kan. App. 888, 58 Pac. Rep. 1006; Fish-

Keck Co. v. Redlon, 7 Kan. App. 93; Cone v. Smyth, 3 Kan. App. 607.

Kentucky.—Johnson v. Com., (Ky. 1900) 55 S. W. Rep. 437; Louisville, etc., R. Co. v. McEwan, (Ky. 1899) 51 S. W. Rep. 619; Cardwell v. Com., (Ky. 1898) 46 S. W. Rep. 705.

Massachusetts.—Com. v. McConnell, 162 Mass. 499.

Michigan.—Miller v. Lachman, 117 Mich. 68; Munroe v. Godkin, 111 Mich. 183; People v. Pope, 108 Mich. 361. See also People v. Swartz, 118 Mich. 292.

Missouri.—State v. Armstrong, 167 Mo. 257; Norris v. Whyte, 158 Mo. 20; State v. Holloway, 156 Mo. 222; Casey v. Gill, 154 Mo. 181; State v. Williams, 147 Mo. 14; State v. Schmidt, 137 Mo. 266; State v. Hilsabeck, 132 Mo. 348; Rose v. McCook, 70 Mo. App. 183.

Montana.—State v. Stevenson, 26 Mont. 332; State v. Bloor, 20 Mont. 574; State v. Biggerstaff, 17 Mont. 510.

Nebraska.—Chicago, etc., R. Co. v. Kellogg, 55 Neb. 748 [*quoting* 2 ENCYC. OF PL. AND PR. 755]; Chicago, etc., R. Co. v. Kellogg, 54 Neb. 127; Golder v. Lund, 50 Neb. 867.

New York.—McFadden v. Morning Journal Assoc., 28 N. Y. App. Div. 508.

North Carolina.—State v. Kinsauls, 126 N. Car. 1095.

Ohio.—Davis v. State, 10 Ohio Cir. Dec. 738. Compare Gawn v. State, 7 Ohio Cir. Dec. 19; Pittsburg, etc., R. Co. v. Martin, 3 Ohio Dec. 493.

Oregon.—Watson v. Southern Oregon Co., 39 Oregon 481.

Pennsylvania.—Sheehan v. Rosen, 12 Pa. Super. Ct. 298.

Tennessee.—Morgan v. Duffy, 94 Tenn. 686.

Texas.—Robinson v. State, (Tex. Crim. 1900) 57 S. W. Rep. 811; Tyler Chair, etc., Works v. St. Louis Southwestern R. Co., (Tex. Civ. App. 1900) 55 S. W. Rep. 350; Adler v. State, (Tex. Crim. 1899) 50 S. W. Rep. 358; Randolph v. State, (Tex. Crim. 1899) 49 S. W. Rep. 591; Steinhauser v. State, (Tex. Crim. 1898) 48 S. W. Rep. 506; Bailey v. State, (Tex. Crim. 1898) 45 S. W. Rep. 708; Smith v. State, (Tex. Crim. 1898) 44 S. W. Rep. 1090; Stewart v. State, (Tex. Crim. 1897) 40 S. W. Rep. 499; Jackson v. State, (Tex. Crim. 1896) 37 S. W. Rep. 430; Galliher v. State, (Tex. Crim. 1896) 37 S.

757. See note 1.

758. See note 1.

759. XVI. AMICUS CURIE — How Far Recognized. — See note 1.
See also FRIEND OF THE COURT.

W. Rep. 329; *Epson v. State*, (Tex. Crim. 1896) 36 S. W. Rep. 584; *Masterson v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 279; *Othold v. State*, (Tex. Crim. 1896) 33 S. W. Rep. 1084; *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579; *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93; *Gulf, etc., R. Co. v. Hockaday*, 14 Tex. Civ. App. 613; *Penn v. State*, 36 Tex. Crim. 140; *Harvey v. State*, 35 Tex. Crim. 545. See also *Lewis v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 240; *Mott v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 368. See *contra*, *Whitsides v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1016; *Anderson v. State*, 39 Tex. Crim. 34.

Vermont. — *Baker v. Sherman*, 71 Vt. 439.

Washington. — *State v. McCann*, 16 Wash. 249.

West Virginia. — *State v. Dickey*, 48 W. Va. 325.

Wisconsin. — *Hacker v. Heiney*, 111 Wis. 313; *Mayer v. Milwaukee St. R. Co.*, 90 Wis. 522.

United States. — *Portland Gold Min. Co. v. Flaherty*, (C. C. A.) 111 Fed. Rep. 312; *Shelp v. U. S.*, (C. C. A.) 81 Fed. Rep. 694.

Necessity for Motion for New Trial. — In *Missouri* the record must show that misconduct was made to appear on the hearing of a motion for a new trial. *State v. Brown*, 168 Mo. 449; *State v. Armstrong*, 167 Mo. 257; *Hamman v. Central Coal, etc., Co.*, 156 Mo. 232; *State v. Rufus*, 149 Mo. 406; *State v. Taylor*, 134 Mo. 109; *Rose v. McCook*, 70 Mo. App. 183.

Estoppel to Make Objection. — A party cannot complain of a ruling in accordance with his request. *Swift v. Rut-*

kowski, 182 Ill. 18; *Illinois Cent. R. Co. v. Beebe*, 174 Ill. 13; *North Chicago St. R. Co. v. Shreve*, 171 Ill. 438; *Pike v. Chicago*, 155 Ill. 656; *Drown v. Hamilton*, 68 N. H. 23.

757. 1. *Reed v. State*, 147 Ind. 41; *Robb v. State*, 144 Ind. 569; *State v. Helm*, 97 Iowa 378; *State v. Hutchinson*, 95 Iowa 566; *Alexander v. Meneff*, (Ky. 1901) 64 S. W. Rep. 855; *Hacker v. Heiney*, 111 Wis. 313. See also *Norris v. Whyte*, 158 Mo. 20; *State v. Johnson*, 129 Mo. 26.

Ex Parte Affidavits. — In *Kansas* under Gen. Stat. Kan. (1897), c. 95, §§ 316, 319 (Gen. Stat. 1899, §§ 4569, 4572), such matters must be sustained by affidavits showing the alleged charge to be true. *Bell v. Day*, 9 Kan. App. 111.

758. 1. *Reed v. State*, 147 Ind. 41; *Parrott v. Com.*, (Ky. 1898) 47 S. W. Rep. 452; *Brown v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 354; *Ball v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 753; *Penn v. State*, 36 Tex. Crim. 140; *Wood v. Agostines*, 72 Vt. 51; *State v. Mooney*, 49 W. Va. 712; *State v. Johnson*, 49 W. Va. 684. See also *State v. Williams*, 147 Mo. 14; *Boyden v. Fitchburg R. Co.*, 72 Vt. 89.

759. 1. In *Boyd v. Brazil Block Coal Co.*, 152 Ind. 543, citing 2 ENCYC. OF PL. AND PR. 758, 759, it was held that the constitutionality of a statute is not "duly presented" within the meaning of *Burns's Annot. Stat. Ind.* (1894), § 1336, so as to give jurisdiction to the Supreme Court and require a cause to be transferred from the appellate court, where the constitutionality is not raised except in a brief on appeal filed by an *amicus curia*.

ARRAIGNMENT AND PLEA.

761. I. ARRAIGNMENT — 1. Necessity — a. GENERALLY — Felonies. — See note 5.

762. See note 1.

Misdemeanor. — See note 3.

763. See note 1.

b. NEW TRIAL. — See note 2.

764. c. CHANGE OF VENUE. — See note 1.

3. Waiver. — See notes 3, 4, 5.

4. Time — Copy of Indictment. — See note 6.

766. Within What Time. — See note 1.

761. 5. Hendrickson v. Com., 23 Ky. L. Rep. 1191; 64 S.W. Rep. 954.

Amended Information. — *State v. Hoffman*, 70 Mo. App. 271; *Barker v. State*, 54 Neb. 53. But see *contra*, *Territory v. Marshall*, 13 Hawaii 76, where there was an amendment in a mere matter of form.

762. 1. State v. Llewellyn, 93 Mo. App. 469; *State v. Hopper*, 142 Mo. 478.

Motion for New Trial — Indiana. — *Winslow v. Greene*, 155 Ind. 368.

3. South Carolina. — *State v. Brock*, 61 S. Car. 141, holding that in misdemeanor cases no arraignment is necessary.

In *Kentucky and Tennessee* no arraignment is necessary except in felony cases. *Griffin v. Com.*, 23 Ky. L. Rep. 2148, 66 S.W. Rep. 740; *Lynch v. State*, 99 Tenn. 124.

763. 1. Arraignment Not Indispensable. — *Salfner v. State*, 84 Md. 299.

2. U. S. v. McKnight, 112 Fed. Rep. 982, *quoting* 2 ENCYC. OF PL. AND PR. 771; *Bradham v. State*, 41 Fla. 541; *State v. Tate*, 156 Mo. 119.

Where Copy Is Supplied for Lost Indictment. — In *McGuire v. State*, 76 Miss. 512 [*citing* with approval 2 ENCYC. OF PL. AND PR. 771], it was held that where the defendant had been arraigned and pleaded to an indictment on a former trial and such indictment was lost and the second trial was had on a copy of the original indictment, no second arraignment or plea was necessary.

Appeal. — *Poole v. People*, 24 Colo. 510.

764. 1. State v. Good, 132 Mo. 114; *Sims v. State*, 36 Tex. Crim. 154.

Double Arraignment. — *Meyers v. State*, 37 Tex. Crim. 208.

3. Felony. — *State v. McMichael*, 50 La. Ann. 428, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 762.

4. Expressly Waiving Arraignment — Consequences. — *Tarver v. State*, 95 Ga. 222, holding that waiver of arraignment in a felony case and entry by the solicitor-general upon the indictment of a plea of not guilty for the accused make the issue complete. See *infra*, III. 2. *Record Showing Plea*.

5. Pleading — Trial. — *State v. Brock*, 61 S. Car. 141 [*citing* with approval 2 ENCYC. OF PL. AND PR. 761, 762]; *Meyers v. State*, 156 Ind. 389; *State v. Thompson*, 95 Iowa 464; *Gaines v. U. S.*, 1 Indian Ter. 296; *State v. Weeden*, 133 Mo. 70; *Jones v. Territory*, 5 Okla. 536; *State v. Straub*, 16 Wash. 111.

6. Illinois — Minor May Waive Copy. — In a criminal case a minor may waive a copy of the indictment, and list of witnesses and jurors, there being no difference between proceedings against infants and adults. *Bartley v. People*, 156 Ill. 234.

766. 1. Lapse of Three Terms Without Arraignment. — When the state fails to arraign a prisoner for more than three terms, an order for dismissal will be sustained when the only excuse was that the prosecuting attorney and the sheriff had heard that the defendant had left the state. *State v. Radovich*, 66 Minn. 294.

Texas Statute. — Under Code Crim.

766. Should Precede Impanelling of Jury. — See note 3.

767. 5. Mode — *a.* IN GENERAL — Right to Counsel. — See note 3.

769. *f.* READING INDICTMENT. — See note 3.

770. II. PLEA — 1. Necessity — *a.* GENERALLY. — See note 4.

771. See note 1.

b. SECOND TRIAL. — See note 2.

772. 3. By Whom Made. — See note 5.

773. 4. Standing Mute. — See note 7.

Pro. Tex., art. 567, providing that in all cases the defendant shall be allowed two entire days after his arrest and during the term of court to file written pleadings, it was held to be reversible error for the court to refuse to postpone the case for two entire days after the information was filed. *Evans v. State*, 36 Tex. Crim. 32.

766. 3. Jury Reworn. — *Browning v. State*, 54 Neb. 203.

Arraignment After Jury Sworn Held Fatal Omission. — *Browning v. State*, 54 Neb. 203.

Setting Aside Verdict. — In *Utterback v. Com.*, 105 Ky. 723, where the indictment was not read until after the trial had begun, and the defendant's attorney pleaded not guilty for him, at that time, and in his presence, and agreed that the witnesses should not be re-examined, it was held that the arraignment and plea were valid.

767. 3. Reversible Error. — *State v. Moore*, 61 Kan. 732, holding that where the defendant was brought into court, and arraigned and required to plead, and pleaded not guilty to the indictment, in the absence of his counsel, who lived in another county, and who was notified by the prosecuting attorney that the trial would not be had until the day after the defendant was so arraigned and required to plead, the error was fatal.

769. 3. *Hendrickson v. Com.*, 23 Ky. L. Rep. 1191, 64 S. W. Rep. 954, wherein it was held that the requirements of *Bullitt's Crim. Code Ky.* (1895), § 219, that the clerk or commonwealth's attorney shall read the indictment to the jury and state defendant's plea, is preemptory and must be complied with.

In *Utterback v. Com.*, 105 Ky. 723, the reading of the indictment by the commonwealth's attorney was held to be a substantial compliance with *Bullitt's Crim. Code Ky.* (1895), §§ 154,

155, requiring the clerk to read the indictment.

Waiver of Right to Hear Indictment Read. — The defendants upon being arraigned may waive the reading of parts of the indictment. *Gardes v. U. S.*, (C. C. A.) 87 Fed. Rep. 172.

Voluntary Pleading. — When one pleads guilty to an oral charge of intoxication before a police justice, he waives the provision of *Code Crim. Pro. N. Y.*, § 699, requiring that the charge be read to him. *People v. Carter*, 88 Hun (N. Y.) 304.

770. 4. Misdemeanor. — It is indispensable that a plea be entered to the indictment or that the record show a waiver thereof. *Payne v. Com.*, (Ky. 1895) 30 S. W. Rep. 416; *Salfner v. State*, 84 Md. 299; *Lynch v. State*, 99 Tenn. 124.

Waiver of Plea. — *Jones v. Territory*, 5 Okla. 536; *State v. Straub*, 16 Wash. 111.

771. 1. *State v. Baker*, 57 Kan. 541.

2. *McGuire v. State*, 76 Miss. 512 [citing 2 ENCYC. OF PL. AND PR. 771]; *Territory v. Marshall*, 13 Hawaii 76; *Cline v. State*, 25 Ind. App. 331.

772. 5. Sufficiency of Defendant's Acquiescence in Plea. — Where the defendant, in response to a question as to whether he desired to substitute a plea of guilty to murder in the second degree for his plea of not guilty to murder in the first degree, nodded his head, indicating such a desire, the evidence having been sufficient to convict of murder in the second degree, he cannot be heard to say that the plea was invalid because he did not plead orally. *State v. Blake*, 5 Wyo. 107.

773. 7. *People v. Emerson*, 130 Cal. 562; *State v. Thompson*, 95 Iowa 464; *Gonzales v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 1018. See also *Mooney v. People*, 96 Ill. App. 622, holding that the rule is applicable in bastardy proceedings.

774. 5. Admissions and Waiver by Plea. — See notes 1, 3.

775. 6. Withdrawal and Substitution of Plea. — *a.* GENERALLY. — See note 3.

778. *d.* WHEN ALLOWED. — See note 2.

Demurrer Overruled. — Provisional Government *v.* Hering, 9 Hawaii 181; Republic of Hawaii *v.* Oishi, 9 Hawaii 641.

Montana Statute. — Where the defendant refuses to plead to any charge in the information, and the court orders a plea of not guilty entered "to all charges contained in said information," there is a substantial compliance with Annot. Codes Mont., § 1948, providing that "if the defendant refuses to answer the indictment or information by demurrer or plea, a plea of not guilty must be entered." State *v.* Clancy, 20 Mont. 498.

Washington Statute. — Where the demurrer is overruled and the defendant refuses to plead further, under 2 Ball. Annot. Codes & Stat. Wash. (1897), § 6898, judgment may be rendered against him on the demurrer. State *v.* Harding, 20 Wash. 556.

774 1. People *v.* Emerson, 130 Cal. 562; Gilmore *v.* People, 87 Ill. App. 128; Com. *v.* Hazlett, 16 Pa. Super. Ct. 534.

3. Objections to Indictment or Information. — Questions as to the sufficiency of the information cannot be raised by a motion to exclude testimony while a plea of not guilty is pending. State *v.* Blanchard, 11 Wash. 116.

Change of Venue After Plea of Not Guilty. — In State *v.* Merrick, 101 Wis. 162, it was held that under Stat. Wis., § 4744, which provides for changes of venue in justices' courts in criminal cases, where the defendant pleads not guilty to the complaint he cannot afterwards take a change of venue, and a withdrawal of such plea does not revive his right to the change.

In Moore *v.* Com., (Ky. 1895) 35 S. W. Rep. 283, it was held that under Bullitt's Crim. Code Ky. (1895), § 157, requiring the defendant either to move to set aside the indictment or plead thereto, a motion to set aside the indictment for want of certainty after pleading not guilty and after the state has concluded its testimony, will not be entertained.

Verification. — State *v.* McCaffery, 16 Mont. 36.

Jurisdiction. — Like any other special

plea in a criminal case, a plea to the jurisdiction must precede the plea of not guilty. State *v.* Watson, 20 R. I. 354.

Irregularities in the Process. — Ryan *v.* State, 83 Wis. 486.

Plea in Abatement. — State *v.* Boyd, 56 S. Car. 382 [citing 9 AM. AND ENG. ENCYC. OF LAW 12, 2 ENCYC. OF PL. AND PR. 775, 10 ENCYC. OF PL. AND PR. 570]; holding that a plea of not guilty in a criminal charge is a waiver of the right to plead in abatement or move to quash for disqualification of a grand juror. See also to the same effect Thompson *v.* State, (Tex. Crim. 1901) 62 S. W. Rep. 919.

775. 3. Peters *v.* Koepke, 156 Ind. 35; Meyers *v.* State, 156 Ind. 388; State *v.* Jammerson, 49 La. Ann. 597; Clark *v.* State, 57 N. J. L. 489, 58 N. J. L. 383; People *v.* Doyle, 11 N. Y. App. Div. 447; Com. *v.* Stephenson, 9 Kulp (Pa.) 561; Com. *v.* Joyce, 7 Pa. Dist. 400; Reed *v.* Com., 98 Va. 817.

Not Guilty and Plea in Abatement. — Crawford *v.* State, 112 Ala. 1; Knight *v.* State, (Fla. 1902) 32 So. Rep. 110; Territory *v.* Barrett, 8 N. Mex. 70.

Matter in Abatement Must Be True and Valid. — Purvis *v.* State, 71 Miss. 706.

In Appellate Court. — State *v.* Martin, 68 Vt. 91.

Presumption as to Withdrawal. — Where defendant, charged in two counts with stealing and with receiving stolen goods, was convicted of the latter charge and sentenced, and on a new trial, having pleaded in bar of the former charge without withdrawing his plea of not guilty, was again convicted, it was held that the plea of not guilty was constructively withdrawn, and that the court had a right to consider the plea in bar. George *v.* State, 59 Neb. 163; Cline *v.* State, 25 Ind. App. 331; Tandy *v.* State, 94 Wis. 498.

778. 2. Deloach *v.* State, 77 Miss. 691.

Motion to Quash. — State *v.* Van Nice, 7 S. Dak. 104, holding that refusal to allow a plea of not guilty to be withdrawn for the purpose of moving to quash is reversible error where it

- 779.** *a.* EFFECT OF WITHDRAWAL. — See note 5.
7. Plea of Guilty — *a.* WHAT IT AMOUNTS TO. — See note 6.
780. See note 1.
781. *b.* HOW MADE AND ACCEPTED. — See note 2.
782. See note 1.
c. EFFECT — JUDGMENT. — See notes 3, 4.

appears that the defendant was prejudiced.

It is not an abuse of discretion to refuse leave to withdraw a plea of guilty for the purpose of moving to quash on the ground that two of the grand jurors were aliens. *State v. Arbes*, 70 Minn. 462; *Com. v. Eagan*, 190 Pa. St. 10.

Second Withdrawal. — Where the defendant pleads not guilty and advisedly withdraws that plea and pleads guilty and upon the evidence being heard is adjudged guilty, it is not an abuse of discretion to refuse to allow him to withdraw his plea of guilty and again plead not guilty, it appearing that he has no defense. *People v. Miller*, 114 Cal. 10.

779. 5. Plea Considered Re-entered. — *Wheeler v. State*, (Ind. 1902) 63 N. E. Rep. 975; *Arbuckle v. State*, 80 Miss. 15; *Lanphere v. State*, 114 Wis. 193.

6. State v. Crusius, 57 N. J. L. 279, holding that a plea of guilty conclusively establishes the truth of the indictment, so far as the legal propriety of conviction is concerned, and that there is nothing to justify a statement or an investigation of facts for the purpose of ascertaining whether the defendant ought to be convicted or not.

What Confessed by Plea of Guilty — Violation of City Ordinance. — On a prosecution for violating an ordinance the defendant, notwithstanding a plea of guilty, may attack the sufficiency of the complaint, the validity of the ordinance under which it was drawn, and the power of the municipal corporation to pass such ordinance. *Akerman v. Lima*, 8 Ohio Dec. 430, 7 Ohio N. P. 92; *Grossman v. Oakland*, 30 Oregon 478.

A Submission of the Law and the Facts to the court is not equivalent to a plea of guilty. *Bailey v. Com.*, 23 Ky. L. Rep. 1223, 64 S. W. Rep. 995.

780. 1. Defective Averment. — Under Comp. Laws Hawaii, § 33, all objections to an indictment that are apparent on the face thereof must be made

before plea, and a defendant cannot after pleading guilty object to the insufficiency of the indictment. *Republic of Hawaii v. Kanalo*, 11 Hawaii 435.

After a plea of not guilty and one trial the defendant cannot move to set aside the information, nor can the question as to its sufficiency be raised by motion in arrest. *State v. Kent*, 5 N. Dak. 516.

781. 2. Presumption as to Sanity — Texas. — *O'Brien v. State*, (Tex. Crim. 1896) 35 S. W. Rep. 666; *King v. State*, (Tex. Crim. 1898) 46 S. W. Rep. 813.

Plea Received at Chambers. — A judge may at chambers receive a plea of guilty in a felony case, and pass sentence at any place in his district, upon reasonable notice to the prosecuting attorney. *McCarty v. Hopkins*, 61 Neb. 550.

782. 1. Texas — Applies to Felonies Only. — *Johnson v. State*, 39 Tex. Crim. 625.

3. Lee v. McClelland, 157 Ind. 84; *West v. Gammon*, (C. C. A.) 98 Fed. Rep. 426.

4. Effect of Pleading Guilty Before Justice Selected by Defendant. — In *Crowder v. State*, 69 Ark. 330, it was held under Sand. & H. Dig. Stat. Ark., § 2343 *et seq.*, providing in substance that whoever shall commit a misdemeanor may submit his case to a justice of the peace of the township in which the offense occurred, and that upon his entering a plea of guilty a judgment of conviction shall be entered, which shall be a bar to another prosecution for the same offense, that where one voluntarily pleads guilty before a justice of the peace of a township other than the one in which the misdemeanor was committed, and is fined, such action will not bar further action in the same case in the township where the misdemeanor was committed.

Judgment Without Trial. — A plea of guilty is a confession of the charge, and judgment is rendered thereon without a trial of any issue of law or fact. *Meyers v. State*, 156 Ind. 388.

- 783.** See notes 1, 3.
d. APPEAL FROM JUDGMENT. — See note 4.
784. 8. Plea of Not Guilty or General Issue — *a.* GENERALLY.
 — See note 3.
785. *b.* DEFENSES UNDER NOT GUILTY. — See notes 1, 2.
Insanity. — See note 3.
786. *c.* TRIAL. — See note 1.
d. SEVERAL PLEAS. — See note 4.
788. III. RECORD — 1. Must Show Arraignment and Plea. —
 See note 1.
789. See note 1.

783. 1. *Hawaii.* — Where defendants pleaded guilty to a criminal charge in the District Court of Honolulu and sentence was suspended with the understanding that if they should repeat the offense the sentence would be imposed, it was held that on their subsequent arrest for a similar offense it was not error for the court to pass sentence in the previous case without proof of the second offense. *Republic of Hawaii v. Friedenborg*, 9 *Hawaii* 626.

Illinois. — Where the defendant pleaded guilty to a charge of conspiracy and judgment thereon was stayed and he was allowed to go without recognizance to again appear for sentence or for any other purpose, it was held that the court thereby lost jurisdiction over the defendant and that the sentence three years afterwards on the plea was without judicial authority. *People v. Allen*, 155 *Ill.* 61.

3. *Colorado.* — In all cases where the court has any discretion as to the punishment to be inflicted, witnesses must be examined as to aggravating or mitigating circumstances. If the record fails to show that this was done, the judgment will be reversed. *Arrano v. People*, 24 *Colo.* 233.

Indiana. — A motion for a new trial is ineffectual, since there has been no trial; a motion to vacate the judgment may be made, after plea, and for leave to withdraw the plea. *Meyers v. State*, 156 *Ind.* 388.

4. In *Hawaii* appeals from the District Court to the Circuit Court for mitigation of punishment are allowed, notwithstanding a plea of guilty was made in the former court. *Provisional Government v. Mura o Hawaii* 428.

784. 3. Prior Conviction. — *People v. Kelly*, 120 *Cal.* 271; *People v. Mc-*

Neill, 118 *Cal.* 388; *People v. Eppinger*, 109 *Cal.* 294.

785. 1. *State v. Bailey*, 57 *Neb.* 204; *Keneval v. State*, 107 *Tenn.* 581.

2. *State v. Buchanan*, 130 *N. Car.* 660.

Statute of Limitations. — Under a plea of not guilty a defendant in a criminal case may take advantage of the statute of limitations. *Boughn v. State*, 44 *Neb.* 889.

3. *State v. Stubblefield*, 157 *Mo.* 360; *Stover v. Com.*, 92 *Va.* 780.

Georgia — *Contra.* — *Carr v. State*, 96 *Ga.* 285.

786. 1. *State v. Jackson*, 105 *La.* 436.

4. Trial on Both Pleas. — *State v. Reiman*, (Del. 1900) 50 *Atl. Rep.* 268; *State v. McCoy*, 111 *Mo.* 517.

788. 1. Arraignment and Plea. — *Arrano v. People*, 24 *Colo.* 233; *Wright v. People*, 22 *Colo.* 143; *Manhattan Oil Co. v. State*, 26 *Ind. App.* 693; *State v. Hubbell*, 55 *Mo. App.* 262; *Barker v. State*, 54 *Neb.* 53; *Crain v. U. S.*, 162 *U. S.* 625.

Plea. — *Tamplin v. State*, (Tex. Crim. 1895) 32 *S. W. Rep.* 542.

Waiving Arraignment, Etc. — *State v. Thompson*, 95 *Iowa* 464; *Shelp v. U. S.*, (C. C. A.) 81 *Fed. Rep.* 694.

Motion for New Trial. — *Meyers v. State*, 156 *Ind.* 388; *Griffin v. Com.*, 23 *Ky. L. Rep.* 2148, 66 *S. W. Rep.* 740.

Even when an Arraignment Is Not Necessary, the case not being a felony case, it is not ground for reversal that the record shows an arraignment when it also shows the entry of a plea and that the indictment was read to the jury. *Oliver v. State*, (Tex. Crim. 1897) 41 *S. W. Rep.* 623.

789. 1. *Wright v. People*, 22 *Colo.* 143.

Presumption of Regularity. — Where nothing appears to the contrary, it will

- 791.** 2. Record Showing Plea — Mode of Recording. — See note 1.
 3. Trial Without Objection. — See note 5.
792. 4. Felony Cases. — See notes 1, 2.
 5. Amendment of Record. — See note 3.

be inferred that a plea was properly entered. *Hinkle v. Com.*, 23 Ky. L. Rep. 1979, 66 S. W. Rep. 1020.

In Capital Cases. — The record need not show that the indictment was read; such fact is always presumed. *McGuire v. State*, 76 Miss. 504.

Record Paramount to Bill of Exceptions. — The record of an arraignment and plea must prevail over an affidavit to the contrary filed in support of a motion in arrest. *Gillespie v. People*, 176 Ill. 238.

791. 1. "Pleaded Not Guilty." — Where the record shows that the defendant "pleaded not guilty" instead of using the words "says he is not guilty," it is sufficient to sustain a conviction. *State v. Beatty*, 51 W. Va. 232.

Clerk's Journal Entry. — Where an entry of arraignment and plea is made by the judge, in a felony case, in his trial docket, but no record of said plea is made in the clerk's journal entry of the cause, a conviction will not be sustained. *Barker v. State*, 54 Neb. 53.

5. *State v. Reddington*, 7 S. Dak. 368.

Misdescription of Indictment. — Where the minutes show that the defendant was arraigned upon an information charging him with forgery, when in fact he was indicted for uttering a fictitious instrument, the error is harmless if it appears that a copy of the indictment was furnished him, and that,

being fully informed of the nature of the offense charged, he pleaded to it. *People v. Eppinger*, 109 Cal. 204.

Mississippi Statute. — Under Annot. Code Miss., § 4370, providing that no judgment in a criminal case shall be reversed because of any error or omission unless the record shows that such error or omission was made ground of special exception, when no objection is made in the court below to the failure of the record to show arraignment and plea of not guilty, the irregularity will not be regarded on appeal. *Arbuckle v. State*, 80 Miss. 15.

792. 1. *Tarver v. State*, 95 Ga. 222; *State v. Grassle*, 74 Mo. App. 313; *Lynch v. State*, 99 Tenn. 124; *State v. Allen*, 45 W. Va. 65.

Presence. — In a felony case, where the record shows that the defendant was regularly in court in person and by his counsel to answer an indictment charging him with murder, that he went to trial without objection, that the issue was submitted and the trial regularly had, it was not ground for reversal that he was not arraigned or that he did not plead to the indictment. *State v. Reddington*, 7 S. Dak. 368.

2. **Texas.** — *Coleman v. State*, 35 Tex. Crim. 404.

3. **Nunc pro Tunc Entry.** — *State v. Fiester*, 32 Oregon 254; *State v. Straub*, 16 Wash. 111.

ARREST OF JUDGMENT.

794. I. DEFINITION. — See note 1.

II. GROUNDS OF ARREST IN GENERAL — 1. Defects of Record. — See note 2.

795. See note 1.

796. 3. Substantial Errors. — See note 1.

797. III. DEFECTS AND IRREGULARITIES AS TO PARTIES — 1. Generally. — See note 2.

3. Misnomer. — See note 4.

798. IV. DEFECTIVE PLEADINGS — 1. Defective Statement of Cause of Action. — See note 2.

799. See note 1.

794. 1. *McDonald v. Algeo*, 96 Ill. App. 79, *citing* 2 ENCYC. OF PL. AND PR. 794.

2. *U. S. v. McKnight*, 112 Fed. Rep. 982, *citing* 2 ENCYC. OF PL. AND PR. 794. See also the following cases:

Colorado. — *Floyd v. Colorado Fuel, etc., Co.*, 10 Colo. App. 54.

Georgia. — *Regopoulos v. State*, 115 Ga. 232.

Illinois. — *Chicago City R. Co. v. Roach*, 180 Ill. 174.

Louisiana. — *State v. Colomb*, 108 La. 253.

Missouri. — *McGammon v. Millers' Nat. Ins. Co.*, (Mo. 1902) 71 S. W. Rep. 160; *McCarty v. O'Bryan*, 137 Mo. 584.

North Carolina. — *State v. Davis*, 126 N. Car. 1007; *State v. Jarvis*, 129 N. Car. 698.

Pennsylvania. — *Com. v. Duff*, 7 Pa. Super. Ct. 415.

Virginia. — *Virginia, etc., Coal, etc., Co. v. Fields*, 94 Va. 102.

Compare *State v. Hyde*, 22 Wash. 551.

"The Face of the Record" does not mean merely the face of the indictment. It embraces the record of the case as made up to that point. *State v. Haines*, 51 La. Ann. 731.

Necessity for Motion in Arrest. — See *Thillman v. Neal*, 88 Md. 525; *Standard Horse Shoe Co. v. O'Brien*, 88 Md. 335.

795. 1. *Brown v. St. Louis, etc., R. Co.*, 69 Mo. App. 418; *State v. Davis*, 126 N. Car. 1007.

796. 1. Fatal Defects in Indictment or Declaration. — *State v. Jones*, 168

Mo. 398; *State v. Wade*, 147 Mo. 73, which was an omission of conclusion from a count in the indictment.

Other Errors of Substance. — *Brown v. St. Louis, etc., R. Co.*, 69 Mo. App. 418.

797. 2. *Crouch v. Hance*, 62 Mo. App. 25; *Thompson v. Kimbrough*, 23 Tex. Civ. App. 350.

Nonjoinder of Joint Party. — In an action on a joint and several bond, it has been held that if only two of the three obligors are sued the defect can be taken advantage of by motion in arrest of judgment. *Scanlon v. People*, 95 Ill. App. 348.

Improper Substitution of Administrator as plaintiff, the order being contained in the common-law record, being reversible error, may be reached by motion in arrest. *McDonald v. Algeo*, 96 Ill. App. 79, *citing* 2 ENCYC. OF PL. AND PR. 794.

4. *State v. Valsin*, 47 La. Ann. 115.

798. 2. *Western Stone Co. v. Whalen*, 151 Ill. 472, 42 Am. St. Rep. 244.

799. 1. *People v. Wynn*, 133 Cal. 72, as to defects not affecting any substantial right of defendant; *People v. Taylor*, 119 Cal. 113, holding that the failure of an information to allege that the acts charged were done "contrary to the force and effect of the statute," etc., is in no sense jurisdictional, nor does it disclose a failure to state a public offense, which are the only grounds of a motion in arrest under the statute; *State v. Alcorn*, (Idaho

799. 2. No Substantial Cause of Action. — See note 2.

800. 3. Defective Counts in Declaration. — See note 2.

801. 4. Defective Counts in Indictment. — See note 1.

802. 5. Duplicity in Pleading. — See note 1. See also DUPLICITY.

6. Joinder of Counts and Causes of Action. — See notes 2, 3.

803. Counts Not Allowed to Be Joined. — See note 2.

804. V. DEFECTIVE VERDICT — 1. Not Conforming to Issue or Indictment. — See note 3.

1901) 64 Pac. Rep. 1014; *Campton v. State*, 140 Ind. 442; *Ellis v. State*, 141 Ind. 357; *State v. Peak*, 130 N. Car. 711; *Parrott v. Com.*, (Ky. 1898) 47 S. W. Rep. 452; *Justice v. Com.*, (Ky. 1898) 46 S. W. Rep. 499; *State v. Barnes*, 122 N. Car. 1031, under the code provision which forbids judgment to be arrested "by reason of any informality or refinement;" *Worthan v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 526; *U. S. v. Dimmick*, 112 Fed. Rep. 352; *U. S. v. McClure*, 107 Fed. Rep. 268, under statute curing defects of form.

Uncertainty in Indictment. — *Indefinite Description* of property cannot be objected to for the first time by motion in arrest. *Young v. People*, 193 Ill. 236; *State v. Perkins*, 49 La. Ann. 310. See also INDICTMENTS, INFORMATIONS, AND COMPLAINTS.

799. 2. Consolidated Canal Co. v. Peters, (Ariz. 1896) 46 Pac. Rep. 74; *Illinois Live Stock Ins. Co. v. Kirkpatrick*, 61 Ill. App. 74; *Lockhart v. Schlottelback*, 12 Ind. App. 683.

Action Prematurely Brought. — Where the statute provides that a particular action shall not be brought within a certain period, judgment, in an action commenced prematurely within the prohibited period, will be arrested, and it cannot be said that a party is required to plead or give notice of facts before verdict which he intends to use after verdict as the basis of a motion in arrest. *Woodcock v. Hawkeye Ins. Co.*, 97 Iowa 562.

Fact Essential to Cause of Action Omitted. — *Rabe v. Sommerbeck*, 94 Iowa 656; *Decatur v. Simpson*, 115 Iowa 343, in which cases the motion reaches the failure to aver want of negligence on plaintiff's part, in an action based upon negligence on the part of defendant; *Pleron v. Independent School Dist.*, 106 Iowa 695, as to averment of performance of condition precedent.

Indictment Based upon Unconstitutional Statutes. — If an indictment fails to charge an offense against law for the reason that the statute upon which it is based is unconstitutional, or for any other reason is not valid or subsisting law, such defect can be taken advantage of by motion in arrest of judgment after verdict. *Boswell v. State*, 114 Ga. 40; *Com. v. Hudusko*, 10 Pa. Dist. 230.

800. 2. Baltimore, etc., R. Co. v. Alsop, 176 Ill. 471; *Swift v. Fue*, 167 Ill. 443; *Gilmore v. Ward*, 22 Ind. App. 106; *Burrows v. Niblack*, 53 U. S. App. 712, as to rule in *Illinois*.

801. 1. Crook v. State, 39 Tex. Crim. 252; *State v. Smith*, 72 Vt. 366 [citing 2 ENCYC. OF PL. AND PR. 801]; *U. S. v. McClure*, 107 Fed. Rep. 268.

802. 1. State v. Wilson, 121 N. Car. 650, as to duplicity in indictment, to reach which motion to quash is the proper remedy.

2. Lead v. Klatt, 13 S. Dak. 140.

3. See Collins v. State, (Tex. Crim. 1897) 43 S. W. Rep. 90.

803. 2. Bull v. Mathews, 20 R. I. 100 [citing 2 ENCYC. OF PL. AND PR. 803]; *Dean v. Cass*, 73 Vt. 314.

Under the Statute of Amendments providing that no judgment shall be arrested for any "misleading," etc., the common-law rule that the misjoinder of counts may be taken advantage of by motion in arrest is not applicable. *Chicago, etc., R. Co. v. Murphy*, 193 Ill. 462.

804. 3. Contra. — *Ellis v. State*, 141 Ind. 357, holding that a motion in arrest should not be sustained merely on account of a defective verdict; that the only reasons given in the statute for arrest of judgment in a criminal case relate to the jurisdiction of the court and the sufficiency of the indictment or information to charge the defendant with a public offense,

805. VI. OBJECTIONS TO JURY — 1. Jury Illegally Constituted.
— See note 3.

806. 2. Irregularities in Summoning and Impaneling Jury. —
See note 1.

Juror Legally Disqualified. — See note 2.

807. 3. Misconduct on Part of Jury. — See note 1.

808. VII. JURISDICTION — 1. Over Subject-matter. — See
note 1.

809. VIII. INSUFFICIENT GROUNDS OF ARREST — 1. Generally
— **Formal Defects.** — See note 1.

810. Clerical Errors. — See note 1.

Defects Cured by Verdict. — See note 2.

Defects Waived by Going to Trial. — See note 3.

Inconsistency Between General Verdict and Special Findings does not justify the arrest of judgment, such a motion being available under the statute when the facts stated in the petition do not entitle plaintiff to any relief whatever. *Moffitt v. Albert*, 97 Iowa 213.

805. 3. Discrimination Against Negro. — *Davis v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 502, as to attack on constitution of grand jury by reason of alleged discrimination against defendant on account of his color, holding that the objection cannot be raised after trial by motion in arrest.

Challenge. — In *Barber v. State*, (Tex. Crim. 1898) 46 S. W. Rep. 233, it is held that under the statute providing that "any person, before the grand jury has been impaneled, may challenge the array of jurors, or any person presented as a grand juror, and in no other way shall objection to the qualifications and legality of the grand jury be heard," if the defendant fails to pursue such method he cannot afterwards complain.

806. 1. State v. Dickerson, 48 La. Ann. 308; *Mencheca v. State*, (Tex. Crim. 1894) 28 S. W. Rep. 203.

2. State v. Davis, 126 N. Car. 1007. As to grand juror, see *State v. Chevis*, 48 La. Ann. 575; *Territory v. Barrett*, 8 N. Mex. 70; *Hopkins v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 986, wherein it is held that such disqualification should be urged by challenge.

Prosecuting Witness on Grand Jury. — *Jones v. State*, 103 Ga. 552.

807. 1. U. S. v. McKnight, 112 Fed. Rep. 982.

808. 1. Skelton v. State, 149 Ind. 641; *Chicago, etc., R. Co. v. Wheeler*, 14 Ind. App. 62.

Wrong Venue. — Where the question touching the proper venue of the offense arises upon the evidence and not upon the record, it should be raised by motion for a new trial and not by motion in arrest. *State v. Wilson*, 66 Mo. App. 540.

809. 1. District of Columbia v. Eaton, 13 App. Cas. (D. C.) 182; *Charles County v. Mandanyohl*, 93 Md. 150, as to failure to enter a joinder of issue upon defendant's plea; *Williams v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 213.

810. 1. Amendable Defects in the Indictment are not good grounds in arrest of judgment. *State v. Lark*, 64 S. Car. 350.

2. Floyd v. Colorado Fuel, etc., Co., 10 Colo. App. 54; *Western Stone Co. v. Whalen*, 151 Ill. 472; *State v. Wilson*, 121 N. Car. 650.

Impossible Date of Offense. — If the time of the commission of the offense alleged is subsequent to the filing of the bill objection should be raised by special demurrer, and if not raised until by motion in arrest of judgment it comes too late. *Adkins v. State*, 103 Ga. 5, following former decisions in that state, but expressing dissatisfaction therewith.

3. Young v. People, 193 Ill. 236 [*cit- ing* 12 ENCYC. OF PL. AND PR. 798]; *Martin v. State*, 115 Ga. 255; *Skelton v. State*, 149 Ind. 641; *State v. Dickerson*, 48 La. Ann. 308; *Lead v. Klatt*, 13 S. Dak. 140; *Bonner v. State*, 38 Tex. Crim. 599; *Davis v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 502.

An Objection Available Only on Motion to Quash will not avail the defendant after trial on a motion in arrest of judgment, as an objection to an infor-

812. 3. Matters Dehors Record. — See note 1.

813. 4. Objections to Evidence. — See note 1.

mation for want of complaint on which to base it, *Jessel v. State* (Tex. Crim. 1900) 57 S. W. Rep. 826; or because distinct defenses are joined. *Collins v. State*, (Tex. Crim. 1897) 43 S. W. Rep. 90.

A Variance Between the Writ and the Declaration, which must be pleaded in abatement, cannot, after trial, be made the ground for a motion in arrest of judgment. *Swindell v. Harper*, 51 W. Va. 381.

Defense Waived by Failure to Plead. — A plea of a discharge in bankruptcy is an independent defense, and, if the condition exists before verdict, should be pleaded and cannot avail on a motion in arrest, the statute providing that a judgment cannot be arrested for any cause existing before verdict unless such cause affects the jurisdiction of the court. *Lane v. Holcomb*, (Mass. 1903) 65 N. E. Rep. 794.

812. 1. Taylor v. Corley, 113 Ala. 580; *Regopoulos v. State*, 115 Ga. 232, as to insufficiency of list of witnesses furnished accused; *State v. Ducote*, 47 La. Ann. 46; *State v. Valsin*, 47 La. Ann. 115; *State v. Patton*, 94 Mo. App. 32, wherein it is said that the court cannot receive evidence outside of the record on the hearing of such a motion; *State v. Wilson*, 66 Mo. App. 540; *State v. Furr*, 121 N. Car. 606; *Moore v. Cross*, 87 Tex. 557, holding that a motion which presents a question as to the sufficiency of a petition must be decided by the record of that pleading and not by the evidence introduced; *Hughes v. Frum*, 41 W. Va. 445; *Burrows v. Niblack*, 53 U. S. App. 712, holding that for the purposes of a motion in arrest the evidence is no part of the record.

Affidavit of Defendant. — Where the record shows that defendant was arraigned and pleaded, it must prevail over his affidavit filed in support of his motion in arrest that he had never been arraigned or pleaded to the indictment. *Gillespie v. People*, 176 Ill. 238.

Matter Proper for Plea in Abatement, which must be supported by evidence, is not the proper subject for a motion in arrest of judgment. *Hamilton v. State*, 97 Ga. 216.

A Refusal to Charge as requested is no

ground in arrest of judgment. *State v. Wilson*, 121 N. Car. 650.

Bill of Exceptions. — A motion in arrest of judgment, the ruling thereon, and the reservation of a question as to such ruling, cannot be presented on the appeal by a bill of exceptions, but must be shown by the record proper. *Durrett v. State*, 133 Ala. 119; *Hampton v. State*, 133 Ala. 180; *Taylor v. State*, 112 Ala. 69. Compare APPEALS, vol. 1, p. 273.

Illegal Proceedings of the Grand Jury in procuring evidence should be taken advantage of before trial, and cannot be urged in arrest of judgment, the statute prescribing only two grounds for such motion: first, that there is no legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court, and, second, that the facts stated do not constitute a crime or misdemeanor. *State v. Hyde*, 22 Wash. 551.

So where some of the testimony or some of the witnesses before the grand jury were incompetent, the court will not go into the barren question how far such testimony or such witnesses contributed to finding the bill, which is merely a charge, but will admit the competent witnesses or testimony before the petit jury, and if sufficient to satisfy the jury beyond a reasonable doubt of the prisoner's guilt the judgment will not be arrested, as the verdict establishes in a conclusive mode that the incompetent testimony was mere surplusage in making out a *prima facie* case before the grand jury. *State v. Coates*, 310 N. Car. 701.

Facts Contained in Affidavits. — Compare *Hatfield v. Cummings*, 152 Ind. 537.

Facts Admitted by Stipulation. — *State v. Crusius*, 57 N. J. L. 279.

813. 1. Sherwood v. State, 18 Ind. App. 260, holding that a motion based on the ground that the facts proved do not constitute offense presents no question for decision; *Montpelier, etc., R. Co. v. Macchi*, (Vt. 1902) 52 Atl. Rep. 960; *Clary v. Hardeeville Brick Co.*, 100 Fed. Rep. 915.

Variance Between Allegation and Proof cannot be made available as an objection by motion in arrest. *Jacobs v.*

813. 5. Irregularities at Trial. — See note 2.

814. IX. GROUNDS OF ARREST GOVERNED BY STATUTE. — See note 1.

816. X. THE MOTION — DECISION AND EFFECT — 1. How and When Made. — See notes 1, 3, 4.

817. When Made. — See notes 2, 4.

Marks, 183 Ill. 533; Donley v. Dougherty, 97 Ill. App. 544; Hughes v. Frum, 41 W. Va. 445.

No Evidence or Insufficient Evidence.

— An exception that there is no evidence to support the verdict or that there is not sufficient evidence to make out the offense cannot be presented by motion in arrest. Curry v. State, 120 Ala. 366; Floyd v. Colorado Fuel, etc., Co., 10 Colo. App. 54; State v. Jarvis, 129 N. Car. 698; State v. Wilson, 121 N. Car. 650; State v. Furr, 121 N. Car. 606.

813. 2. Arraignment After Jury Sworn.

— In Dansby v. U. S., 2 Indian Ter. 456, it is held that where the defendant is arraigned after the jury were sworn to try the case, and refuses to plead, judgment should be arrested.

Matter of Exception is not reached by motion in arrest, but only such matter as is part of the record proper. Elsenrath v. Kallmeyer, 61 Mo. App. 430; Barnard v. State, 88 Wis. 656, citing 12 Am. and Eng. Encyc. of Law 147b.

No Plea for Defendant in Criminal Case.

— Persefield v. People, 100 Ill. App. 488.

814. 1. California. — The grounds provided are exclusive. People v. Chaves, 122 Cal. 134; People v. Taylor, 119 Cal. 113.

Georgia. — The rule that nothing is good in arrest of judgment which does not arise from intrinsic causes appearing upon the face of the record is recognized by express provision of statute declaring that the motion in arrest must be predicated upon some defect which appears on the face of the record or pleadings. Washington v. Calhoun, 103 Ga. 675.

Kansas. — Emporia v. Haussler, 6 Kan. App. 747, overruling a motion not based on one of the statutory grounds.

In Massachusetts the statute provides that a judgment shall not be arrested for a cause existing before the verdict, unless such cause affects the jurisdiction of the court. Lane v. Holcomb, (Mass. 1903) 65 N. E. Rep. 794; Dean v. Ross, 178 Mass. 397; Com. v. Monahan, 170 Mass. 460, holding grounds

relating to the sufficiency of the indictment not available.

New York. — See People v. Cox, 67 N. Y. App. Div. 344.

South Carolina. — The purpose and effect of the code provision requiring objections to an indictment for any defect apparent on its face to be taken by demurrer or motion to quash, before the jury shall be sworn, are to prevent motions to arrest judgment on grounds based upon such defects in the indictment. State v. Lark, 64 S. Car. 350.

Washington. — Two grounds are prescribed in a criminal case: first, that there is no legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court; second, that the facts stated do not constitute a crime or misdemeanor. State v. Hyde, 22 Wash. 551.

816. 1. Motion for Judgment Non Obstante. — Where a defendant moves for judgment *non obstante*, but one of the reasons which he assigns is, if sustainable, sufficient to arrest the judgment, the motion may well be treated as a motion in arrest, which it is in substance. Trow v. Thomas, 70 Vt. 580.

3. State v. Bouline, 107 La. 454.

That an Indictment Charges No Offense is no reason for granting a new trial, and a motion for a new trial will not be treated as a motion in arrest. Martin v. State, 115 Ga. 255; Boswell v. State, 114 Ga. 40.

4. Causes Specified in Writing. —

Under the statute in *Indiana* a motion in arrest must be in writing and must state the causes relied on. Nichols v. State, 28 Ind. App. 674.

But before this it was held that the motion need not be in writing or specify the causes. Chicago, etc., R. Co. v. Wheeler, 14 Ind. App. 62.

817. 2. People v. Walker, 132 Cal. 137; Donley v. Dougherty, 97 Ill. App. 544, as to motions made at a term subsequent to that at which judgment was rendered; Smith v. State, 140 Ind. 343; Woodcock v. Hawkeye Ins. Co., 97 Iowa 562.

818. [Sometimes the statute allows the motion to be filed within a certain number of days after the determination of a motion for a new trial. See note 2a.]

2. As Waiver of Motion for New Trial. — See note 3.

3. After Overruling Demurrer. — See note 4.

819. 4. How Determined. — See note 1.

Special Findings on the Last Day of the Term. — And the fact that special findings and conclusions of law were entered on record on the last day of the term and judgment was rendered on the same day, did not necessarily prevent filing of the motion in arrest of judgment. *Wheeler v. Rohrer*, 21 Ind. App. 477.

Between Verdict and Sentence. — The motion in arrest comes properly between the verdict and the judgment pronouncing sentence. *Hampton v. State*, 133 Ala. 180; *Sanders v. State*, 129 Ala. 69.

On Second Trial. — Where on the first trial the jury failed to agree, a motion in arrest after verdict on a second trial is not too late. *State v. Feamster*, 12 Wash. 461.

817. 4. Compare *Lee v. Wilkins*, 79 Mo. App. 159.

Construction of Statute. — In *Rhode Island* it was held that upon filing a motion in arrest of judgment within five days, as prescribed by the statute, the clerk of the Common Pleas should certify the papers to the appellate division of the Supreme Court; that other provisions of the statute relating to petitions for a new trial were not applicable to motions in arrest, and that the provision that such motion "in other respects shall follow the same course as claims for new trials on questions arising on the record," etc., meant that such motion should follow the same course as claims for new trials as far as applicable; that the motion in arrest itself specified the grounds relied on, and the provisions of the statute relating to notice of intention to apply for a new trial and to the time of filing grounds relied on for new trial have no application. *Lodge v. O'Toole*, 20 R. I. 300.

818. 2a. State v. Gates, 130 Mo. 351, holding, however, that the correctness of a ruling refusing to allow the filing of a motion in arrest cannot be investigated, where the motion is not preserved in the record.

3. Wheeler v. Rohrer, 21 Ind. App. 477, unless the grounds of the motion

for a new trial are unknown at the time the motion in arrest is made; *Willard v. Albertson*, 23 Ind. App. 166.

Simultaneous Motions. — If the motions for a new trial and in arrest of judgment are simultaneous and disposed of at the same time and in one judgment, the motion in arrest cannot be regarded as an admission that the verdict is unobjectionable. *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689.

4. Chicago v. Smith, 95 Ill. App. 335; *Chicago, etc., R. Co. v. Pearson*, 82 Ill. App. 605, *affirmed* 184 Ill. 386; *Bloomington v. Winslow*, 71 Ill. App. 340; *Chicago, etc., R. Co. v. Clausen*, 70 Ill. App. 550, *affirmed* 173 Ill. 100; *Crown Coal, etc., Co. v. Yoch Coal Min. Co.*, 57 Ill. App. 666.

Contra. — *Decatur v. Simpson*, 115 Iowa 348, under statute.

Defective Complaint. — *Himrod Coal Co. v. Clark*, 197 Ill. 514.

Judgment on Demurrer. — *Chicago, etc., R. Co. v. Clausen*, 173 Ill. 100; *Mayer v. Lawrence*, 58 Ill. App. 194; *Miller v. McCormick Harvesting Mach. Co.*, 84 Ill. App. 571; *Cleveland, etc., R. Co. v. Jenkins*, 70 Ill. App. 415; *Story, etc., Organ Co. v. Rendleman*, 63 Ill. App. 123, which are like *Indiana, etc., R. Co. v. Sampson*, 31 Ill. App. 513, cited in this note in the original article. But in *Hydes Ferry Turnpike Co. v. Yates*, 108 Tenn. 428, wherein a demurrer was sustained and the pleading amended, it was held that the rule established by the weight of authority being that if all the same causes had been assigned in the demurrer the court would not be precluded from sustaining a motion in arrest, it must follow that where the particular cause assigned in arrest was not raised by the demurrer the court may nevertheless look to it on the motion.

819. 1. See *State v. Newcomb*, 126 N. Car. 1104.

Recollection of Matters Which Occurred on the Trial. — It is not allowable for a judge, in passing upon a motion in arrest of judgment, to invoke his recollection of what occurred at the

820. 5. Effect of Motion When Sustained — In Civil Cases. —
See note 1.

Criminal Cases. — See note 2.

821. Writ of Error. — See note 1.

822. 6. Effect of Motion When Overruled — Appeal from Order Denying Arrest. — See note 5.

7. Costs of Motion. — See note 6.

trial. *Washington v. Calhoun*, 103 Ga. 675.

Presumption of Proof of Facts. — On a motion in arrest the presumption is indulged that the facts necessary to support the verdict were sustained by proof. *Herman Berghoff Brewing Co. v. Przbylski*, 82 Ill. App. 361.

820. 1. Filing an Amended Complaint. — An amendment of a complaint may be allowed to conform to the facts proved, and where the court sustains a motion in arrest but refuses to dismiss the complaint, and on the same day grants the plaintiff leave to make such an amendment, which the plaintiff makes, and final judgment is afterwards entered, the order sustaining the motion in arrest is virtually annulled. *Johnson v. Johnson*, (Colo. 1902) 70 Pac. Rep. 692.

New Trial on Terms. — In *Vermont* it is the practice not to arrest a judgment for insufficient pleadings but to grant a new trial at plaintiff's request, upon the terms, however, that he pay defendant's costs up to the time of filing a new declaration and take none for that time if he finally recover, and that if plaintiff will not accept the terms judgment will be arrested, with costs to defendant in the appellate and lower

courts. *Dean v. Cass*, 73 Vt. 314; *Baker v. Sherman*, 73 Vt. 26.

2. People v. Eppinger, 109 Cal. 294, holding that the arrest of judgment operates as an acquittal only when no evidence has been shown sufficient to charge the defendant with any offense; *Brown v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1056.

Motion Sustained as to Some Counts. — Where some of the counts of an indictment are bad and a motion in arrest is sustained as to them, and it appears that error committed upon the trial of the counts as to which judgment is arrested was prejudicial to defendant on the trial upon the other counts, a new trial will be granted as to such latter counts. *U. S. v. Tubbs*, 94 Fed. Rep. 356.

821. 1. State v. Arnold, 144 Ind. 651; *State v. Alverson*, 105 Iowa 152.

822. 5. In Alabama the order is not appealable. *Quinn v. State*, 121 Ala. 38.

California. — *People v. Burgle*, 123 Cal. 303; *People v. Ford*, (Cal. 1902) 70 Pac. Rep. 1075; *People v. Walker*, 132 Cal. 137, holding that the order can only be reviewed on appeal from the judgment.

6. Compare *Dean v. Cass*, 73 Vt. 314; *Baker v. Sherman*, 73 Vt. 26.

ARSON.

823. II. INDICTMENT — 1. Generally — Following Statute. — See note 4.

824. 2. Malice and Wilfulness. — See note 1.

825. Allegation that Burning Was "Felonious." — See note 2.

3. Allegations of Burning. — See note 4.

826. 4. Allegations as to House — Statutory Name of Building. — See note 3.

823. 4. *Lavelle v. State*, 136 Ind. 233; *State v. Spiegel*, 111 Iowa 701; *State v. Tennebom*, 92 Iowa 551; *Collier v. Com.*, (Ky. 1901) 62 S. W. Rep. 4; *State v. Young*, 9 N. Dak. 165.

Surplusage. — Unnecessary words of description will be rejected as surplusage. *State v. Spiegel*, 111 Iowa 701.

"In the Nighttime." — Where an indictment charges the burning of a warehouse in the nighttime, and this allegation is unnecessary under the particular section of the statute applicable, it would seem that the words "in the nighttime" may be treated as surplusage. *Com. v. Uhrig*, 167 Mass. 420.

Time. — When the statute under which the indictment is drawn does not make the time of day (whether daytime or nighttime) an element of the offense, and the indictment does not specify the time of day, evidence is admissible without regard to the time of day to which it refers. *State v. Tennebom*, 92 Iowa 551.

824. 1. *State v. McCoy*, 162 Mo. 383, holding that where the word "maliciously" is not used in the statute defining arson in the third degree, it may be omitted from the indictment.

Conspiracy to Commit Arson. — An indictment which charged that the defendants "feloniously, wilfully, and maliciously did conspire, co-operate, and agree together to burn and cause to be burned a certain residence building," etc., was held to be fatally defective at common law or under the statute in that it failed to aver an unlawful act as the object of the conspiracy; the words "feloniously, wilfully, and maliciously" being used to qualify the conspiracy and not the burning. *Lipschitz v. People*, 25

Colo. 261. And see generally CONSPIRACY.

825. 2. Sufficiency of Indictment Following Words of Statute. — Where the indictment, following the language of the statute, charges that the burning was done wilfully, maliciously, and unlawfully, the use of the word "feloniously" is not necessary. *Collier v. Com.*, (Ky. 1901) 62 S. W. Rep. 4.

Surplusage. — The words "unlawfully, wilfully, and feloniously," in addition to the statutory words "wantonly and wilfully," in an indictment for arson, are simply surplusage. *State v. Battle*, 126 N. Car. 1036. See also *State v. Pierce*, 123 N. Car. 745.

4. *State v. McCoy*, 162 Mo. 383, holding that an allegation that the building was consumed is unnecessary.

826. 3. *Jordan v. State*, 142 Ind. 422, holding that buildings must be so described as to bring them within the statute.

"House" and "building" are synonymous terms." *State v. Spiegel*, 111 Iowa 701.

Necessity to Allege that Building Was Within Curtilage. — An indictment for burning a corner of another, which fails to allege that the house burned was within the curtilage of the dwelling house, and that the burning endangered such dwelling house, is not sufficient to charge arson under the provisions of *Crim. Stat. S. Car.* (1893), § 140 (*Crim. Code S. Car.* 1902, § 143). *State v. Jeter*, 47 S. Car. 2.

Failure to Allege that Building Was Dwelling House. — An indictment charging arson in the first degree under the statute, which fails to allege that the building was a dwelling house, is fatally defective. *State v. Whitmore*, 147 Mo. 78.

827. 5. Value — At Common Law. — See note 1.

Essential by Statute. — See note 2.

6. Place. — See note 3.

828. 8. Ownership of Property. — See note 6.

829. See note 1.

Allegations as to Public Building. — Under Rev. Laws Vt. (1880), § 4128 (Stat. Vt. 1894, § 4930), which makes it a criminal offense for a person wilfully to set fire to "a meeting house, church, court house, town house, * * * school house, or other building erected for public use," an indictment for setting fire to a school house, which failed to state that it was erected for public use, was held to be sufficient after verdict. *State v. Bedell*, 65 Vt. 541.

Variance. — Where the indictment charged the burning of a corncrib containing corn, evidence that the building had been used as a human habitation until a month before the burning was held to constitute a fatal variance. *Thomas v. State*, 116 Ala. 461. See also *Avant v. State*, 71 Miss. 78 (variance as to ownership of building).

827. 1. Where the Value Is Unnecessarily Averred, the allegation may be rejected as surplusage. *Henderson v. State*, 105 Ala. 82.

2. State v. Jeter, 47 S. Car. 2. But see *James v. State*, 104 Ala. 20, holding that where the statute makes the degree of arson determinable by the value of the house burned (second degree if of the value of five hundred dollars or more, otherwise third degree), an indictment which does not allege the value may be good for the third degree.

3. Armstrong v. Com., (Ky. 1895) 29 S. W. Rep. 342.

Insufficient Allegation. — An allegation that the outhouse burned was at a point thirty-five or forty feet from a dwelling house located in the county laid in the indictment is not sufficient. *Green v. State*, 110 Ga. 270.

Averment as to Location in City, Town, or Village. — It is not essential that an indictment for arson should allege whether the building was located in a city, town, or village, as that fact does not affect the legal character of the offense. It affects the punishment only. *Carter v. State*, 106 Ga. 372.

828. 6. State v. Keena, 63 Conn. 329, holding that the indictment must allege a malicious burning of the house or other structure of another; *State v.*

Tennebom, 92 Iowa 551, holding that an indictment charging the setting fire to certain materials apart from a building, with intent to burn the building, must set out the ownership of the building.

829. 1. Avant v. State, 71 Miss. 78, holding that ownership must be proved as laid.

How Ownership May Be Alleged. — "In statutory offenses for burning, the property may be described as 'belonging to,' 'the property of,' 'owned by,' 'in possession of,' or simply 'of' a person named." *State v. Daniel*, 121 N. Car. 574.

"Of" as Denoting Ownership. — In *Jordan v. State*, 142 Ind. 422, the allegation that the building burned was "the mill house of Samuel A. Jordan" was held sufficient to charge the ownership.

Owner Described by Same Name as Defendant. — The fact that an indictment charging arson lays the ownership in a person of the same name as the accused is not ground for quashal unless it affirmatively appears that the owner and the accused are the same person. *Com. v. Jacoby*, 11 York Leg. Rec. (Pa.) 163.

Ownership Laid in Owner of Fee. — When the occupant or tenant of a house is the party charged with the burning, it is sufficient to charge ownership of the premises to be in the person owning the fee. *Guigesell v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 1016.

A Trustee may be alleged as the owner. *Lipschitz v. People*, 25 Colo. 261.

Ownership Laid in Different Persons. — Ownership of a building and its contents may be laid in different persons, in one count, if the burning was one act. *Clue v. State*, 78 Miss. 661.

Allegation as to Residence. — Where the indictment, under Rev. Stat. Fla., § 2426, charged the burning of "the dwelling house of one Wesley Hearn," it was held to be necessary to prove not only that the building burned was the property of Hearn, but that it was his residence. *Hicks v. State*, (Fla. 1901) 29 So. Rep. 631.

830. Ownership Laid in Occupant. — See notes 1, 2.

831. Landlord and Tenant. — See note 1.

Public Buildings. — See notes 4, 5.

9. Intent. — See note 7.

833. 11. Degrees of Crime. — See note 1.

III. INSTRUCTIONS. — [The court should instruct the jury as to the law of the case upon the facts adduced as well as upon the allegations of the indictment. See note 2a.]

834. [IV. VERDICT. — The verdict must be responsive to the issue and definite in its terms, and a general verdict of guilty will not be sustained where the trial is on two counts, if one be a felony and the other a misdemeanor. See note 3a.]

Surplusage. — In *People v. Handley*, 100 Cal. 370, it was held that where the premises are sufficiently described and are alleged to have been occupied by the defendant, an allegation of ownership is surplusage.

Election. — Where the indictment contains two counts, alleging ownership in different parties, if the testimony tends to develop separate and distinct offenses the court will require the prosecution to elect on which offense a conviction is claimed; but in the absence of such cause for an election, it is proper to refuse a charge to the jury tending to restrict it to the first count in the indictment. *Cunningham v. State*, 117 Ala. 59.

830. 1. Necessity to Allege Name of Occupant. — It may be necessary to allege the name of the occupant, as where the owner is alleged, but it is not alleged that the owner was a person other than the defendant. *State v. Keena*, 63 Conn. 329.

2. *Hannigan v. State*, (Ala. 1901) 31 So. Rep. 89; *State v. Barrett*, 2 Penn. (Del.) 297.

831. 1. *People v. Davis*, 135 Cal. 162; *State v. Graham*, 121 N. Car. 623; *State v. Carter*, 49 S. Car. 265.

4. *Com. v. Fitzgerald*, 164 Mass. 587, holding that where a bridge was laid out as a public highway and the expense of maintenance thereof apportioned between the county of Hampden and others, the ownership of said bridge was properly laid in the county. See also *Howard v. State*, 109 Ga. 137.

5. *State v. Whitmore*, 147 Mo. 78, holding that the ownership of a jail may be laid in the name of the person in possession, i. e., the sheriff, giving his name.

7. *People v. Mooney*, 127 Cal. 339.

Indictment for Entry with Intent to Commit Arson. — Under Pen. Code Cal.

§ 459, providing punishment for every person who enters any building with intent to commit a felony, an information charging the accused with entering with intent to commit arson need not allege facts constituting the arson. *People v. Goldsworthy*, 130 Cal. 600.

833. 1. *Cunningham v. State*, 117 Ala. 59; *James v. State*, 104 Ala. 20; *State v. Young*, 9 N. Dak. 165. In these cases it was held that a conviction may be had of a degree of the offense lower than that charged. *Contra*, when by statute the different divisions of arson constitute separate substantive offenses. *State v. Atkinson*, 88 Wis. 1. **2a.** *People v. Hittell*, 131 Cal. 577; *People v. Fitzgerald*, 156 N. Y. 253; *Landers v. State*, 39 Tex. Crim. 671; *State v. Gorham*, 67 Vt. 365.

Where Indictment Contains Two Counts. — Where an indictment in one count charged the burning of certain buildings, and in another count charged the burning of the said buildings with intent to defraud the insurance company, it was not error for the court to instruct the jury that if it found the defendant guilty under the first count it would probably find him guilty under the other. *State v. Gorham*, 67 Vt. 365.

834. 3a. *James v. State*, 104 Ala. 20.

If the Jury Finds the Defendant Guilty of an Attempt to Commit Arson, the verdict need not specify which degree of arson was attempted, provided but one substantive offense is in issue. *Benbow v. State*, 128 Ala. 1, holding that under an indictment for burning a dwelling house — an offense which includes arson in the first and second degrees, and which is felony, but cannot embrace the third degree, which is a misdemeanor — a verdict that "We, the jury, find the defendant guilty of an attempt to commit arson," was sufficiently definite.

ASSAULT AND BATTERY.

839. III. CRIMINAL PROSECUTION — 2. Indictment — a. SIMPLE ASSAULT — (1) Necessary Allegations. — See note 4.

840. See notes 1, 2.

841. (2) *Unnecessary Allegations.* — See notes 1, 2.

842. (3) *Surplusage.* — See note 1.

843. b. AGGRAVATED ASSAULT — (1) Generally — (a) Matters of Aggravation. — See note 3.

839. 4. *State v. Rogers*, (Miss. 1901) 29 So. Rep. 73, holding that the indictment must set forth facts sufficient to constitute a charge of the crime at common law.

840. 1. Failure to Designate Crime — New York Statute. — An information charging that the defendant "struck him [the deponent] in the face with his fists and knocked him down and kicked him" is defective, as unlawful intent is not alleged, nor is any crime designated as required by Code Crim. Pro. N. Y., § 145, which defines an information thus: "The information is the allegation made to a magistrate that a person has been guilty of some designated crime." *People v. Hiley*, (County Ct.) 33 Misc. (N. Y.) 168.

2. *Voght v. State*, 145 Ind. 12; *State v. Lewellyn*, (Mo. App. 1902) 67 S. W. Rep. 677; *State v. Broadbent*, 19 Mont. 467; *Wagner v. State*, 43 Neb. 1; *Smith v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 949, in which cases it was held that the indictment must set forth the offense in the language of the statute.

Equivalent Words. — The allegation that the assault was committed "unlawfully, feloniously, purposely, and with premeditated malice," sufficiently imports that the assault was made in a "rude, insolent, or angry manner," as prescribed by statute. *Chandler v. State*, 141 Ind. 106.

841. 1. *State v. Boyer*, 70 Mo. App. 156.

Wilfully and Maliciously Equivalent to Unlawfully. — It is not necessary to use the precise words of the statute. The words "wilfully and maliciously" are equivalent to the term "unlawfully." *Hodgkins v. State*, 36 Neb. 160.

2. "Did Unmercifully Whip" — Sufficiency of Warrant. — A warrant charging that a school teacher "did unmercifully whip" a child, "inflicting bruises on her person," sufficiently sets out a battery. It is not necessary that the *quo animo* should be charged. *State v. Stafford*, 113 N. Car. 635. See also **WARRANTS.**

842. 1. *State v. Bryson*, 127 N. Car. 574.

843. 3. *Price v. State*, 35 Tex. Crim. 501.

"Serious Damages." — "In indictments for assaults, assaults and batteries, and affrays, where serious damage has been done, it is necessary to describe the 'serious damages' done, their character and extent, so that the court can see from the face of the indictment the particular descriptive facts charged," and a simple averment that a party "was seriously injured" will not support a conviction of an offense higher than simple assault. *State v. Battle*, 130 N. Car. 655.

Assault by Man upon Woman. — If the aggravation is in the fact that the assault was committed by a man upon a woman, the sex of the parties must be clearly indicated in the indictment. *Slawson v. State*, 39 Tex. Crim. 176.

Assault with Deadly Weapon. — In an indictment under a statute providing for the punishment of any person who "shall wilfully and maliciously cut, strike, or stab another with a knife, sword, or other deadly weapon," where the cutting was alleged to have been done with a knife, it was not essential to allege that the knife was a deadly weapon. *Sprague v. Com.*, (Ky. 1900) 58 S. W. Rep. 430.

844. (b) Language of Statute. — See note 2.

Necessity to Allege that Gun Was Discharged. — Where an information charges an aggravated assault with a gun, "the same then and there being a deadly weapon," it is not necessary to set forth how said gun was a deadly weapon or to state that it was discharged. *Vann v. State*, (Tex. Crim. 1900) 64 S. W. Rep. 243.

Allegations in Alternative. — In describing the means or weapon employed in the assault, if more than one is mentioned in the alternative, each must be described as definitely as if used in separate counts, and if the instrument or means be unknown, that fact must affirmatively appear in the indictment. *Rogers v. State*, 117 Ala. 192. *Compare Nelson v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 775.

Assault upon Person Engaged in Lawful Employment. — An information charging an assault and intimidation of another under Pen. Code Tex. (1895), art. 600, providing punishment for any person who by threats or acts of violence shall prevent or attempt to prevent another from engaging in any lawful employment, need not allege that the person assaulted was in the employ of another, nor need such be the fact. *Nelson v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 645.

Necessity to Allege How Fists Were Used. — An indictment which charged that the defendant "did then and there * * * make an aggravated assault and battery upon D. by then and there wounding and beating, bruising and striking, the said D. with his fists," need not allege how he used his fists, as this is a matter of proof and not of allegation. *Yeary v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1106.

Failure to Describe Instrument Used. — Where an information charging an assault with intent to do great bodily harm, less than murder, describes the offense in the words of the statute, though it fails to describe the instrument used, it is sufficient under 2 How. Annot. Stat. Mich. (1882), § 9539. *People v. Ochotski*, 115 Mich. 601.

Proof of Means Other than Those Alleged. — A statement of the means used will confine the prosecution to proof of the particular means charged. *Kinnard v. State*, 35 Tex. Crim. 276.

Avowment of Several Phases of Aggravation in One Count. — Where the offense

charged is not of a higher grade than a misdemeanor, several phases of aggravation may be stated in one count. *Black v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 113.

Necessity to Describe Brick as Deadly Weapon. — An indictment charging an assault with a "deadly weapon, to wit, a brick," will support a conviction for felonious assault and battery, and is not rendered insufficient because a brick is not described as a deadly weapon in the code. *State v. Sims*, (Miss. 1902) 31 So. Rep. 907.

Indictment for Resisting Arrest. — Though one is not required to submit to arrest under an illegal warrant, if he resists in an unwarrantable manner he is responsible for his acts, but he cannot be convicted of assault with intent to kill under an indictment for violating Pen. Code Tex., art. 222 (Pen. Code 1895, art. 238), which provides for punishment of one resisting arrest. *Toliver v. State*, 32 Tex. Crim. 444.

Where the Gravamen of the Charge Is the Character of the Assault, apart from the means or instrument used, a variance as to the means or instrument is immaterial. *Duke v. State*, 35 Tex. Crim. 283; *Holliday v. State*, 35 Tex. Crim. 133, the gravamen of the offense in the latter case consisting in the assault being made with a deadly weapon upon a woman.

Immaterial Variance as to Kind of Weapon. — In *State v. Washington*, 104 La. 443, it was held that where an indictment under a statute charges the crime of wilfully and maliciously, with a dangerous weapon, or with intent to kill, indicting a wound less than mayhem, and specifies the weapon used as a "piece of iron," the kind of weapon not being essential to the charge, and there being no objection raised on the ground of variance, it is proper to admit evidence to show that any other dangerous weapon was used.

Immaterial Variance as to Weapon Used. — Under an indictment charging an assault with dangerous weapons, to wit, knives and clubs, proof that a pistol was employed as a club will not sustain conviction. *State v. Braxton*, 47 La. Ann. 158.

844. 2. *State v. Robinson*, 104 La. 224, holding that under a statute defining the offense as "whoever shall wilfully and maliciously," etc., the

844. (d) Joinder of Counts. — See note 5.

omission of the word "wilfully" was fatal, although the charge was that the offender "did unlawfully, maliciously, and feloniously, with a dangerous weapon, to wit, a pistol, inflict a wound less than mayhem." See also INDICTMENTS, INFORMATIONS, AND COMPLAINTS.

The Use of Other Words will not as a general rule vitiate the indictment. *State v. Young*, 22 Wash. 273.

Assault with Intent to Steal — Ownership of Goods. — An indictment under Pub. Stat. Mass., c. 202, § 26 (Rev. Laws Mass. 1902, c. 207, § 21), for assault with intent to steal from a building, etc., need not aver the ownership of the goods intended to be stolen. *Com. v. Crowley*, 167 Mass. 434.

Assault in Secret Manner. — In an indictment under a statute for assault in a secret manner, the omission of the words "by waylaying or otherwise" was held not to be fatally defective, the language used being sufficiently plain, intelligible, and explicit to enable the defendant to prepare her defense. *State v. Shade*, 115 N. Car. 757.

Where Statute Is Not Descriptive of Offense. — An indictment in the language of the statute is not sufficient where the statute is not sufficiently descriptive of the offense, and an indictment following its language would not enable the court to fix the punishment. *Territory v. Armijo*, 7 N. Mex. 571.

"Inflicting" Instead of "Did Inflict." — In an indictment for an aggravated assault the use of the participle "inflicting" instead of the verb "did inflict" does not vitiate the count. *Yeary v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1106.

Omission of Word "Wilfully." — In an indictment under Rev. Stat. La., § 792, which provides punishment for an assault "by wilfully shooting at" another, the form of the statute should be followed. The omission of the word "wilfully" before the words "shooting at" is a fatal defect, though the assault is alleged to have been wilfully made. *State v. Langston*, 45 La. Ann. 1182.

844. 5. Carleton v. State, 100 Ala. 130, decided under Crim. Code Ala. (1886), § 4385 (Crim. Code 1896, § 4913); *State v. Boyer*, 70 Mo. App. 156.

Offenses Forming Part of the Development of the Same Transaction may be joined by separate counts, except

where they are repugnant in their nature and legal incidents. *State v. Fitzsimon*, 18 R. I. 236.

Election Between Counts. — Under an indictment for assault and battery, the court will not require the state to elect on which count it will proceed, the offense of assault and battery being a misdemeanor. *State v. Boyer*, 70 Mo. App. 156.

Two or More Offenses Subject to Different Penalties must not be charged in one count, but if the matters properly alleged in setting out one offense are also sufficient to constitute other offenses, the indictment or information is not rendered duplicitous thereby. *State v. Osborne*, 96 Iowa 281; *Com. v. Holmes*, 165 Mass. 457; *State v. Inskeep*, 49 Ohio St. 228; *Oxshier v. State*, 38 Tex. Crim. 499; *State v. Townsend*, 7 Wash. 462. See also INDICTMENTS, INFORMATIONS, AND COMPLAINTS.

Indictment Charging but One Offense. — An indictment which charged an assault by wilfully shooting at, with a dangerous weapon, with intent then and there and thereby feloniously, wilfully, and maliciously to kill and murder, was held to allege but one act, and therefore proper to be charged in one count, under the statute. *State v. Romus*, 48 La. Ann. 581.

Averments as to Attempt to Commit Felony — Surplusage. — Where an indictment properly and sufficiently charges the commission of the crime of an assault with intent to kill, and also charges an attempt to commit a felony, but does not charge the acts by which the crime of attempt was committed, the objection that the indictment charges two crimes is not well taken; the words referring to the attempt being insufficient to charge a criminal attempt under the statute, they may be rejected as surplusage. *Gatliff v. Territory*, 2 Okla. 523.

If an Offense Incidentally Charged is a necessary constituent of the greater offense, evidence may be received as to either. *State v. Smith*, 57 Kan. 673. See also *State v. Marcks*, 3 N. Dak. 532, holding that a simple assault is necessarily a part of the statutory crime of aggravated assault with a deadly weapon, but an assault and battery is not an essential element in the greater offense, and that an infor-

845. (e) *Surplusage*. — See note 1.

846. (2) *Assaulting Officer*. — See note 2.

(3) *Assault with Special Intent* — (a) *Generally*. — See note 5.

847. See note 2.

848. (b) *Assault with Intent to Ravish*. — See RAPE.

849. (c) *Assault with Intent to Rob*. — See note 4.

850. (d) *Assault with Intent to Do Bodily Harm*. — See notes 2, 3.

mation charging both the statutory offense and assault and battery is bad.

845. 1. *State v. Sparks*, 1 Ohio Dec. 275; *White v. State*, 13 Ohio St. 569.

Allegation as to Means. — An information which charges that the defendant, "an adult male, did then and there commit an aggravated assault and battery in and upon W., a female," sufficiently charges an aggravated assault, and the further charge setting forth the means by which the assault was committed may be rejected as surplusage. *Webb v. State*, 36 Tex. Crim. 41.

Allegation as to Intent. — An indictment charging an assault with a dangerous weapon, under the provisions of Hill's Annot. Laws Oregon, § 1744 (Code Oregon, § 536), which substantially charges the crime in the language of the statute, is sufficient, and words relating to the intent may be treated as surplusage. *Jackson v. U. S.*, (C. C. A.) 102 Fed. Rep. 473.

846. 2. *Bristow v. State*, 36 Tex. Crim. 379.

Use of Words "Knowingly and Wilfully." — Where an indictment under Rev. Stat. U. S., § 5398, uses the words "knowingly and wilfully" to describe the assault, such words by reasonable implication refer to the defendant's knowledge of the official character of the officer assaulted. *Blake v. U. S.*, (C. C. A.) 71 Fed. Rep. 286. See also to the same effect *People v. Tompkins*, 121 Mich. 431.

5. *State v. McDonald*, 14 Utah 173.

847. 2. *State v. Michel*, 20 Wash. 162, holding that an indictment which charges that the defendant did "unlawfully, feloniously, maliciously, purposely, and forcibly assault, beat, cut, stab, and wound" a certain person with intent "to kill and murder him," sufficiently alleges the malicious intent which is necessary to constitute the crime of intent to commit murder.

See also *State v. McDonald*, 14 Utah 173.

Defects Waived. — When an indictment, though awkwardly constructed and ungrammatical, sufficiently charges the appellant with assault and battery with intent to murder, a motion in arrest of judgment should be denied, though the defect might have been fatal on demurrer or motion to quash. *Ellis v. State*, 141 Ind. 357. See also *Laycock v. State*, 136 Ind. 217.

849. 4. *State v. Bohn*, 19 Wash. 36.

The Word "Attempt" used in an indictment sufficiently charges "intent" in setting out the offense of an assault with intent to commit robbery. *Runnells v. State*, 34 Tex. Crim. 431.

850. 2. **"Personal" Synonymous with "Bodily."** — An indictment which charges an assault with a deadly weapon with intent to inflict a "personal" injury, is good, although it is framed under a statute which defines the offense as a "bodily" injury, the words "personal" and "bodily" conveying substantially the same idea. *State v. Clayborne*, 14 Wash. 622.

Omission of Word "Feloniously." — The omission of the technical word "feloniously" in the averment of an assault does not render an information invalid where the intent with which the assault was made is specifically alleged to have been "feloniously to inflict * * * a bodily injury." *State v. McCaffery*, 16 Mont. 33.

3. *Smith v. State*, 58 Neb. 531; *Murphy v. State*, 43 Neb. 38; *Alyea v. State*, 62 Neb. 143. See also *Spradley v. State*, (Miss. 1902) 31 So. Rep. 534, holding that the indictment must substantially follow the form of the statute.

Present Ability to Injure. — An information charging an assault with intent to commit a felony must aver that the defendant had the present ability to commit the violent injury alleged; but where it alleges that he did actually commit such injury the actual battery

851. (c) *Assault with Intent to Murder* — *bb. INTENT.* — See note 4.

852. See note 1.

853. See note 2.

854. 3. *Instructions.* — See notes 2, 3.

is charged, and the lesser misdemeanor of an assault is merged in the greater of an assault and battery, in charging which present ability need not be averred. *Chandler v. State*, 141 Ind. 106. See also *Woodworth v. State*, 145 Ind. 276.

851. 4. *Gratz v. Com.*, 96 Ky. 162; *State v. Jones*, 86 Mo. 623, in which cases it was held that the pleader may use the words of the statute or words of equivalent or more comprehensive meaning.

Necessity to Conclude with Word "Feloniously." — An indictment which charges the assault to have been committed "feloniously, on purpose, and of his malice aforethought, * * * with the intent then and there him the said S., on purpose, and of his malice aforethought, to kill and murder," is sufficient, and need not conclude with the words "with intent feloniously to kill." *State v. Wood*, 124 Mo. 412.

The Degree of Murder need not be alleged. *Davis v. State*, 35 Fla. 614.

Approved Form. — An indictment alleging that the defendant "did unlawfully, with a pistol, make an assault, the said pistol being a deadly weapon, by shooting and wounding M., with intent the said M. feloniously, wilfully, and of his malice aforethought to kill and murder, against the peace," etc., though awkwardly expressed, is good for either a felonious or a simple assault. *Mann v. State*, (Miss. 1902) 31 So. Rep. 786.

852. 1. *State v. Simms*, (Miss. 1902) 31 So. Rep. 907, holding that where the offense is committed with a deadly weapon, not prescribed such by statute, no more particularity of statement is necessary than when it is committed by the use of a weapon declared deadly by statute. See also *Territory v. Armijo*, 7 N. Mex. 571, holding that where the statute denounces assaults with pistols and with knives "with which dangerous cuts can be given or with which dangerous thrusts can be inflicted," it is not sufficient to charge that the assault was committed with a "deadly weapon, to wit, a knife," without describing the knife or stating that it was one "with which dangerous cuts could be given."

Requisite Particularity in Describing Means. — It is unnecessary to describe the means used with minute particularity. *Parker v. State*, 95 Ga. 482.

853. 2. **Use of Words "With Malice Aforethought."** — Although the intent must be averred, the words "with malice aforethought" are not indispensable when they are not included in the statutory definition of the offense. *State v. McDonald*, 14 Utah 173, *overruling* *People v. Fairbanks*, 7 Utah 3.

854. 2. *Thomas v. State*, 99 Ga. 38; *Mansfield v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 630.

3. *State v. Shea*, 104 Iowa 724; *People v. Carter*, 117 Mich. 576; *Brown v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 548; *Gann v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 725; *Lawson v. State*, (Tex. Crim. 1895) 32 S. W. Rep. 895.

Charge Based upon Immaterial Allegations. — Where the information charged an aggravated assault by "an adult male person" upon "a female person," although it was alleged that the assault was made with the intent to have carnal intercourse with her, the court properly refused to charge the jury that the defendant's acts must have been with such intent, for the reason that this allegation was not an essential descriptive averment. *Berry v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 984. See also *State v. Boyer*, 70 Mo. App. 156, holding that as it is unnecessary to charge in an indictment for assault and battery that the act was done wilfully and maliciously, the court need not submit such question to the jury. *Compare* *State v. Carver*, 89 Me. 74.

Definition of "Serious Bodily Injury."

— Where the defendant is charged with having committed an aggravated assault, and it appears from the evidence that the injury inflicted by the defendant was nearly fatal, it is proper to refuse to define "serious bodily injury" to the jury, for the reason that there was no issue of fact as to that matter. *De Los Santos v. State*, (Tex. Crim. 1895) 31 S. W. Rep. 395.

Deadly Weapon. — Where an information charges an aggravated assault committed with a knife, and the evi-

855. See notes 2, 3, 4.

856. See note 1.

4. Verdict — a. CONVICTION OF LESSER OFFENSE —

In General. — See note 4.

857. See note 1.

Assault and Battery. — See note 10.

858. **Simple Assault.** — See notes 8, 9.

dence supports the allegation, it is not error to charge the jury with reference to the use of a dangerous weapon or the semblance thereof in an angry and threatening manner, with intent to alarm another, for the knife may have been so used. *Ellison v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 945.

Harmless Error. — Where an indictment for an assault with intent to kill unnecessarily alleges that the assault was with malice aforethought, an instruction that the jury, in order to convict, must find that the defendant acted with malice aforethought, although erroneous, is not prejudicial to the defendant. *Jennings v. U. S.*, 2 Indian Ter. 670.

Instruction as to Self-defense. — Where there is any evidence to support a plea of self-defense, the defendant is entitled to have the jury instructed on that theory. *State v. Fredericks*, 136 Mo. 51; *Ennis v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 998. See also *Clark v. State*, (Tex. Crim. 1896) 35 S. W. Rep. 149, holding that where the defendant does not attempt to show self-defense, an instruction as to the extent to which one may defend himself is not prejudicial to the defendant and is not reversible error.

Where Matters in Mitigation Are Set Up and appear in the evidence, the court may grant specific instructions as to the extent such matters can be considered in mitigation. *Buchanan v. State*, 100 Ga. 75; *Harris v. State*, 37 Tex. Crim. 454.

Error Cured by Verdict. — Where the defendant was indicted for an assault with intent to commit murder, and the jury found him guilty of an aggravated assault, a lesser offense, any injury to the appellant by reason of any supposed error in submitting the issue of an assault with intent to murder is eliminated by the verdict. *Tollett v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 335.

855. **2.** *State v. McDonald*, 14 Utah 173.

3. *Parrott v. Com.*, (Ky. 1898) 47 S. W. Rep. 452; *People v. Abbott*, 97 Mich. 484; *State v. Broadbent*, 19 Mont. 467; *Blackwell v. State*, 33 Tex. Crim. 278; *State v. Surry*, 23 Wash. 655; *State v. Young*, 22 Wash. 273.

Common Assault. — Where the defendants were charged with felonious assault, and it was submitted to the jury to determine whether or not the sticks used in an assault were deadly weapons, the court erred in refusing to submit to the jury the law of common assault. *State v. Fredericks*, 136 Mo. 51.

4. *State v. Mowry*, 37 Kan. 370; *People v. Williams*, 118 Mich. 692; *State v. Wood*, 124 Mo. 412; *Gatliff v. Territory*, 2 Okla. 523; *Henry v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 592.

856. **1.** *State v. Mize*, 36 Kan. 187, holding that where the evidence tends to show that the defendant is guilty of either an assault and battery or nothing, it is error to instruct the jury that it may find the defendant guilty of a lower offense. See also to the same effect *State v. Duncan*, 142 Mo. 456.

4. *Sankey v. State*, 128 Ala. 51; *State v. Price*, 45 La. Ann. 1430; *Com. v. Crowley*, 167 Mass. 434; *Mulloy v. State*, 58 Neb. 204; *Wagner v. State*, 43 Neb. 1; *State v. Maloney*, 7 N. Dak. 119; *Gatliff v. Territory*, 2 Okla. 523; *State v. Michel*, 20 Wash. 162.

857. **1.** *Alyea v. State*, 62 Neb. 143.

10. *Polson v. State*, 137 Ind. 519, holding that on an indictment for rape the defendant may be convicted of an assault and battery with intent to commit rape. See also **RAPE**.

858. **8.** *State v. Brechbill*, 10 Kan. App. 575, 62 Pac. Rep. 251; *State v. Triplett*, 52 Kan. 678.

9. *Keeling v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 372.

Indictment for Assault with Intent to Commit Rape. — The defendant may be convicted of simple assault where the indictment is for an assault with intent to commit rape. *State v. White*, 52 Mo. App. 285. See also **RAPE**.

859. *Assault with Intent to Kill.* — See note 3.

b. SUFFICIENCY OF VERDICT. — See note 5.

861. See note 1.

862. *IV. CIVIL ACTION FOR DAMAGES* — 1. *Setting Forth Damages.* — See note 1.

[*General Requisites of Declaration or Complaint.* — The declaration or complaint must allege facts necessary to constitute an assault at common law or under the statute relied upon. See note 1a.]

859. 3. *West v. Territory*, (Ariz. 1894) 36 Pac. Rep. 209, holding that although the crime of an assault with a deadly weapon is not a part of the crime of an assault to commit murder, yet where an indictment charging the last-mentioned offense also charges the former, the defendant may be convicted of the lesser offense.

8. *McCulloch v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 94; *Styles v. State*, 37 Tex. Crim. 599.

861. 1. *The Verdict Must Find the Degree of the Offense* if more than one degree is submitted to the jury. *Rousey v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 372; *Millard v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 273; *Styles v. State*, 37 Tex. Crim. 599; *Hays v. State*, 33 Tex. Crim. 546. *Compare Pearce v. State*, 37 Tex. Crim. 643, in which case it was held that where the defendant is indicted for aggravated assault, and the jury is charged on both aggravated assault and simple assault, a verdict of guilty is sufficient if the fine assessed is applicable to either an aggravated or a simple assault. And see *Davis v. State*, 35 Fla. 614, in which case the defendant being indicted for an assault with intent to commit a felony, it was held that the verdict need not specify the degree of the offense intended to be committed.

862. 1. *Harshman v. Rose*, 50 Neb. 113, in which case the petition alleged special damages in the sum of eight dollars expended for medical attendance, and demanded one thousand dollars damages for the injuries which were set forth. It was held that the plaintiff was entitled to recover for such physical and mental suffering as was the natural and proximate result of the wrong complained of, and was not restricted to the special damage alleged. *Citing* 2 ENCYC. OF PL. AND PR. 862. And see DAMAGES.

Where Both Compensatory and Exemplary Damages Are Demanded the amount of each should be alleged. *Berryman v. Cox*, 73 Mo. App. 67.

Averment of Malicious Intent. — Since exemplary damages are dependent upon the aggravated nature of the assault, malicious intent should be set up, though it is not necessary to use the word "malice." *Lyddon v. Dose*, 81 Mo. App. 71; *Sloan v. Speaker*, 63 Mo. App. 321.

1a. *Rankin v. Sievern, etc., R. Co.*, 58 S. Car 532; *Shapiro v. Michelson*, 19 Tex. Civ. App. 615.

Assault upon Woman. — In an action by a woman to recover damages for criminal assault, a very general statement of the facts of the assault is good as against a general demurrer. *Bornmuth v. Beyer*, 3 Ohio Dec. 312.

The allegation, in substance, that the defendant took hold of the plaintiff's arm, and by words of persuasion alone tried to induce the plaintiff to grant the favor of sexual intercourse, does not set up a cause of action. *Prince v. Ridge*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 666.

An Averment of Care on the Part of the Plaintiff for his own safety is not necessary. *Chicago, etc., R. Co. v. Doherty*, 53 Ill. App. 282. And see generally CONTRIBUTORY NEGLIGENCE.

Slandorous Words may be set up for the purpose of showing intent. *Delmage v. Crow*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 511, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 326.

Matters of Aggravation need not necessarily be pleaded if the assault is alleged to have been unlawfully made. *List v. Miner*, 74 Conn. 50; *Reizenstein v. Clark*, 104 Iowa 287; *Pierce v. Carpenter*, 65 Mo. App. 191.

Variances. — In a civil action the rules of pleading in criminal prosecutions, that one charged with a battery may be convicted of an assault, do not apply, and where a complaint alleges an assault and battery recovery cannot

862. 3. Pleading Justification. — See note 3.

863. 4. Damages Recoverable. — See note 2.

864. [5. Instructions. — In giving or refusing instructions to

be had for a simple assault. *Shapiro v. Michelson*, 19 Tex. Civ. App. 615.

Objection Waived. — Where, in an action for damages, there is a variance between the allegations of the petition and the proof as to the nature of the injuries resulting from an assault, objection cannot be raised for the first time on appeal. *Reizenstein v. Clark*, 104 Iowa 287.

Criminal Proceedings Instituted. — Where a declaration in trespass for an assault does not allege that criminal proceedings had been instituted against the defendant, in accordance with Gen. Laws R. I., c. 233, § 16, noncompliance with the statute cannot be raised by demurrer. *Harford v. Carroll*, 21 R. I. 515.

Joinder of Causes of Action. — Two or more causes of action for assault may be joined in the same declaration. *Sloan v. Speaker*, 63 Mo. App. 321.

Where there are two counts alleging two separate assaults, a recovery can be had for either or both of the assaults, and it is error to instruct the jury that the right of recovery for one assault depends upon its connection with the other. *Lee v. Springer*, 73 Vt. 183, citing 1 ENCYC. OF PL. AND PR. 164, 169.

Trespass upon Personalty and Assault and Battery. — In *New York* it has been declared under Code Civ. Pro. N. Y., § 484, that cases of action for trespass upon personalty and an assault and battery may be joined. *Doyle v. American Wringer Co.*, 60 N. Y. App. Div. 525; *Griffith v. Friendly*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 393.

A Count Quare Clausum Fregit may be joined with a count for trespass on the person and a recovery had for both, when the averments are such as to show but one transaction. *Henry v. Carlton*, 113 Ala. 636.

Several Defendants. — In an action in trespass against several defendants, a complaint which avers that two or more assaulted the plaintiff imports that the assault was joint, and evidence that one of the defendants committed an assault at one time and the others at a different time will not be admissible in support of the averment. *Henry v. Carlton*, 113 Ala. 636.

Action Against Master for Assault Committed by Servant. — The declaration in an action against a master for an assault committed by his servant must allege facts which show the master's liability. *Tomlin v. Hildreth*, 65 N. J. L. 438. See also MASTER AND SERVANT.

Insufficient Allegation. — A complaint which alleges that the defendant was present when his servant assaulted the plaintiff, but fails to aver that the assault was instigated or sanctioned by the master or that it was done while engaged in the master's business, is fatally defective. *Andersen v. Schlesinger*, (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 535.

862. 3. *Illinois Steel Co. v. Novak*, 184 Ill. 501; *Smith v. Wilson*, 21 R. I. 327, in which cases the court cited 2 ENCYC. OF PL. AND PR. 862. See also *Grace v. Teague*, 81 Me. 559; *Omhundro v. Emerson*, 80 Mo. App. 317; *Sloan v. Speaker*, 63 Mo. App. 321; *Mangold v. Oft*, (Neb. 1901) 88 N. W. Rep. 507; *Barr v. Post*, 56 Neb. 698; *Wilken v. Exterkamp*, 102 Ky. 143. In the last case it was held that in a plea of not guilty the defendant cannot introduce evidence to show that the plaintiff first assaulted him.

The defendant may amend his answer before verdict and plead justification. *Hannabalsen v. Sessions*, (Iowa 1902) 90 N. W. Rep. 93.

Requisite Allegations of Justification. — In setting up matters of justification or in mitigation the averments must clearly refer to the occurrence upon which the action is founded. *Pyle v. Peyton*, 146 Ind. 90.

Under a Plea of Son Assault Demons the defendant may show that a particular wound was not the result of his act. *Watson v. Hastings*, 1 Penn. (Del.) 47.

863. 2. **Counterclaim by Defendant.** — In order to constitute a valid counterclaim, an assault committed by the plaintiff upon the defendant must have arisen out of the same transaction or be related to the subject-matter of the action, as prescribed by statute, and must be set up as the statute provides. *Pelton v. Powell*, 96 Wis. 473. See also *Barr v. Post*, 56 Neb. 698; *Murphy v. McQuade*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 671.

the jury in an action for assault and battery, the court is governed to a large extent by the general rules applicable to the instruction of juries, as will appear from the cases cited. See note 1a.]

§64. 1a. Exemplary Damages. — In an action for indecent assault, where the complaint alleged that the defendant violently assaulted the plaintiff, and against her will debauched and carnally knew her, an instruction that the jury are at liberty to give exemplary damages if they find wilful and malicious misconduct on the part of the defendant is proper, even though express malice was not charged in the complaint. *List v. Miner*, 74 Conn. 50.

Where the Issue of Exemplary Damages Is Abandoned by the plaintiff it is error to instruct that "an assault or an assault and battery becomes aggravated when committed by an adult male person upon the person of a female." *Texas Coal, etc., Co. v. Arenstein*, 22 Tex. Civ. App. 441.

Definition of Offense. — In a civil action for an assault and battery, it is not necessary for the court to give the jury a technical definition of assault and battery. *Hendricks v. Fowler*, 9 Ohio Cir. Dec. 209, 16 Ohio Cir. Ct. 597.

Using the Words "the Unlawful Act of the Defendant" is not erroneous when given in a charge in connection with the words "if they shall find that defendant assaulted and struck her." *Thillman v. Neal*, 88 Md. 525.

Malicious Intent. — It is held error to instruct that if the jury believe that the defendant committed the battery

on the person of the plaintiff in a malicious manner they may give exemplary damages, since exemplary damages are dependent upon malicious intent. *Badostain v. Grazide*, 115 Cal. 425.

Invading Province of Jury. — In *Hayes v. Sease*, 51 S. Car. 534, the court charged the jury: "Having admitted the battery, if he [the defendant] has not shown a legal justification (and words spoken would not be a legal justification) it is your duty to find a verdict for the plaintiff." It was held that this language in the charge did not deprive the defendant of his right to have the jury pass upon the question as to how far opprobrious words should go in mitigation of damages.

Presumption of Defendant's Innocence. — Where the court correctly enumerates what must be shown by the plaintiff by a preponderance of the evidence, without making mention of the presumption that the defendant is innocent, the instruction is sufficient as against a party who does not ask further instructions. *Treschman v. Treschman*, (Ind. App. 1901) 61 N. E. Rep. 964.

Failure to Define "Malice" and to charge that the burden of proving it is upon the plaintiff is not error, where such specific instruction is not requested by the defendant. *Reizenstein v. Clark*, 104 Iowa 287.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

866. 1. COMING IN UNDER ASSIGNMENT — 1. Generally. — See note 1.

867. 2. How to Come In — Becoming Party to Assignment. — See note 4.

868. 3. Time to Come In. — See note 1.

Statutory Provisions as to Time. — See notes 3, 4.

869. See notes 3, 4, 7.

866. 1. Must Accept or Reject. — *Ohio Cultivator Co. v. People's Nat. Bank*, 22 Tex. Civ. App. 643, holding that a creditor cannot accept a preferred claim and at the same time attack it as fraudulent. *Moody v. Templeman*, 23 Tex. Civ. App. 374, holding that the assignee has the right to require an unconditional acceptance.

Attaching Without Knowledge of Assignment. — In *National Bank of Commerce v. Graham*, 16 Colo. App. 498, it was held that where an attachment was levied on the same day, but after the assignment was made and without knowledge of the assignment, this is not claiming against the assignment, and the attaching creditor may credit his claim by the amount so realized and apply to the assignee for allowance of the balance of his claim against the estate.

For Debt Contracted by Assignee. — Where an assignee contracts a debt under the order of the court he is personally liable, and his creditor may take a dividend from the estate and sue the assignee for the balance, and these remedies are not repugnant. *Smith v. Williams*, 178 Ill. 420.

867. 4. Oral Agreement to Assent in Writing. — See *Roberts v. Norcross*, 69 N. H. 533.

868. 1. National Bank of Commerce v. Bailey, 179 Mass. 415.

If the Assignee May Extend the Time, under the provisions of the deed, and he does so, he cannot be required by suit to further extend the time, and an allegation in such a suit that the assignee is acting from improper motives is not sufficient to justify the re-

lief, even conceding that the assignee cannot act arbitrarily in refusing further time. *National Bank of Commerce v. Bailey*, 179 Mass. 415.

3. Rasseleur v. Jenkins, 170 Ill. 503; *H. B. Claflin Co. v. Kelley*, 169 Ill. 20.

A Creditor Who Has Not Filed His Claim cannot question an order made in the assignment proceeding by a creditor's bill. *Taylor v. Selter*, 100 Ill. App. 643.

Extension by Court. — The statutory limitation as to time of filing claims is not absolute, but in exceptional cases the County Court may exercise its equitable powers to extend the limitation so imposed. *Joliet Nat. Bank v. O'Donnell*, 165 Ill. 32.

4. Petition for Preference. — The statutory time for filing claims does not control the case of a petition to have a claim which was filed in proper time made a preferred claim. *Matter of Knapp*, 101 Iowa 488.

869. 3. Extension of Time on Account of Bad Notice. — Where the statute provided not merely that notice should be given to creditors to bring in their claims within a fixed period, but also that the notice should warn the creditor that the result of his failure to present his claim within such time would forever bar, a notice which does not so inform the creditor of the result of his failure to present his claim will not bar him if he fails to present it within the time and the Orphans' Court has power to make an order for the extension of the time. *Matter of Elmer*, 60 N. J. Eq. 343.

4. The assignee is not required to pass upon a claim which has not been

§70. II. SUITS TO PROTECT ASSIGNED PROPERTY — 1. Suits by Assignee. — See note 1.

filed, and, the assignment having been made several years before, the creditor cannot come in on the final accounting and have his claim determined where such attempt would delay and hinder the other creditors who are entitled to the fund and who would not be paid until after a long litigation which would eat up the whole estate. *Matter of Carter*, 21 N. Y. App. Div. 118.

§69. 7. *Haynie v. Blum*, (Tex. Civ. App. 1894) 28 S. W. Rep. 368, holding that actual notice by receipt of a copy of the assignment, though there was no publication of notice, is sufficient to charge the party under the statute; *Patty v. City Bank*, 15 Tex. Civ. App. 475; *De Walt v. Ziegler*, 9 Tex. Civ. App. 82; *Moody v. Templeman*, 23 Tex. Civ. App. 374, holding further that when a good excuse is shown for delay a creditor may accept after the expiration of the time, but he will not be allowed to excuse his delay on the ground that he was awaiting the result of a suit to avoid the assignment. See also *Hamblen v. Tuck*, (Tex. Civ. App. 1898) 45 S. W. Rep. 175.

§70. 1. *Congress Constr. Co. v. Farson, etc., Co.*, 199 Ill. 398; *Gibbs v. Montcalm Circuit Judge*, 123 Mich. 615, holding that objection to suit by an assignee on a note assigned, on the ground that the statute requires the assignee to sell the assigned property at public or private sale, etc., will not be upheld, as it is no concern of the debtor whether the assignee or his vendee brings the suit, the statute being for the benefit of creditors, and not of the debtors of the estate; *Boyn-ton v. Roe*, 114 Mich. 401; *Davies v. Dow*, 80 Minn. 223; *Schneider-Davis Co. v. Brown*, (Tex. Civ. App. 1898) 46 S. W. Rep. 108, holding that an assignee is entitled to recover the full value of the goods wrongfully seized by a nonaccepting creditor, notwithstanding the assignee had in his possession funds amply sufficient to satisfy the debts due to all the accepting creditors.

Action of Trover. — *Davies v. Dow*, 80 Minn. 223; *Miller v. Waite*, 59 Neb. 319; *Rock Island Plow Co. v. Hill*, (Tex. Civ. App. 1895) 32 S. W. Rep. 242.

Relief at Law. — But compare *Taylor v. Evans*, 16 Tex. Civ. App. 409.

Informal Remedy upon Dissolution of Levy. — Where the levy of an execution was dissolved by an assignment, the assignee and the judgment debtor are allowed to petition the court for an order directing the marshal to turn over the property to the assignee and to set aside the writ, etc. This informal procedure is allowable for the speedy determination of the rights involved, in the interest of the claimant of the property and of the officer. *Brochon v. Wilson*, (C. C. A.) 91 Fed. Rep. 617.

Legal Capacity — Bond and Inventory. — Conceding that the assignment of an insurance policy is an assignment for the benefit of creditors, an assignee has no legal capacity to sue for the proceeds thereof without giving the bond and filing the inventory required by statute. *Westchester F. Ins. Co. v. Blackford*, 2 Indian Ter. 370.

Foreign Assignment. — In *Watson v. Holden*, 58 Kan. 657, it was held that foreign assignees cannot maintain a suit for land in *Kansas* as against attaching creditors. See also *infra*, II. 2, c. *Suits to Avoid Attachment Proceedings*, note 2.

After Discharge. — The legal title to corporate stock vests in the assignee and remains in him until disposed of by some judicial proceeding, and his right to have such property, discovered after his discharge, is not defeated by his previous discharge. *St. George's Church Soc. v. Branch*, 120 Mo. 226.

Money Paid Out by Assignee. — If one as assignee pay out money improperly from the trust fund, the right of action to recover it back is not in him personally but as assignee, and if he is removed as assignee such right passes with the rest of the trust estate to his successor. *Mitchell v. Stoddard County Bank*, (Ky. 1901) 65 S. W. Rep. 839.

On the other hand, where an assignee is required to pay a debt in order to get possession of collaterals and thus prevent their sacrifice, he is the legal representative of the assignor and may recover back usury included in the payment. *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. Rep. 143.

Suit Against an Assignee. — Where an assignment is made under the statute to two assignees and one of them is in-

870. [He stands in the shoes of the assignor except where, by particular statutes and for particular purposes, he represents the creditor; he may pursue any remedy which the assignor might have pursued, and, in cases not within the statutory exception, his title will be subject to the same equities that might have been urged against the assignor. See note 1a.]

871. 2. Usual Forms of Action — *b.* REPLEVIN. — See note 3.

debted to the estate, the court cannot enter separate judgment against him upon a mere rule to show cause why such judgment should not be entered, but the assignee is entitled to a trial by jury if he denies liability, and the court should appoint an assignee for the purpose of suing the original debtor assignee and establishing the claim against him. *In re Excelsior Mfg. Co.*, 164 Mo. 316.

A Stipulation by a Trustee and a debtor, who had taken proper steps to have a claim for services rendered the assignee (whom the trustee succeeded) passed upon in the County Court, that the trustee should take judgment for the claim against defendant, but that execution should not issue until defendant's claim could be passed upon by the county judge, and that if allowed it should be credited on the judgment, cannot be violated by the trustee. *Eames v. Bagg*, 8 N. Y. App. Div. 541.

Defense. — The debtor of the assignor cannot set up in avoidance of the assignment matter which is available only to creditors at their election. *Missouri, etc., R. Co. v. Fuller*, (C. C. A.) 72 Fed. Rep. 467.

So in an action by a trustee against attaching creditors, an answer that the trust was intended as a general assignment, and as such was invalid because it did not provide for the transfer of the individual property of the members of the firm, is defective in not stating that the members of the firm had other property. *Hamilton Brown Shoe Co. v. Mayo*, 8 Tex. Civ. App. 164.

870. 1a. *Sampson v. Jackson*, 103 Ala. 550; *George v. Pierce*, 123 Cal. 172; *Knight v. Martin*, 155 Ill. 486, holding that an assignee may move to set aside a confession of judgment by the assignor, notwithstanding the rule that no one but a party to a judgment or execution can move to set aside the judgment or quash the execution; *Ringen Stove Co. v. Bowers*, 109 Iowa 175; *Michigan*

Trust Co. v. Webber, 109 Mich. 87; *Dickson v. Kittson*, 75 Minn. 168; *Evans-Snyder-Buell Co. v. Turner*, 143 Mo. 638; *Lancaster County Bank v. Gillilan*, 49 Neb. 165; *El Reno First Nat. Bank v. Salyer*, (Okla. 1897) 50 Pac. Rep. 77, holding that under the statute the assignee represents the creditors and may resist a claim upon any ground available to creditors and which would not be available to the assignor; *Dittman v. Weiss*, 87 Tex. 614; *Momsen v. Noyes*, 105 Wis. 565. See also *infra*, IV. 2. **By Statute** — *Right Governed by Statute*, note 1.

A Cause of Action for a Statutory Penalty does not pass up the assignment to the assignee. The enforcement is a personal privilege to the party aggrieved. He could not be compelled by his creditors to bring the action to enforce the penalty when it has no right to do so by the assignee. The assignee in such a case is not a debtor's "legal representative" within the terms of the statute giving the penalty. *Osborn v. Athens First Nat. Bank*, 175 Pa. St. 494.

871. 3. Intervention by Assignee. — Where an assignee voluntarily intervenes in a replevin suit as the defendant therein to protect goods which he asserts belonged to his assignor when the deed of assignment was executed, he is not estopped in such intervention from challenging the validity of the writ under which plaintiff would take goods; the writ being void, the assignee may set up such fact. *Taylor v. Ellis*, 200 Pa. St. 191.

Where the Assignment Was Void a contention by the assignee, in an action of replevin by him against an officer who had levied an attachment on the property, that the assignee was an officer of the court and the plaintiff in attachment had not obtained permission of court to levy the attachment, was held to be without force, since, the assignment being void, there was in fact no assignee. *Mosconi v. Burchinell*, 7 Colo. App. 435.

872. c. SUITS TO AVOID ATTACHMENT PROCEEDINGS. — See note 2.

875. 3. Complaint. — See note 2.

Assignment as Part of Complaint. — See note 3.

876. 4. Parties. — See note 2.

877. III. SUITS BY CREDITORS TO PROTECT ASSIGNED PROPERTY — 1. **When Creditors May Sue.** — See note 2.

872. 2. Intervention — *Intervention by Interplea.* — Under the statutes of some states an assignee may defend in an attachment sued out against the assignor. *Ringen Stove Co. v. Bowers*, 109 Iowa 175, holding that the assignee may counterclaim damages on the attachment bond for the wrongful suing out of the attachment; *F. O. Sawyer Paper Co. v. Continental Printing Co.*, 77 Mo. App. 184; *Parlin, etc., Co. v. Schram*, 4 Okla. 651. And another statute empowering an assignee to bring an action for the recovery of the assignor's estate, does not affect the right to defend in such attachment. *F. O. Sawyer Paper Co. v. Continental Printing Co.*, 77 Mo. App. 184.

Foreign Assignee. — In *Happy v. Prickett*, 24 Wash. 290, it was held that while an assignee under an assignment in another state for the benefit of creditors there could not take property in *Washington* as against resident attaching creditors, he should be allowed to intervene for the purpose of testing the validity of the claims sued on, and if they were illegal or were not sustained, the property would be subject to the claim of the assignee.

875. 2. See *Searles v. Little*, 153 Ind. 433, wherein a complaint in an action to set aside a prior conveyance was held good, though prolix and containing unnecessary matter.

Acceptance by Beneficiaries. — In an action by a trustee against an attaching creditor and the officer who levied the writ, it is not necessary to allege or prove that all the beneficiaries had accepted, and an allegation that some had accepted will admit proof of who they were, and in this respect the pleading is sufficient. *Rock Island Plow Co. v. Hill*, (Tex. Civ. App. 1895) 32 S. W. Rep. 242.

Allegations as to Foreign Corporation. — If an assignment is shown it is *prima facie* evidence of plaintiff's right to sue, and where the suit is by an assignee of a foreign corporation it is not necessary to allege that the corpora-

tion had complied with the laws of the state where the suit is brought to admit it to engage in business there, nor is it necessary to allege the condition of the laws of the state of the corporation's domicile as to its right to make an assignment. *Miller v. Goodman*, 15 Tex. Civ. App. 244.

Confined to Theory of Complaint. — Where the complaint by an assignee is ostensibly for a conversion, and, defendant being a nonresident, plaintiff causes an attachment to issue and be levied on defendant's property, and thus forces him to appear to defend his property, it would be a breach of comity amounting to a fraud to allow plaintiff to change front and treat the action as one to set aside a transfer and for recovery of property. *Hay v. Tuttle*, 67 Minn. 56.

3. Failure to File as Exhibit cannot be raised for the first time on appeal under the assignment that the complaint does not state facts sufficient to constitute a cause of action. *Searles v. Little*, 153 Ind. 432.

876. 2. Congress Constr. Co. v. Farson, etc., Co., 199 Ill. 398, holding that this right does not prevent the assignee from suing in the name of the assignor, if he so chooses, *citing* 7 ENCYC. OF PL. AND PR. 734.

Judgment Debtor of Assignor. — Where an assignee seeks to have the lien of a deed of trust executed by the judgment debtor of the assignor postponed to the lien of the judgment in favor of the assignor, the judgment debtor is a necessary party. *Larson v. Ross*, 10 Colo. App. 267.

877. 2. Loucheim v. Casperson, 61 N. J. Eq. 529; *Terhune v. Sibbald*, 55 N. J. Eq. 236; *Maas v. Falk*, 146 N. Y. 34; *Dittman v. Weiss*, 87 Tex. 614; *H. B. Claflin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958. *Compare* *Cornell v. Sulter*, 23 Ohio Cir. Ct. 384.

No Previous Request to Bring Suit. — The requirement that the assignee be requested to proceed is based upon the assumption that he is living and is

879. 2. Necessary Steps Before Supplanting Assignee. — See note 1.

IV. ACTIONS TO SET ASIDE PRIOR FRAUDULENT CONVEYANCES — 1. **At Common Law.** — See note 3.

880. Exhaustion of Legal Remedies. — See note 2.

881. 2. By Statute. — See note 4.

882. Right Governed by Statute. — See note 1.

not himself a party to the fraudulent disposition of the property. *Loucheim v. Casperson*, 61 N. J. Eq. 529; 80 where the suit is for the purpose of removing the assignee and reaching assets fraudulently disposed of by the assignor, such a demand would be idle and is not necessary. *Terhune v. Sibbald*, 55 N. J. Eq. 236.

Creditors in Trust Deed. — In *Mack v. Mittenenthal*, (Tex. Civ. App. 1896) 36 S. W. Rep. 799, creditors in a deed of trust sued to recover against a sheriff and his indemnitors for seizing property under attachment, and it was held that the action was maintainable, especially where the trustee was made a defendant because he was a surety on the sheriff's bond; that the petition was defective in not alleging that there were not goods enough to pay plaintiffs' debts in full, as otherwise it would not appear how plaintiffs were injured; that plaintiffs' title was equitable, not legal, hence they must show how their security has been injured.

879. 1. Suit in Assignee's Name. — Provision for such a proceeding relates only to such actions as the assignee is authorized to institute as representing the creditors, and does not authorize an action by a creditor to set aside a conveyance made by the assignee himself. *Kyes v. Merrill Furniture Co.*, 92 Wis. 32.

In *Kansas* the remedy is by application to the court having the supervision of assignments, under the statute, to compel the assignee to act. *John Deere Plow Co. v. Emporia Nat. Bank*, 59 Kan. 38.

In *Rhode Island* it is for the assignee to proceed to avoid a preference, and if he fails to discharge such duty he may be compelled to do so or removed from his trust; in other words, he is subject to the control of the court upon the petition of the creditors. *Colt v. Sears Commercial Co.*, 20 R. I. 323.

Action to Compel Execution of Trust. — If the assignee fails to collect a debt due the assignor, the creditor has a

remedy by action to compel the execution of the trust. *West v. Gribben*, (Ky. 1901) 62 S. W. Rep. 869.

3. Illinois. — *Hinkley v. Reed*, 182 Ill. 440; *Mills v. Bear*, 95 Ill. App. 586. **880. 2. See Wenger's Estate**, 17 Pa. Co. Ct. 203.

881. 4. New York. — *McNaney v. Hall*, 86 Hun (N. Y.) 415, *affirmed* in 159 N. Y. 544.

882. 1. The Assignee Is the Proper Party to sue to set aside conveyances. *Bailey v. American Nat. Bank*, 12 Colo. App. 66; *Searles v. Little*, 153 Ind. 432; *Ringen Stove Co. v. Bowers*, 109 Iowa 175; *Mehlhop v. Ellsworth*, 95 Iowa 657; *Thomas Mfg. Co. v. Drew*, 69 Minn. 69; *Dickson v. Kittson*, 75 Minn. 168; *Loucheim v. Casperson*, 61 N. J. Eq. 529; *Watson v. Rowley*, 63 N. J. Eq. 195; *Crocker v. Huntzicker*, 113 Wis. 181; *H. B. Claflin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958.

Conveyance Operating as Preference. — So under statute an assignee may sue to reach property conveyed by way of preference. *Taylor v. Seiter*, 199 Ill. 555; *Ahlgren v. Huntington*, 85 Ill. App. 639; *Dickson v. Kittson*, 75 Minn. 168; *Wile v. Cauffman*, 39 N. Y. App. Div. 206, holding that in such a suit several defendants to whom such transfers were made may be joined so that only a third of the assignor's estate may be applied to their debts as provided by statute; *Colt v. Sears Commercial Co.*, 20 R. I. 323; *Loving v. Arnold*, 84 Fed. Rep. 214. Or if the assignee fail to assert the rights of the creditors, they may sue. *Maass v. Falk*, 146 N. Y. 34. And see *supra*, III. 1. *When Creditors May Sue*, note 2. Or such action may be brought by any person interested. *Early Times Distillery Co. v. Zeiger*, (N. Mex. 1902) 67 Pac. Rep. 734. But it must be brought within the time prescribed by the statute. *Zeman v. Steinberg*, (Ky. 1899) 54 S. W. Rep. 178; *Early Times Distillery Co. v. Zeiger*, (N. Mex. 1902) 67 Pac. Rep. 734.

In *Alabama* an insolvent may sell

884. V. ACTIONS TO ENFORCE ASSIGNMENT — 1. Jurisdiction. —
See note 1.

part or the whole of his property to one of his creditors in payment of an antecedent debt. Such a transaction is not annulled or rendered fraudulent by the statutory provision that a conveyance by the debtor of substantially all of his property, etc., shall inure to the benefit of all his creditors, but a court of equity will apply the same, at the election of the creditors, for their equal benefit, and such trust character is not enforceable at law. *Morrow v. Campbell*, 118 Ala. 330; *Davidson v. Kahn*, 116 Ala. 427.

Assignor as Defendant. — It is held that under the statute in *Kentucky* the assignor is a necessary party to a suit by the assignee against a prior transferee or vendee, attacking such conveyance as an unlawful preference. *Loving v. Arnold*, 84 Fed. Rep. 214, on a question as to diverse citizenship upon removal of cause to federal court.

Fraudulent Grantee Necessary Party. — In a suit by creditors to reach estates fraudulently disposed of by the assignor, the grantee in such fraudulent sale must be made a party defendant before a decree can be made as to such property. *Terhune v. Sibbald*, 55 N. J. Eq. 236.

Foreclosure Against Assignee and Assignor binds the creditors, and a creditor under the assignment cannot sue to set aside the mortgage. *Mehlhop v. Ellsworth*, 95 Iowa 657.

Presumption. — In an action by an assignee to set aside a conveyance, it will be presumed that he represents creditors who are entitled to attack the transfer. *Davies v. Dow*, 80 Minn. 223.

Ratification of Fraudulent Transfer. — Creditors may affirm a fraudulent transfer by their debtor by pursuing the property acquired by the debtor in exchange, but the simple fact that the notes for the transfer came into the hands of the assignee who held them at the time of the trial of the suit by him to set aside the transfer will not constitute such ratification. *Kells v. McClure*, 69 Minn. 60.

884. 1. Bohmer v. Louisville Deposit Bank, (Ky. 1895) 30 S. W. Rep. 874; *Havens v. Sibbald*, (N. J. 1898) 41 Atl. Rep. 371; *Peabody v. Tenney*, 18 R. I. 498; *H. B. Claffin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958. But it is otherwise as to a trust by a

solvent concern, which is not an assignment for the benefit of creditors, but only a trust in the nature of an agency to sell property and pay debts. In such a case there is no more necessity to invoke the aid of equity than if the conveyance had not been made. *Ames v. Sabin*, 107 Fed. Rep. 582.

Retaining Cause to Administer Trust. — Though some particular relief sought by a bill by creditors cannot be granted, the court may nevertheless retain the cause for the administration of the trust. *Southern Commission Co. v. Porter*, 122 N. Car. 692; *Taylor v. Mahoney*, 94 Va. 508; *Spindle v. Fletcher*, 93 Va. 186; *Putnam v. Timothy Dry-Goods, etc., Co.*, 79 Fed. Rep. 454.

Other Courts Having Jurisdiction Over Assignments. — Under various statutes jurisdiction over assignments is conferred upon particular courts, and proceedings are prescribed for the administration of the trusts which must generally be pursued. See *Hill v. Graham*, 11 Colo. App. 536; *Atlas Nat. Bank v. More*, 152 Ill. 528; *Weir v. Mowe*, 182 Ill. 444; *Clark v. Burke*, 163 Ill. 334; *McNamara v. Schwaniger*, 106 Ky. 1, holding that as to an assignment made before the statute it is proper to conform the proceedings for administering and accounting by and discharge of the assignee to the requirements of the statute; *State v. Withrow*, 141 Mo. 69, holding that if the deed is void on its face all proceedings by the Circuit Court are without its jurisdiction, and prohibition will lie to prevent it from proceeding; *Smith v. Egan*, 80 Mo. App. 56; *Havens v. Horton*, 53 Ohio St. 342; *Sprinkle v. Wallace*, 28 Oregon 198; *Gilbert Hunt Mfg. Co. v. Wheeler*, 15 Wash. 594, wherein it is held that such court may refuse to permit a mortgagee of personalty to bring a separate action to foreclose, and may settle the matter in the assignment proceeding, yet having granted permission to bring such action it is error to dismiss it. So a separate suit to set aside a final judgment discharging an assignee for fraud, and to require an accounting (*Freeman v. Wood*, (N. Dak. 1901) 88 N. W. Rep. 721), or a suit to require an accounting after the creditors' claims have been paid according to the terms of a compromise agreement

885. 3. Bill or Complaint. — See note 4.

886. See note 1.

(*Phenix Nat. Bank v. Keim*, 69 N. Y. App. Div. 210), cannot be maintained unless it is shown that the method and machinery provided by the assignment statute are not sufficient for the protection of the creditor.

In *Illinois* it is held that the County Court, having jurisdiction over assignments, has no general chancery jurisdiction, and cannot order property in the hands of a third person, and which had never been in the possession of the assignee, turned over to the assignee, and determine the title of the holder to be fraudulent. *Friedman v. Podolski*, 185 Ill. 587; *Oakford v. Fischer*, 75 Ill. App. 544.

In *Ohio* the general powers conferred on the Probate Court to administer assignments does not preclude the Court of Common Pleas from exercising its powers as a court of general jurisdiction. *Robinson v. Williams*, 62 Ohio St. 401. The Probate Court can act under the assignment, not in opposition to it. *Standard Home, etc., Assoc. v. Jones*, 64 Ohio St. 147.

Reconveyance to Assignor. — Where the assignor had settled with all creditors except one, and upon application for an order on the assignee to reconvey the order was granted upon deposit in court of a fund to secure the objecting creditor, the objecting creditor desiring his claim passed upon by the jury should apply for an issue, but having brought a suit in the court where the fund was, an appeal by the assignor from a refusal of the court to appoint an auditor to distribute the fund is premature. *Hopper's Estate*, 192 Pa. St. 287.

Where All Claims are Paid Except the Assignee's Fee the court may turn over the property (an hotel) to the assignor as a receiver of the court, to be operated during a particular season, and prevent a sale of the property. *Dickinson v. Earle*, 34 N. Y. App. Div. 559.

Order Closing Estate and discharging the assignee is final and conclusive and cannot be kept open unless appealed from, and this cannot be done by writ of error. *Waukesha Malleable Iron Co. v. Kingman*, 96 Ill. App. 510.

Discontinuance or Closing by Consent. — Where, under the statute, an assignment is revocable by consent of a ma-

jority of the creditors in numbers and amount who have proved their claims, the court cannot judicially know that such majority have consented until the expiration of the time for filing claims, and an order of discontinuance entered before such time is void. *Higinbotham v. Chicago Title, etc., Co.*, 182 Ill. 68; *Manufacturer's Paper Co. v. Royal Trust Co.*, 98 Ill. App. 41.

Accounting After Bankruptcy of Assignor. — Where the assignor is adjudicated a bankrupt in the federal court, the assignee will be required to account in the court which has supervision over assignments, although the amount found due is to be paid over to the receiver in bankruptcy and not to creditors, because an accounting would be necessary to make the assignee's bond effective. *Matter of Bieber*, 38 N. Y. App. Div. 639.

Assignee Receiver of Court. — In *Mississippi* the code provides that within a certain time the assignee shall file a petition in the Chancery Court making the assignor and creditors parties, and that upon the filing and approval of his bond he shall become a receiver of the court. *Weimer v. Scales*, 74 Miss. 1.

885. 4. An Action at Law Cannot Be Maintained. — See *De Walt v. Zeigler*, 9 Tex. Civ. App. 82.

886. 1. In Court Having Supervision of Assignments. — In *Stoerzer v. Nolan*, 19 N. Y. App. Div. 338, it was held that the Supreme Court, in the exercise of its jurisdiction over assignments, could proceed either in an action or by petition and citation; that it could control the matter by rules, designating which of the two remedies should be pursued; that the creditor could not elect to proceed by action in opposition to a rule of court requiring him to proceed by petition and citation. But the court has no summary jurisdiction over the assignee as it has over its own officer as a receiver. *Matter of Devlin*, 24 N. Y. App. Div. 219. But see *supra*, V. 1. *Jurisdiction*, note 1.

"Motion" to Compel Distribution. — In *Kansas* the District Court acquires jurisdiction in respect to the condition and distribution of the estate upon the sworn petition of a creditor or other person interested in the estate, upon which the assignee may be cited to

- 887.** *a. PARTIES PLAINTIFF* — (1) *Creditors.* — See note 1.
888. (2) *Assignee.* — See note 3.
889. See note 1.
b. PARTIES DEFENDANT — *Assignee.* — See note 3.
892. *c. NECESSARY AVERMENTS* — *Generally.* — See note 2.

answer, etc. Where the application was called a motion, but contained a full recital of the facts and explicit statement of the relief asked, was verified, and notice was given the assignee, who appeared and resisted, it was held that the proceeding was in substantial compliance with all requirements, and want of formal citation was not an available objection to the assignee. *American Nat. Bank v. Branch*, 57 Kan. 27.

887. 1. *Parkhurst, etc., Co. v. Etina Coal Co.*, (Tenn. Ch. 1899) 54 S. W. Rep. 58; *Tennent v. Davis*, (Tex. Civ. App. 1895) 31 S. W. Rep. 251; *Putnam v. Timothy Dry-Goods, etc., Co.*, 79 Fed. Rep. 454.

Dissenting Creditors. — Where complainants had dissented, as shown by the fact that after the assignment they brought suit against the assignor and attached the assigned property, and in that suit obtained judgment for the amount of their claim, the bill cannot be maintained by them against an assignee and other creditors for an accounting. *Farrar v. Powell*, 71 Vt. 247.

Right of Only Remaining Creditor. — On application of the only remaining creditor of an assignor after payment of all other debts, if the assignee admits that assets came to his hands and sets up matter in excuse or in discharge of his liability to account to the petitioner, and the replication denies such matters of the excuse, on the pleadings the petitioner is entitled to an account. *Passmore's Estate*, 194 Pa. St. 632.

888. 3. *McDowell v. Columbia Bldg., etc., Assoc.*, (Ky. 1899) 51 S. W. Rep. 1013; *Putnam v. Timothy Dry-Goods, etc., Co.*, 79 Fed. Rep. 454. See also *Craig v. Hoge*, 95 Va. 275, as to effect of jurisdiction first acquired in such suit.

Effect of Erroneous Determination upon Successor. — After an assignment a creditor levied an attachment upon part of the property, and subsequently the assignee instituted a suit to have determined the rights of the parties

under the assignment and whether the assignee, in the distribution of the fund, should observe the provisions of the instrument creating preferences, and after such determination the assignee resigned and another was appointed, in the same suit, to carry out the trust according to the provisions of the instrument. It was held that the fact that in the suit by the original assignee the court erroneously determined the question as to whether the original assignee should observe the provisions of the deed did not change the character of the title vested in the assignee, and his successor could recover property purchased by the creditor in the attachment suit. *Thaxton v. Smith*, 90 Tex. 589.

Costs. — In a suit by an assignee for the settlement of the trust, the costs will be paid out of the general fund if sufficient for that purpose. If the general fund is insufficient for that purpose such expenses as were necessary to the settlement of the rights of the creditors may be paid out of the fund adjudged to one of the creditors having a superior right. *Shewmaker v. Yankey*, (Ky. 1902) 66 S. W. Rep. 1.

889. 1. So in such a suit it is not proper to allow a single creditor to come in and have himself appointed to represent the creditors of the class to which he belongs, raise the very questions which the assignee has raised, and then have an allowance made for a fee to be taxed out of the fund. *McDowell v. Columbia Bldg., etc., Assoc.*, (Ky. 1899) 51 S. W. Rep. 1013.

3. Multifariousness. — A bill for an accounting against assignees who are also creditors, in which no one is made a party defendant unless it is alleged in the bill that he has been in some way connected with the fraudulent disposition of the property or in some manner with the proceedings in respect to it, is not multifarious. *Farrar v. Powell*, 71 Vt. 247.

892. 2. *Kleinschmidt v. Steele*, 15 Mont. 181; *Peabody v. Tenney*, 18 R. I. 498.

894. VII. ACTION TO SET ASIDE ASSIGNMENT — 1. Jurisdiction.

— See note 3.

901. 3. Requisite Steps Before Suing — c. EXCEPTIONS TO RULE REQUIRING JUDGMENT AND RETURN OF NULLA BONA — (2) Statutory Exceptions — (b) Right of Attaching Creditors to Sue. — See note 1.

904. 4. Bill or Complaint — a. PARTIES PLAINTIFF. — See note 2.

910. VIII. ACTION ON ASSIGNEE'S BOND. — See note 3.

[The bond of an assignee being joint and several, all the creditors need not join as plaintiffs in an action thereon, but they may have separate actions. See note 4a.]

904. 3. Garnishment. — In *Florida* it is held that a proceeding by garnishment is the proper way to test the validity of an assignment, and if upon the trial of the issue in such a proceeding the assignment is found to be fraudulent, ineffectual, or void, the garnishing creditor should recover against the assignee garnished the amount found in his hands under a void assignment at the time of the service of garnishment process, to the extent of the creditor's claim. *Dorr v. Schmidt*, 38 Fla. 354.

Attachment. — In *Parlin, etc., Co. v. Schram*, 4 Okla. 651, it is held that the District Court only is vested with jurisdiction over assignments; that a creditor cannot by attachment proceeding in the Probate Court raise any question of the validity of the assignment, as that question must be determined in a direct proceeding in the District Court.

So in *Bates v. Harding*, 17 N. Y. App. Div. 606, it was held that where property in the hands of an assignee was attached, and the assignee stipulated with the attaching creditor for the release of the levy and its transfer to the proceeds of the property when sold, the validity of the assignment could not be determined summarily on motion, but only by action, in which the assignee for the creditors may contest.

Judgment for Amount Admitted. — In a suit to set aside an assignment as fraudulent or void complainant is entitled to a judgment on its note admitted to be due and unpaid, although it fails in the assault upon the assignment. *Gordonsville Milling Co. v. Jones*, (Tenn. Ch. 1900) 57 S. W. Rep. 630.

901. 1. Bailey v. American Nat.

Bank, 12 Colo. App. 66, on the ground that the remedy by attachment is adequate.

904. 2. The assignment remains valid as to creditors who are not parties, and they may require the assignee to file his account. *Matter of Thoesen*, 62 N. Y. App. Div. 87.

910. 3. State v. Boeppler, 63 Mo. App. 151.

When Cause Accrues. — A cause of action on a bond of an assignee does not accrue to a distributee until the assignee has been adjudged or ordered to pay him a definite sum and has failed to do it. *Stone v. Hart*, (Ky. 1902) 66 S. W. Rep. 191.

In a suit on a bond, in the name of the state for the use of plaintiff and of other creditors who may come in, the fact that plaintiff for whose use as nominal plaintiff the state sued had received the amount due it, but had been required to give a refunding bond to await the final decision of its right to hold the fund, does not defeat its right as an interested party to prosecute the suit. *German Bank v. Haller*, 103 Tenn. 73.

4a. Hays v. Comstock Castle Stove Co., 70 Ark. 151.

Judgment. — In a suit by a part of the accepting creditors against the sureties on the bond of the assignee the judgment should be only for the *pro rata* share of what all the accepting creditors would be entitled to recover if they were plaintiffs, and not for the whole amount of damages suffered by all of the accepting creditors. *Hays v. Comstock Castle Stove Co.*, 70 Ark. 151; *State v. Boeppler*, 63 Mo. App. 151.

Assignor Not Necessary Party. — In a suit on the bond of an assignee under a general assignment of an insolvent

911. Defenses. — See note 1.

IX. ACTIONS BY THIRD PERSON AGAINST ASSIGNEE —

1. In General. — See note 2.

912. See note 1.

2. Forms of Action — Replevin. — See note 3.

corporation there is no necessity to make such corporation a party defendant. *Andrews v. Ford*, 106 Ala. 173.

Jurisdiction. — A suit by the creditors on an assignee's bond is well brought in the Chancery Court where the bill by positive averments shows that the assignee has moved out of the state and abandoned the business intrusted to him. These are themselves sufficient to authorize such court to assume the administration of the trust. *Andrews v. Ford*, 106 Ala. 173.

Venue. — An action by accepting creditors against the sureties on an assignee's bond is transitory and may be brought against the sureties wherever they may be found. *Hays v. Comstock-Castle Stove Co.*, 70 Ark. 151.

Effect of Judgment on Settlement of Accounts. — The sureties on a bond of an assignee undertake that he shall pay over the amount found to be due from the assignee on final settlement, and in an action on the bond the sureties are concluded by a judgment against the principal, rendered in a suit against the assignee for final settlement, as to the amount in the assignee's hands unaccounted for. *National Surety Co. v. Arterburn*, 62 S. W. Rep. 862, 23 Ky. L. Rep. 281.

So the plaintiff is concluded by a judgment as to the allowances of costs and charges in the settlement in a suit against the assignee to settle his accounts. *Arterburn v. National Surety Co.*, 62 S. W. Rep. 864, 23 Ky. L. Rep. 288.

911. 1. Bond Not Good under Statute. — Where an assignee enters into a bond for the discharge of his duties as such, conditioned to faithfully perform such duties and to pay such damages as may accrue from his failure to do so, notwithstanding the bond is not conditioned in some respects, and is not payable as required by the statute to make a statutory bond, it is none the less a valid common-law bond and may be enforced in an action thereon, and neither the assignee nor his sureties will be allowed to set up as a defense against the common-law liability that the bond is not in all respects

statutory. *Andrews v. Ford*, 106 Ala. 173.

Premature Action. — In *Hill v. American Surety Co.*, 107 Wis. 19, it is held that the action may be brought while the assignment proceedings are open and pending; that the objection that the action cannot be brought until the breach has been adjudicated in the assignment proceedings is in abatement, and must be so raised to be available.

2. Jones v. McCormick Harvesting Mach. Co., (C. C. A.) 82 Fed. Rep. 295, under the statute in *Wisconsin*.

Suit to Enforce Lien. — An assignment by an insolvent corporation vests the title to the assets in the assignee, and in a suit to charge the assets in the hands of the assignee with a lien the assignee is the only necessary party, and the *cestuis que trustent* need not be joined. *Bircher v. St. Louis Sheet Metal Ornament Co.*, 77 Mo. App. 509.

912. 1. Election to Pursue Particular Property, or to claim as creditor, is binding. *Burrows v. Johnitz*, 57 Kan. 778; *Hargadine-McKittrick Dry Goods Co. v. Warden*, 151 Mo. 578.

But a claim for the specific property or the value thereof, filed with the assignee, is not a claim as creditor under the assignment so as to preclude the party from suing for the property or its proceeds. *Rhineland v. National City Bank*, 36 N. Y. App. Div. 11.

Application to Court in Assignment Proceeding. — Where an assignment embraces property to which the assignor has no title the owner may apply to the court for an order requiring the assignee to deliver the property. This is the proper remedy where the assignor holds property under a conditional sale with title reserved in the seller. The assignee is not an innocent purchaser. *Herring-Hall-Marvin Co. v. Moore*, (Miss. 1895) 17 So. Rep. 385.

3. Filing and Approval of Assignee's Bond. — If the assignee's bond is filed and approved within the period prescribed by the statute, it is immaterial that it had not been approved or filed when the action was brought against

913. *Trover.* — See note 1.

X. REMOVAL OF ASSIGNEE AND APPOINTMENT OF RECEIVER — 1. *Generally.* — See note 2.

914. 2. *Jurisdiction.* — See note 1.

915. 3. *When Assignee May Be Removed.* — See notes 1, 4.

him. *Thomas Mfg. Co. v. Drew*, 69 Minn. 69.

913. 1. *George v. Pierce*, 123 Cal. 172; *Jones v. McCormick Harvesting Mach. Co.*, (C. C. A.) 82 Fed. Rep. 295.

2. *Objection to Interest of Petitioner* that he is not a creditor may be determined in advance of granting the relief, but it should be upon issues regularly formed, and not upon a summary motion to dismiss the petition. *Matter of Hense*, 13 Wash. 614.

914. 1. *Morgan v. South Milwaukee Lake View Co.*, 100 Wis. 465; *H. B. Clafin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958. Or the power is exercised by particular courts which, under the statutes, have jurisdiction over assignment proceedings. *Caldwell v. Matthewson*, 57 Kan. 258, holding that the petition is a step in the proceeding and may be filed without giving security for costs. *In re Mast, etc., Co.*, 58 Minn. 313; *Rogers v. Pell*, 166 N. Y. 565; *Matter of Sheldon*, 72 N. Y. App. Div. 625; *Matter of Dwight*, 61 N. Y. App. Div. 357; *Brown v. Armstrong*, 18 R. I. 537; *Birmingham Drug Co. v. Freeman*, 15 Tex. Civ. App. 451; *Morgan v. South Milwaukee Lake View Co.*, 100 Wis. 465, holding that the remedy in the assignment proceeding is cumulative; *Brown v. Parker*, (C. C. A.) 73 Fed. Rep. 762, under the *Iowa* statute.

Refusal to Act or Failure to Qualify. — Equity will not allow the trust to fail. *H. B. Clafin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958.

The assignee himself may apply to have a successor appointed. *Brown v. Parker*, (C. C. A.) 73 Fed. Rep. 762.

Under the statute in *Texas* the judge of the County Court, on application of any creditor in writing, may appoint a competent assignee, if the original assignee fails within the prescribed time to execute a bond. The order may be made in vacation or in term time, and no notice to the assignor or assignee is required, and the order of appointment is appealable. *Birmingham Drug Co. v. Freeman*, 15 Tex. Civ. App. 451.

Acceptance of Resignation while petition for removal is pending is in effect

a removal of such assignee because of his declination to further execute the trust, and thereafter he is not entitled to be heard in opposition to the petition for the appointment of a successor. *State v. Johnson*, 105 Wis. 164.

Reference to Master. — Where a petition is filed by creditors, in the court administering the estate, to remove the assignee, the court has no right to refer the matter to the master for any other purpose than to lay the facts before the court, and not for the purpose of deciding the application. *Powell's Estate*, 163 Pa. St. 349.

Effect. — By the appointment of a successor he is invested with all the rights of the original assignee. *Brown v. Parker*, (C. C. A.) 97 Fed. Rep. 446.

Conclusiveness of Order. — An order removing an assignee and appointing a successor cannot be collaterally attacked while it stands unrevoked. *Turner v. New Farmer's Bank*, 102 Ky. 473; *Brown v. Parker*, (C. C. A.) 73 Fed. Rep. 762.

Bankruptcy Pending Reference. — In *Matter of Bieber*, 38 N. Y. App. Div. 639, on motion to remove an assignee, a reference was ordered on condition that if the creditor failed to prove the charges he should pay personally all the costs of the reference, which condition the creditor accepted. After the reference had proceeded until a large amount of expenses, in the way of stenographers' fees and referees' fees, had been incurred, the assignors were adjudicated bankrupt in the federal court. Upon motion of the assignee to discontinue the reference the court ordered the reference to be continued upon condition that the creditor pay all fees up to date and give bond for payment of all future expenses, otherwise the reference to be stayed.

915. 1. *Rogers v. Pell*, 166 N. Y. 565, where the appointment was pending an appeal to the Court of Appeals, and on motion in that court the new assignee was substituted; *Matter of Tousey*, 2 N. Y. App. Div. 569; *Hayne v. Sealy*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 243.

4. *When Necessary.* — It is held that

918. 5. Final Accounting of Assignee. — See note 1.

6. Cost of Accounting. — See note 2.

919. XI. ASSIGNMENT AS DEFENSE. — See note 1.

a receiver should be appointed only in extreme cases and when the interests of the parties are exposed to manifest peril. *Dozier v. Logan*, 101 Ga. 173.

Where no practical good can result from his removal, an assignee will not be removed by way of punishment for a mere mistake which causes no injury. *Matter of Le Brun Music Co.*, 56 Mo. App. 41. See *Boatmen's Bank Appeal*, 74 Mo. App. 60, holding the circumstances insufficient to require a removal.

On the other hand, there are positions in which an honest man might be placed in which he would be incompetent to act, and if his relations are such as to hamper or embarrass him in the vigorous performance of his duty he may be removed. *In re Mast, etc.*, Co., 58 Minn. 313; *Bryson v. Wood*, 187 Pa. St. 366; *Brown v. Armstrong*, 18 R. I. 537.

Delay and Neglect of Duty justify removal. *Tomkins v. Sheehan*, 6 N. Y. App. Div. 76, holding, however, that where, at the time of the application, all available assets have been collected and nothing remains to be done but to take and state the account, this may be done as well under the direction of the court as to burden the estate with the expense of a new assignee.

Upon Refusing Other Relief, as the setting aside of the assignment, the court may nevertheless be justified on the facts to take the funds from the control of the assignee and appoint a receiver. *Goldsmith v. Fechheimer*, (Ky. 1894) 28 S. W. Rep. 21; *Southern Commission Co. v. Porter*, 122 N. Car. 692; *Taylor v. Mahoney*, 94 Va. 508.

Notice. — An order removing an assignee without formal notice, when the assignee and his counsel are present in court pursuant to notice of motion that the assignee render his account, report his proceedings, and make distribution of the proceeds in his hands, although it may be irregular, will not be reversed where the report and admissions of the assignee in open court show gross irregularities in the management of the estate, and neither he nor his counsel objects, but the assignee informs the court at the time the order is made

that he has no objection to being removed. *King v. McClurg*, 7 S. Dak. 67.

On Motion of Surety. — In *Minnesota* the surety may apply to be discharged upon failure of the assignee to pay the agreed premium, and acceptance, pending such application, of a part of the premium, but only so much as had been earned and was absolutely due, will not be a waiver of the application. The removal is not erroneous because a prior order requiring the assignee to furnish a new bond within thirty days was made *ex parte*, as on the hearing the assignee was still entitled to raise the question of the propriety of the former order. *American Surety Co. v. Nelson*, 77 Minn. 402.

918. 1. Citation. — Creditors must be cited on a proceeding for appointment of substituted assignee, and accounting by representatives of deceased assignee. *Matter of Farmer*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 150.

2. Mitchell v. Stoddard County Bank, (Ky. 1902) 67 S. W. Rep. 983, (Ky. 1901) 65 S. W. Rep. 839.

Where the petition to dismiss an assignee is not sustained by the proof, though it was not groundless, it is error to impose costs on the petitioner. *Powell's Estate*, 163 Pa. St. 349, petition in court in which assignee is accounting.

919. 1. Personal Judgment. — *George v. Pierce*, 123 Cal. 172; *New Albany Mfg. Co. v. Sulzer*, (Ind. App. 1902) 63 N. E. Rep. 873; *Irwin v. Lloyd*, 65 Ohio St. 55, holding that such a course does not preclude the creditor from coming in under the assignment like other creditors.

But it is otherwise where the assignment statute contemplates the passing of the property into the possession of an assignee as an officer of the court and at once into the jurisdiction of the court, and the distribution by the court discharges the assignor. *Matter of Day*, 18 Wash. 359.

Judgment Against Assignee. — In an action against an assignor and his assignee for services rendered the assignor, the judgment cannot go against the assignee personally, but only against the assignor, to be a valid

claim against the estate. *Mattingly v. Willett*, (Ky. 1898) 44 S. W. Rep. 376.

A Foreign Assignment will not preclude a creditor from reaching by garnishment assets in his state. *Smith v. Lamson*, 82 Ill. App. 466.

Answer of Assignee as Garnishee, alleging the making of the assignment, that it was in due form of law, that all conditions required by the statute to give it effect and validity had been performed, and that the assignee had entered on the discharge of his duties,

is sufficient to allow proof of the assignment. *Rollins v. Humphrey*, 98 Wis. 66.

Garnishment Holding Surplus. — The assignee having accepted the trust, garnishments served upon him in the meantime would only hold such part of the fund as might remain after payment of all claims of creditors accepting and authorized to accept the assignment within the time prescribed by law. *Patty v. City Bank*, 15 Tex. Civ. App. 475.

ASSIGNMENT OF ERRORS.

922. II. NECESSITY OF ASSIGNMENT — 1. In General. — See notes 1, 2.

924. Effect of Failure to File. — See note 1.

926. Errors Not Considered. — See note 1.

927. Waiver of Errors Assigned. — See note 1. See also BRIEFS.

922. 1. *Noyes v. Tootle*, 2 Indian Ter. 144, in which case the court cited with approval 2 ENCYC. OF PL. AND PR. 922-924.

Useless Assignments, i. e., assignments which present immaterial questions, are reprehensible. *General Electric Co. v. Black*, 19 Mont. 110.

2. *Randall v. Wadsworth*, 130 Ala. 633; *Wheelock v. Myers*, 64 Kan. 47; *Perry v. Wheeler*, 63 Kan. 870; *Forrest v. Buchanan*, 203 Pa. St. 454; *Scranton Traction Co. v. Schlichter*, 202 Pa. St. 6; *Wilson v. Johnson*, 94 Tex. 272.

Minnesota Rule of Court. — Rule 9, subdiv. 3, of the Supreme Court of Minnesota, requires assignments of error, and provides that in the absence of an assignment of error no error not affecting the jurisdiction will be considered. *Adams v. Thief River Falls*, 84 Minn. 30.

Absence of Necessary Parties. — An appellate court will of its own motion reverse a decree rendered by the court below in the absence of necessary parties. *Craver v. Spencer*, 40 Fla. 135. See also PARTIES TO ACTIONS.

924. 1. *Noyes v. Tootle*, 2 Indian Ter. 144 [citing 2 ENCYC. OF PL. AND PR. 922-924]; *Security Imp. Co. v. Cass County*, 9 N. Dak. 553.

926. 1. *Colorado.* — *Lathrop v. Tracy*, 24 Colo. 382.

Florida. — *Dell v. Marvin*, 41 Fla. 221; *Rawlins v. State*, 40 Fla. 155.

Georgia. — *Brooks v. Raiden*, 113 Ga. 86.

Illinois. — *McCaleb v. Coon Run Drainage, etc., Dist.*, 190 Ill. 549; *Burke v. Dunning*, 72 Ill. App. 193.

Iowa. — *Spurrier v. McLennan*, 115 Iowa 461. See also *Smith v. Etna L. Ins. Co.*, 115 Iowa 217.

Montana. — *Wood v. Gleim*, 19 Mont. 22.

Nebraska. — *Union State Bank v. Hutton*, 62 Neb. 664; *Raker v. State*, 59 Neb. 202; *Montgomery v. Albion Nat. Bank*, 50 Neb. 652; *Clarke v. Nebraska Sav. Bank*, 50 Neb. 669; *Roberts v. Hopper*, 50 Neb. 681; *Graham v. Frazier*, 49 Neb. 90; *Denise v. Omaha*, 49 Neb. 750; *Hay v. Miller*, 48 Neb. 156; *Coburn v. Watson*, 48 Neb. 257.

North Dakota. — *Erickson v. Citizen's Nat. Bank*, 9 N. Dak. 81.

Pennsylvania. — *Scranton Traction Co. v. Schlichter*, 202 Pa. St. 6.

Texas. — *Link v. Houston*, 94 Tex. 378.

Immaterial that Question Is Discussed in Brief. — A question discussed in the brief of counsel, but not raised by any assignment in the petition in error, will not be considered. *Raker v. State*, 50 Neb. 202; *Clarke v. Nebraska Sav., etc., Bank*, 50 Neb. 669.

927. 1. *Alabama.* — *Daniel v. Bradford*, 132 Ala. 262; *Hunt v. Matthews*, 132 Ala. 286; *Postal Tel. Cable Co. v. Hulsey*, 132 Ala. 444; *Memphis, etc., R. Co. v. Martin*, 131 Ala. 269; *Pearson v. Adams*, 129 Ala. 157; *Tutwiler Coal, etc., Co. v. Enslen*, 129 Ala. 336; *Zirkle v. Jones*, 129 Ala. 444; *Dean v. Witherington*, 116 Ala. 573.

Georgia. — *Evans v. State*, 115 Ga. 229.

Illinois. — See also *Reardon v. Smith*, 72 Ill. App. 674.

Iowa. — *Fink v. Des Moines*, 115 Iowa 641.

Massachusetts. — See *Barrett v. Bruffee*, 182 Mass. 229.

Michigan. — *McLeod v. Hunt*, 128 Mich. 124; *Hart v. Doyle*, 128 Mich. 257, holding that the appellant is not entitled to a consideration of alleged errors first brought to the attention of the court in a supplemental brief. See

928. Fundamental Errors. — See note 2.

929. 2. In Criminal Cases — In General. — See note 2.

930. 3. In Equity Cases. — See note 2.

4. Appeals from Intermediate Appellate Courts. — See note 4.

932. III. FILING AND SERVICE — 1. Who May Assign Errors —

a. IN GENERAL. — See note 1.

933. *b.* JOINT ASSIGNMENT. — See note 1.

also *Frohlich v. Carroll*, 127 Mich. 561.

Missouri. — *Corrigan v. Kansas City*, 93 Mo. App. 173; *Matter of Cogswell*, 93 Mo. App. 482.

Nebraska. — *Russell v. State*, 62 Neb. 512; *Martin v. Kearney County*, 62 Neb. 538; *Roberts v. Hopper*, 50 Neb. 681; *Aetna Ins. Co. v. Simmons*, 49 Neb. 811.

The Court Is Confined to the Assignment of Error Insisted On. — *Rawlins v. State*, 40 Fla. 155.

Where No Reason or Argument Is Given in support of an assignment of error the court will not consider it, even though the appellant refers to the error as a ground for reversal. *Tutwiler Coal, etc., Co. v. Enslin*, 129 Ala. 336. See also *Brooks v. Raiden*, 113 Ga. 86; *Allen v. Harris*, 113 Ga. 107; *Hart v. Phenix Ins. Co.*, 113 Ga. 859; *Dolan v. Mutual Reserve Fund L. Assoc.*, 182 Mass. 413; *Barrett v. Bruffee*, 182 Mass. 229; *Doherty v. Rice*, 182 Mass. 182; *Nix v. Reiss Coal Co.*, 114 Wis. 493; *Cornell v. State*, 104 Wis. 527; *Butler v. State*, 102 Wis. 364.

Errors Waived in Intermediate Appellate Court. — Errors assigned in the appellate court upon rulings of the trial court, which are neither argued in the appellate court nor pressed upon that court's attention, are deemed waived, and cannot be revived and pressed in the Supreme Court. *Sutter v. Rose*, 169 Ill. 66.

Cross-assignments. — Where an appellee assigns cross-errors, and in his brief asks the court to affirm the judgment appealed from, he will be deemed to have abandoned his assignment of cross-errors. *Springfield Iron Co. v. McIntyre*, 72 Ill. App. 444.

928. 2. Consolidated Engineering Co. v. Crowley, 105 La. 615, citing 2 ENCYC. OF PL. AND PR. 928.

In Texas. — See *Wilson v. Johnson*, 94 Tex. 272.

Errors Apparent of Record Which Will Be Examined on appeal without any as-

signment of error are (1) that the court has not jurisdiction, or (2) that the complaint (or indictment) does not state a cause of action, or (3) that the facts found, whether by general verdict or special verdict, or by the judge, or by consent, do not justify the judgment imposed. *Wilson v. Beaufort County Lumber Co.*, 131 N. Car. 163.

929. 2. By the Code of Alabama — *Error in Giving or Refusing Instruction.* — Civ. Code Ala. 1896, § 613, dispenses with an exception to the ruling of the court in giving or refusing an instruction, but an assignment of error is necessary. *Smith v. State*, 130 Ala. 95; *Williams v. State*, 130 Ala. 107.

Failure to Assign Error in Striking Plea to Jurisdiction. — The mere recital in a bill of exceptions in a criminal case that the accused filed a plea to the jurisdiction of the court, and that the plea was stricken on demurrer, is no assignment of error and does not authorize the Supreme Court to review the action of the court below. *Daniel v. State*, 115 Ga. 205.

930. 2. *Brooks v. Raiden*, 113 Ga. 86, which was a suit for an injunction; *Sandberg v. Victor Gold, etc.*, Min. Co., 24 Utah 1.

4. Colorado. — *Bitter v. Mouat Lumber, etc., Co.*, 27 Colo. 120; *Akron Bank v. Dole*, 24 Colo. 94; *Robinson v. Denver, etc., R. Co.*, 24 Colo. 98; *Munn v. Corbin*, 24 Colo. 381, which cases were decided under rule 50 (compilation of 1897, being 41 of the preceding book of rules), requiring new assignments of error in the Supreme Court.

932. 1. *Norris v. Downing*, 196 Ill. 91, citing with approval 2 ENCYC. OF PL. AND PR. 931.

933. 1. *Killian v. Cox*, 132 Ala. 666; *Monson v. Meyer*, 93 Ill. App. 94, affirmed 195 Ill. 142; *Sondheimer v. Graeser*, 72 Ill. App. 41, affirmed 172 Ill. 293; *Brachtendorf v. Kehm*, 72 Ill. App. 232, in each of which cases the court cited 2 ENCYC. OF PL. AND PR.

- 933.** Joint and Several, or Joint or Several, Assignment. — See note 4.
934. 3. Time of Filing — *a.* IN GENERAL. — See note 2.
935. *b.* EFFECT OF FAILURE TO FILE WITHIN TIME. — See note 1.
938. IV. SUFFICIENCY — 1. In General. — See note 3.
 Specification Must Be Complete in Itself. — See note 4.
 Different Rulings United in One Specification. — See note 5.
940. Stating Reasons for Error. — See note 1.
941. Disregard of Rules. — See note 3.
942. 2. Objections for Generality — *a.* IN GENERAL — Rule Stated. — See note 2.

933. See also *Wilson v. Alston*, 122 Ala. 630.

933. 4. *Sidway v. American Mortg. Co.*, 67 Ill. App. 24; *Consolidated Engineering Co. v. Crowley*, 105 La. 615, in each of which cases the court cited 2 ENCYC. OF PL. AND PR. 933. See also *Sondheimer v. Graesser*, 72 Ill. App. 41, affirmed 172 Ill. 293.

Necessity for Severance. — In *Wilson v. Alston*, 122 Ala. 630, it was held that where on an appeal by several defendants there is no severance in the assignment of error, error in the ruling of the trial court which is prejudicial to some of the appellants and not to all is unavailable to reverse the judgment or decree appealed from; it being necessary on such an appeal that the judgment or decree should be prejudicial to all of the appellants. See also *Killian v. Cox*, 132 Ala. 666; *Sondheimer v. Graesser*, 72 Ill. App. 41, affirmed 172 Ill. 293.

934. 2. *After Reargument Has Been Ordered.* — In *Mississippi*, when a cause has been remanded by the Supreme Court to its docket for reargument on one question, leave will not be given to raise other questions by additional assignments of error. *National Mut. Bldg., etc., Assoc. v. Pinkston*, 79 Miss. 478.

935. 1. In Georgia, if no exceptions *pendente lite* are filed, an assignment of error upon the court's refusal to dismiss the action is too late unless it is presented within thirty days from the term in which the ruling complained of was made. *Heery v. Burkhalter*, 113 Ga. 1043. See also *American Freehold Land Mortg. Co. v. Walker*, 115 Ga. 737; *Heery v. Burkhalter*, 113 Ga. 1043.

938. 3. In Pennsylvania, on Appeal from the Superior Court, the proper form of an assignment of error is that the Superior Court erred in not sustaining

(or in sustaining, as the case may be) the first (or second, etc.) assignment of error to the judgment of the Common Pleas; or if there be any new and further matters raised by the judgment of the Superior Court itself, they should be assigned in their due order. *Mellick v. Pennsylvania R. Co.*, 203 Pa. St. 457.

4. *United States Supreme Court Rule No. 11* provides that an assignment of error must set out separately and particularly each error asserted and intended to be urged. *Deering Harvester Co. v. Kelly*, (C. C. A.) 103 Fed. Rep. 261.

5. *Ostrom v. Arnold*, 24 Tex. Civ. App. 192; *Smith v. Hopkins*, (C. C. A.) 120 Fed. Rep. 921.

940. 1. *Reasons Must Be Stated.* — Where error is assigned to a ruling of the court, but no reason is given why such ruling is erroneous, the assignment will not be considered. *Inter State Sav., etc., Assoc. v. Benson*, 28 Wash. 578.

Grounds of Exception Narrowed by Assignment of Error. — Such grounds of exception as are not stated in the assignment of error will not be regarded, as the court will look solely to the assignments of error. *Clarke v. East Atlanta Land Co.*, 113 Ga. 21.

941. 3. *Deering Harvester Co. v. Kelly*, (C. C. A.) 103 Fed. Rep. 261.

942. 2. *Georgia.* — *Dickson v. Burwell*, 113 Ga. 93; *Hart v. Phenix Ins. Co.*, 113 Ga. 859; *Eastmore v. Bunkley*, 113 Ga. 637; *Grogan v. Tate*, 113 Ga. 1057.

Indiana. — *Chicago, etc., R. Co. v. State*, 158 Ind. 189. See also *Turpie v. Lowe*, 158 Ind. 47.

Minnesota. — *Hunt v. O'Leary*, 84 Minn. 200; *Hughes v. Meehan*, 84 Minn. 226; *Parish v. St. Paul*, 84 Minn. 426; *State v. Veek*, 80 Minn. 221.

943. Degree of Precision Required. — See note 2.

944. *b.* ASSIGNMENT UPON THE PLEADINGS. — See note 3.

945. See note 2.

c. ASSIGNMENT UPON THE EVIDENCE — General Assignment. — See note 5.

Nebraska. — Modern Woodmen of America *v.* Lane, 62 Neb. 89; Bush *v.* State, 62 Neb. 128; Green *v.* Tierney, 62 Neb. 561; Drexel *v.* Daniels, 49 Neb. 99; Aetna Ins. Co. *v.* Simmons, 49 Neb. 811; Imhoff *v.* Richards, 48 Neb. 590.

South Carolina. — Elkins *v.* South Carolina, etc., R. Co., 64 S. Car. 553.

Tennessee. — See also Minton *v.* Stahlman, 96 Tenn. 98

Some Assignments Not Sufficiently Specific. — It is not a ground for dismissal that some of the assignments do not plainly specify the alleged error if it appears that other errors are sufficiently assigned. Dickson *v.* Burwell, 113 Ga. 93, in which case the court said: "The better practice, unless all the assignments are amenable to the same objection, is to call attention to the assignments which do not specifically allege error, in the brief or oral argument, accompanied with a suggestion that such be not considered. In any event this court will, when it has a case under consideration, decline to consider any exception not properly made."

Assignment that Court Erred in Refusing to Order Judgment, etc. — In Adams *v.* Thief River Falls, 84 Minn. 30, the court refused to consider a contention that the verdict was excessive because there was no such assignment of errors as was required by a rule of court. The court said: "On this appeal the assignments that the court erred in refusing to order judgment notwithstanding the verdict, and its refusal to grant a new trial, are of no efficient value, and do not call attention to any of the numerous propositions of law involved in such motions, particularly since the motion for new trial was made upon several grounds. It has been repeatedly held by this court that such assignments are without avail."

943. 2. Adams *v.* Thief River Falls, 84 Minn. 30.

An Assignment that the Verdict Is Contrary to Law raises the question whether the verdict is contrary to the law as contained in the charge given by the court to the jury, but it does not

present for review alleged errors in the instructions. Drexel *v.* Daniels, 49 Neb. 99.

944. 3. Error in Allowing Intervention. — An assignment of error that the court "over the protest of the plaintiff" allowed named persons, not parties to the original action, to file an intervention and except generally to the allowance of such intervention without stating what, if any, objection was made thereto when offered, does not present any question for decision in the appellate court. Eastmore *v.* Bunkley, 113 Ga. 637.

945. 3. Error in Sustaining Demurrer. — A bill of exceptions reciting that a demurrer was heard and an order passed sustaining the same, and assigning "error upon the judgment sustaining said demurrer and passing said order," specifies plainly the decision complained of and the alleged error, and specifically sets forth the error alleged to have been committed, within the meaning of Civ. Code Ga., §§ 5527, 5528. Melson *v.* Thornton, 113 Ga. 99.

Error in Sustaining Demurrer and Striking Party Defendant. — In Johnson *v.* Porter, 115 Ga. 401, the court said: "The bill of exceptions, after reciting the fact that the court passed an order sustaining the demurrer and striking P. as a defendant in the case, declares: 'To which ruling this plaintiff, J., excepted, excepts, assigned, and now assigns the same as error.' Under a number of decisions of this court it must be ruled that this is a sufficient assignment of error." Citing Melson *v.* Thornton, 113 Ga. 99, and Frierson *v.* Alexander, 74 Ga. 666.

5. Western R. Co. v. Williamson, 114 Ala. 131; Dickson *v.* Burwell, 113 Ga. 93; Gilmore *v.* Butts, 61 Kan. 315; Omaha *v.* Richards, 49 Neb. 244; Schofield *v.* Territory, 9 N. Mex. 526.

Relevancy. — In Scott *v.* Maddox, 113 Ga. 795, the court said: "The record contains assignments of error upon the refusal of the court to allow the proponders to ask certain witnesses different questions that are contained in the record. As it is not disclosed what answers were expected to these

946. See note 1.

947. By Reference. — See note 1.

[Insufficiency of Evidence to Sustain Findings. — Assignments of error that the trial court erred in finding for the plaintiff, in rendering judgment for the plaintiff, and in not rendering judgment for the defendant, are sufficient to raise the question whether the evidence justified the findings and judgment of the trial court, and entitle the appellant to a review of the questions of fact. See note 4a.]

948. *d.* ASSIGNMENT UPON REQUESTS AND INSTRUCTIONS — General Rule. — See note 1.

949. Where Charge or Instruction Is Lengthy. — See note 1.

various questions, these assignments present no question for decision." *Citing* Central of Georgia R. Co. v. Bond, 111 Ga. 13. See also EXCEPTIONS AND OBJECTIONS.

Necessity to Show What Excluded Evidence Was. — An assignment of error in excluding evidence must, to entitle it to consideration, on its face disclose, either literally or in substance, what such evidence was. *Russell v. Mohr-Weil Lumber Co.*, 115 Ga. 35.

946. 1. *Nebraska*. — *Imhoff v. Richards*, 48 Neb. 590.

Pennsylvania. — *Hart's Estate*, 203 Pa. St. 492.

Texas. — *Galveston, etc., R. Co. v. Johnson*, 24 Tex. Civ. App. 180.

Assignment that Excessive Damages Were Awarded. — Under an assignment of error that the damages awarded by the jury are excessive, the court will not review the action of the trial court in admitting in evidence items of damage. *Roberts v. Hopper*, 50 Neb. 681.

947. 1. *Broughan v. Broughan*, 62 Kan. 724; *Garden City v. Heller*, 61 Kan. 767.

4a. *Coverdale v. Royal Arcanum*, 199 Ill. 649, in which case it was held that where the question whether a benefit society waived a by-law is raised by the pleadings as a question of fact, no proposition of law is necessary to make the finding upon such question reviewable upon appeal. See also *Parish v. St. Paul*, 84 Minn. 426. Compare *Atlanta R., etc., Co. v. Atlanta Rapid Transit Co.*, 113 Ga. 481.

Assignment that "Decision" Is Not Justified by Evidence. — In *Hunt v. O'Leary*, 84 Minn. 200, one of the assignments of error was as follows: "The decision of the court herein is not justified by the evidence." The

court said: "It is difficult to tell exactly what counsel had in mind when making this assignment, or what they were attempting to challenge as not justified. The findings of fact are not the 'decision,' but, if they were, we have twenty-eight in number, as before stated, several being fully warranted by the proofs, as counsel must admit. It was incumbent upon counsel to specify, distinguish, and point out those open to the claim that they were unsupported by the evidence, and a wholesale assignment of errors in respect to the findings is entirely inadequate. For this reason the alleged insufficiency of the evidence to sustain the findings of fact is not before us for review. Possibly counsel intended the conclusions of law, or the judgment, when using the word 'decision;' but, if so, the assignment was also ineffectual, because insufficient. The conclusions of law were certainly justified by the findings of fact, and the judgment was in strict accordance with these conclusions. To attack one or more of the conclusions of law, or the judgment entered thereon, the assignment should have so specified."

948. 1. *Bernstein v. Downs*, 112 Cal. 197, wherein the court cited 2 ENCYC. OF PL. AND PR. 948-951. See also the following cases:

Alabama. — *Smith v. State*, 130 Ala. 95.

Florida. — *Eggart v. State*, 40 Fla. 527.

Minnesota. — *State v. Veek*, 80 Minn. 221.

Nebraska. — *Behrends v. Beyschlag*, 50 Neb. 304; *Johnston v. Milwaukee, etc., Invest. Co.*, 49 Neb. 68.

949. 1. *State v. Veek*, 80 Minn. 221.

950. Specification for Each Instruction. — See notes 1, 2.

951. See note 1.

952. *e.* ASSIGNMENT UPON RULINGS ON MOTIONS, ETC. — Motion Based on Single Ground. — See note 2.

Motion Based on Several Grounds. — See note 3.

953. See notes 1, 2.

954. *f.* ASSIGNMENT UPON JUDGMENT, DECREE, OR VERDICT. — See notes 2, 3.

950. 1. *Eggart v. State*, 40 Fla. 527, in which case the court cited with approval 2 ENCYC. OF PL. AND PR. 950.

2. *Propriety of Exception to Each Instruction by Number.* — There certainly should be at least an exception to each of the instructions by number or other designation; otherwise the attention of the court is not called to any one particular alleged error. *Bernstein v. Downs*, 112 Cal. 197, wherein the court cited 2 ENCYC. OF PL. AND PR. 948-951.

951. 1. *Florida.* — *Eggart v. State*, 40 Fla. 527.

Nebraska. — *Bush v. State*, 62 Neb. 128; *Green v. Tierney*, 62 Neb. 561; *Denise v. Omaha*, 49 Neb. 750; *Unland v. Garton*, 48 Neb. 203; *Newman v. Ryne*, 48 Neb. 362; *Link v. Connell*, 48 Neb. 585; *Woodworth v. Parrott*, 48 Neb. 675.

952. 2. *Grounds upon Which Motion Was Based.* — In *Grogan v. Tate*, 113 Ga. 1057, some of the defendants moved the court to strike their names as parties defendant, and it was held that an assignment of error which did not show the ground upon which the motion was based or the ground upon which the motion was overruled was insufficient.

3. *Minnesota.* — *Hughes v. Meehan*, 84 Minn. 226.

953. 1. *J. I. Case Threshing Mach. Co. v. Huffman*, 86 Minn. 30; *Fowler v. Harrison*, 64 S. Car. 311.

In *Oklahoma* an assignment that the court erred in overruling the appellant's motion for a new trial presents for review every error properly assigned in the motion for the new trial. *Boyd v. Bryan*, 11 Okla. 56.

2. *Demurrers.* — *Smith v. Bradstreet Co.*, 63 S. Car. 525.

954. 2. *An Assignment that the Court Erred in Rendering Judgment is too general to be considered.* *Smith v. Hopkins*, (C. C. A.) 120 Fed. Rep. 921.

3. *Assignment upon Judgment of Intermediate Appellate Court.* — In *Bitter v. Mouat Lumber, etc., Co.*, 27 Colo. 120, the court said: "The plaintiff in

error has filed what is called an assignment of errors, charging that the Court of Appeals erred (a) in affirming the judgment and decree of the County Court, and (b) in overruling the motion for a rehearing filed by plaintiff in error. Under rule 11, which requires that each error shall be separately alleged and particularly specified, this is no assignment at all. It is merely equivalent to stating in general terms that the Court of Appeals was wrong in its judgment."

Error in Dismissal. — A bill of exceptions reciting that "the defendant made a motion to dismiss petitioner's suit as amended," and that such motion was sustained, "to which said order of the court dismissing plaintiff's suit plaintiff then and there excepted and now assigns the same as error, and says the court erred in sustaining said motion and in dismissing said petition" contains a sufficiently specific assignment of error. *Dyson v. Southern R. Co.*, 113 Ga. 327.

Several Decrees in Favor of Different Complainants. — It is not proper assignment of error to say that all of the several decrees, in favor of different complainants in the same suit are wrong. *Murphy v. Kohlsaat*, 68 Ill. App. 579.

Assignments of Errors upon Judgment Rendered on Agreed Statement of Facts. — In *Carter v. Jackson*, 115 Ga. 676, Cobb, J., referring to judgments rendered by the court on an agreed statement of facts, said: "The proper way to assign error upon such a judgment is to state whether the court erred in his findings of fact or in his conclusions of law; and if in the latter, it would probably be good practice to set out specifically wherein it is claimed the court erred in his conclusions of law upon which the judgment in favor of the defendant in error was based. In the present case the plaintiffs except generally to the judgment, and then for specific assignment of error say the court erred in certain 'hold-

955. Contrary to Law and Evidence. — See note 1.

956. Errors in Fact or Law. — See note 2.

957. Verdict. — See note 1.

958. 3. Entitling Assignment — *b*. NAMES OF PARTIES. — See note 2.

961. 6. Defective Assignment Aided by Brief. — See note 3.

962. V. SCOPE OF ASSIGNMENT — General Assignments. — See note 2.

963. Conclusions of Fact. — See note 1.

965. VI. RELATION TO RECORD — Confined to Record. — See note 2.

See also APPEALS.

967. Statement of Facts Improper. — See note 3.

970. VIII. CROSS-ASSIGNMENT. — See note 4.

972. IX. AMENDMENT AND ADDITIONAL ASSIGNMENT. — See note 3.

ings.' If the bill of exceptions means to allege that the general judgment was based on these rulings and that they are erroneous, this is manifestly all that either the law or good practice would require. And when the bill of exceptions is construed in the light of the record, it becomes plain that this is exactly what is meant."

955. 1. *Nebraska*. — *Modern Woodmen of America v. Lane*, 62 Neb. 89.

New Mexico. — *Cevada v. Miera*, 10 N. Mex. 62.

Tennessee. — *Record v. Cooperage Co.*, 108 Tenn. 657.

956. 2. *U. S. v. Rio Grande Dam, etc., Co.*, 10 N. Mex. 617.

Allegation of Error Essential. — See *Thompson v. Hays*, 24 Utah 275.

957. 1. *Where Evidence Is Conflicting*. — See *Minton v. Stahlman*, 96 Tenn. 98.

Objection that Verdict Is Not Supported by Evidence. — In *Tennessee* the rule is that an assignment of error "that the verdict is contrary to the evidence" is insufficient, and that it should be assigned as error that there is no evidence to support the verdict. *Minton v. Stahlman*, 96 Tenn. 98.

Amount of Recovery. — The question whether there was error in the assessment of the amount of recovery will not be considered unless raised by an assignment of error. *Montgomery v. Albion Nat. Bank*, 50 Neb. 652.

958. 2. See *Murphy v. Kohlsaat*, 68 Ill. App. 579.

961. 3. *Where There Is No Assignment of Error* the point cannot be dealt with although it is made in the brief of counsel. *Brooks v. Raiden*, 113 Ga. 86.

962. 2. *Chicago, etc., R. Co. v. State*, 158 Ind. 189; *Wilson v. Seaman*, 15 S. Dak. 103; *Ostrom v. Arnold*, 24 Tex. Civ. App. 192.

963. 1. *Joint Assignment as to Court's Conclusions of Law*. — Where the assignment assails all of the conclusions of law jointly, and one of them is correct, the correctness of the others is not presented for decision. *Chicago, etc., R. Co. v. State*, 158 Ind. 189. See also *Turpie v. Lowe*, 158 Ind. 47.

965. 2. *Emmons v. Hilton*, 72 Ill. App. 124. See also *Western R. Co. v. Williamson*, 114 Ala. 131.

967. 3. *State v. Dixon*, 131 N. Car. 809; *Easley v. Pegg*, 63 S. Car. 98.

970. 4. *Kirkwood v. Kidwell*, 72 Ill. App. 492, holding that if an appellee desires to contend that the court below erred in reducing the amount found due to him by a master he must assign cross-errors. See also *Childers v. Loudin*, 51 W. Va. 559.

972. 3. *Amendment to Show Error Presented by Record*. — The plaintiff in error will be permitted on motion to amend his petition in error so as to include an assignment that the evidence was insufficient to support the verdict when it is disclosed by the record that one of the grounds of a motion for a new trial in the District Court was the insufficiency of the evidence to sustain the verdict. *Robinson v. Kilpatrick-Koch Dry Goods Co.*, 50 Neb. 795.

In *Minnesota* the Supreme Court has not been inclined to be technical in the application of the rule requiring assignments of errors, and has allowed assignments to be amended. *Adams v. Thief River Falls*, 84 Minn. 30, *per* *Lovely, J.*

ASSISTANCE, WRIT OF.

975. I. DEFINITION AND USE OF WRIT. — See note 1.

977. See note 1.

978. II. IN WHOSE FAVOR IT WILL ISSUE. — See notes 1, 2.

979. III. AGAINST WHOM IT WILL ISSUE. — See note 1.

975. 1. *Roach v. Clark*, 150 Ind. 93; *Sills v. Goodyear*, 88 Mo. App. 316; *Hagerman v. Heltzel*, 21 Wash. 444, each *citing* 2 ENCYC. OF PL. AND PR. 975.

Basis of Power. — *Emerick v. Miller*, (Ind. 1902) 64 N. E. Rep. 28 [*citing* 2 ENCYC. OF PL. AND PR. 975]; *Kirsch v. Kirsch*, 113 Cal. 56.

Writ a Means of Execution Only. — The writ operates only to give effect to rights already determined, and is not a means of trying questions of title or right to possession. *Kirsch v. Kirsch*, 113 Cal. 56; *Stillwell v. Hart*, 40 N. Y. App. Div. 112; *Ex p. Jenkins*, 48 S. Car. 325. *Compare* *Piedmont Wagon Co. v. Byrd*, 119 N. Car. 460.

Writ Not Impliedly Abolished by Code Procedure. — A statute providing a procedure for obtaining the possession of property does not, in the absence of express limitation, prevent the use of the writ. *Emerick v. Miller*, (Ind. 1902) 64 N. E. Rep. 28.

A Refusal of the Writ Is Not Conclusive as to questions of title or right of possession and is no bar to a subsequent action of ejectment. *Dickey v. Gibson*, 121 Cal. 276.

977. 1. To Purchaser at a Tax Sale. — In *Michigan* a purchaser at a tax sale is entitled to the writ and is not required to resort to an action of law. *Beck v. Finn*, 122 Mich. 21; *Ball v. Ridge Copper Co.*, 118 Mich. 7; *Youngs v. Peters*, 118 Mich. 45.

Under Act No. 229, Pub. Acts Mich. 1897, the writ will not issue in favor of a purchaser at a tax sale until six months after the filing of a return of service upon the grantee in the last recorded deed and the mortgagee in the last recorded mortgage of notice of the right to redeem the property. See *Pierpont v. Osmun*, 118 Mich. 472.

In New Jersey a court of equity will

grant a writ of assistance to a purchaser at a tax sale who presents a proper deed, but will not consider questions as to the validity of the proceedings under which the land was appraised and sold, which must be determined by a court of law. *Belmar v. Kennedy*, 53 N. J. Eq. 466.

To Reinstated Lessor After Decree of Forfeiture of Lease. — See *Pittsburg, etc., R. Co. v. Altoona, etc., R. Co.*, 203 Pa. St. 108.

In Divorce Proceedings the court has power to determine and dispose of community property and put the parties in possession by writ of assistance. *Kirsch v. Kirsch*, 113 Cal. 56.

A Purchaser of an Equity of Redemption who has redeemed the property within the statutory period is entitled to the writ. *Hagerman v. Heltzel*, 21 Wash. 444.

978. 1. *Taylor v. Ellenberger*, 134 Cal. 31; *Hibernia Sav., etc., Soc. v. Lewis*, 117 Cal. 577; *Magruder v. Kittle*, (Neb. 1902) 89 N. W. Rep. 272.

2. *Emerick v. Miller*, (Ind. 1902) 64 N. E. Rep. 28, *quoting* with approval 2 ENCYC. OF PL. AND PR. 978.

979. 1. *Sills v. Goodyear*, 88 Mo. App. 316; *Ex p. Jenkins*, 48 S. Car. 325 [each *citing* with approval 2 ENCYC. OF PL. AND PR. 979]; *Ricketts v. Chicago Permanent Bldg., etc., Assoc.*, 67 Ill. App. 71; *State v. Moore*, 21 Wash. 628; *State v. Superior Ct.*, 21 Wash. 469. See also *St. Louis, etc., R. Co. v. Wear*, 135 Mo. 230.

Against Purchaser from Mortgagor, Pendente Lite. — The writ will issue against a mortgagor and all persons who have purchased the fee under him *pendente lite* with notice. *Hibernia Sav., etc., Soc. v. Lewis*, 117 Cal. 577.

Against Administratrix of Mortgagor. — The writ will issue against an administratrix, the wife of a deceased

980. IV. ISSUANCE OF WRIT DISCRETIONARY — General Rule with Limitations. — See note 3.

981. See notes 1, 2, 3.

982. V. OBTAINING WRIT — 2. Modern Practice. — See notes 3, 5.

984. 4. Proceedings on Petition. — See note 3.

985. 6. Appeals. — See note 2.

mortgagor, who was, as executrix, a party to the foreclosure proceedings, and whose answer to the petition fails to show any right or title independent of or adverse to that of the decedent whose rights were foreclosed. *Finger v. McCaughey*, 119 Cal. 59.

Parties in Privity. — The rule as stated in the text includes those in privity with the parties to the original action. *Hagerman v. Heltzel*, 21 Wash. 444, *quoting* with approval 2 ENCYC. OF PL. AND PR. 979.

Persons Not Parties. — The writ should not issue against the tenant of a mortgagor where the mortgagor was not made a party to the foreclosure proceedings and is not clearly bound by the decree entered therein. *National Bldg., etc., Assoc. v. Strauss*, (N. J. 1901) 49 Atl. Rep. 137.

980. 3. In Doubtful Cases. — *Ex p. Forman*, 130 Ala. 278; *National Bldg., etc., Assoc. v. Strauss*, (N. J. 1901) 49 Atl. Rep. 137.

Laches of Applicant. — *Ex p. Forman*, 130 Ala. 278, in which case the court refused to issue an alias writ, application for which was made four years after the return of the first writ.

981. 1. See *Vermont L. & T. Co. v. McGregor*, (Idaho 1897) 51 Pac. Rep. 104. *Compare* *Belmar v. Kennedy*, 53 N. J. Eq. 466.

2. *Stillwell v. Hart*, 40 N. Y. App. Div. 112.

Where Defendant Claims by a New Title. — To prevent the writ from issuing, the claim of new title must be a reasonable one and supported by a reasonable showing. *Kirsch v. Kirsch*, 113 Cal. 56.

3. *Roach v. Clark*, 150 Ind. 93, *quoting* with approval 2 ENCYC. OF PL. AND PR. 980.

Pending an Appeal in an action by one railroad to condemn land of another for a crossing, the necessity for which is disputed, the writ should not issue. *State v. Burnell*, 104 Wis. 246.

982. 3. *Compare* *Dorr v. Root*, 104 Ill. App. 417.

5. *Hald v. Day*, 36 Oregon 189, hold-

ing that the exhibition of the certificate of sale merely characterizes the manner of making the demand, and need not be separately alleged in the petition.

Demand of Possession is a necessary condition of an application for the writ. *Dickey v. Gibson*, 121 Cal. 276, *per* *Harrison, J.* See also *Ball v. Ridge Copper Co.*, 118 Mich. 7.

984. 3. Defendant Concluded on the Merits. — *Peters v. Youngs*, 122 Mich. 484; *Ball v. Ridge Copper Co.*, 118 Mich. 7; *Pittsburg, etc., R. Co. v. Altoona, etc., R. Co.*, 203 Pa. St. 108.

May Show Lack of Jurisdiction. — No matter affecting the decree may be set up in defense of the motion for writ of assistance unless the matter goes to the jurisdiction of the court in rendering the decree. See *Peters v. Youngs*, 122 Mich. 484; *Ball v. Ridge Copper Co.*, 118 Mich. 7.

Sufficiency of Answer. — A mere verbal objection to the granting of the writ is not sufficient. *Aldrich v. Wayne Circuit Judge*, 111 Mich. 525.

985. 2. California. — When an order granting a writ of assistance is made *ex parte*, the adverse party may move to vacate the order, and from an order refusing to vacate an appeal will lie. *Pignaz v. Burnett*, 119 Cal. 157.

Indiana. — The time for perfecting an appeal from a judgment granting a writ of assistance to a purchaser under an administrator's sale is not provided for under the Probate Procedure Act, and must be regulated by the Civil Code. *Roach v. Clark*, 150 Ind. 93.

Michigan. — The remedy against a writ of assistance is by appeal, and not by mandamus to vacate the order. *Aldrich v. Wayne Circuit Judge*, 111 Mich. 525.

New Trial. — A motion or petition for a writ of assistance is not such an action as entitles a party to a new trial as a matter of right under *Burns's Annot. Stat. Ind.* (1894), § 1076. *Gilliland v. Milligan*, 144 Ind. 154, *citing* with approval 2 ENCYC. OF PL. AND PR. 975-986.

ASSUMPSIT.

988. I. DEFINITION AND CLASSIFICATION — *Classification.* — See note 2.

II. LIMITATIONS OF ACTION — 1. *Common-law Doctrine.* — See note 3.

989. 2. Statutory Modifications. — See note 1.

990. III. SPECIAL AND GENERAL ASSUMPSITS — *Special Assumpsit.* — See note 3.

988. 2. History. — See *Robinson v. Welty*, 40 W. Va. 385.

3. *Dunn v. Auburn Electric Motor Co.*, 92 Me. 165; *Knight v. Trim*, 89 Me. 469; *Baldwin v. Emery*, 89 Me. 496.

Implied Promise as Evidenced by Sealed Instrument. — Where a sealed instrument does not contain an express stipulation for payment or performance to the party to be benefited, or to some other person for his use, assumpsit may lie upon an implied promise as evidenced by the recitals as to the respective rights of the parties. *Baldwin v. Emery*, 89 Me. 496; *Varney v. Bradford*, 86 Me. 510.

Assumpsit Will Lie by a City to Collect a Tax due from a defendant which was erroneously assessed in the name of a different party. *Menominee v. S. K. Martin Lumber Co.*, 119 Mich. 201.

Simple Contract Substituted for Sealed Agreement. — *McCardell v. Miller*, 22 R. I. 96, holding the rule to be the same where the sealed agreement is varied by act of law.

An Action Against a Telegraph Company for damages arising out of a negligent failure to deliver a message may be brought in assumpsit. *Carland v. Western Union Tel. Co.*, 118 Mich. 369.

Acceptor of Deed Poll. — Assumpsit will lie to enforce the conditions of a deed poll under seal against an acceptor who did not sign the deed. *First Congregational Meeting House Soc. v. Rochester*, 66 Vt. 501; *West Virginia Cent., etc., R. Co. v. McIntire*, 44 W. Va. 210.

989. 1. In Illinois. — *Harts v. Emery*, 184 Ill. 560; *Webster v. Fleming*, 178 Ill. 140.

In Maine, under Rev. Stat., c. 94, § 10, sums due for rent on leases under seal or otherwise may be recovered in an action of assumpsit. *Rumford Falls Boom Co. v. Rumford Falls Paper Co.*, 96 Me. 96.

In Michigan, under Comp. Laws Mich., § 10421, assumpsit will lie for damages growing out of fraud and deceit, and such action will lie against an agent through whose fraudulent representations the plaintiff was induced to contract with the agent's principal. *Hallett v. Gordon*, 128 Mich. 364.

In Virginia. — Acts Va. 1897-98, c. 96, § 1, provides that "in any case in which an action of covenant will lie there may be maintained an action of assumpsit." See *Grubb v. Burford*, 98 Va. 553.

In West Virginia. — See *Middle States Loan, etc., Co. v. Engle*, 45 W. Va. 588.

990. 3. Loranger v. Davidson, 110 Mich. 605. See also *Field v. Brown*, 146 Ind. 293 [citing 2 ENCYC. OF PL. AND PR. 990]; *Houston v. McNeer*, 40 W. Va. 365.

Special Contract Executed — *Illinois.* — Where the plaintiff relies on an express contract, there can be no recovery under the common counts unless he proves a full performance on his part. *Parmly v. Farrar*, 169 Ill. 606.

Maine. — In an action for goods sold and delivered where the goods have been delivered and the price is to be paid in money, a general count on an account annexed is sufficient. *Dudley v. Poland Paper Co.*, 90 Me. 257.

Michigan. — *Nicol v. Fitch*, 115 Mich. 15; *White v. Taylor*, 113 Mich. 543. See also *Flint, etc., R. Co. v. Wayne Circuit Judge*, 108 Mich. 80.

991. General Assumpsit. — See note 1.

997. IV. DECLARATION — 3. Promise — Sufficiency of Allegation in General. — See note 2.

998. See note 1.

999. 4. Necessary Averments — *b.* PERFORMANCE BY PLAINTIFF. — See note 2.

1001. *d.* REQUEST. — See note 1.

1002. 5. Breach — Certainty Necessary. — See note 1.

6. Common Counts — *a.* IN GENERAL. — See note 3.

1003. *b.* BILLS OF PARTICULARS. — See note 2. See also BILLS OF PARTICULARS.

1006. *c.* GOODS SOLD — (1) *Sold and Delivered.* — See note 1.

1008. *f.* WORK, LABOR, AND MATERIALS — (1) *In General.* — See note 5.

Vermont. — Rowell *v.* Dunwoodie, 69 Vt. 111. Compare Wertheim *v.* Fidelity, etc., Co., 72 Vt. 326, holding that money so due can be recovered under the general counts only when there is a general count appropriate to the particular case.

991. 1. Elm City Club *v.* Howes, 92 Me. 211, holding that in an action of assumpsit to collect dues due to a club, *indebitatus assumpsit* with account annexed is sufficient, and it is not necessary to declare specially upon the contract formed by the signing of the club's by-laws.

Total Failure of Consideration. — General assumpsit is proper to recover money paid on an express contract where there has been a total failure of consideration. Tatro *v.* Bailey, 67 Vt. 73.

997. 2. Moody *v.* Richards, 29 Oregon 282, citing with approval 2 ENCYC. OF PL. AND PR. 997.

998. 1. Wilcox *v.* Jamieson, 20 Colo. 158.

999. 2. Tichenor *v.* Newman, 186 Ill. 264; Peoria *v.* Fruin-Bambrick Constr. Co., 169 Ill. 36; Lamson Consol. Store Service Co. *v.* Prudential F. Ins. Co., 171 Mass. 433; Newton Rubber Works *v.* Graham, 171 Mass. 352; Grubb *v.* Burford, 98 Va. 553.

Where a plaintiff bases his action solely upon express contract, alleging full performance of conditions precedent, he is not entitled, upon failure to prove performance as alleged, to recover on a *quantum meruit*. Morrow *v.* Board of Education, 7 S. Dak. 553, citing 2 ENCYC. OF PL. AND PR. 999.

In New Jersey, under the Practice Act (Gen. Stat., p. 2554, par. 126), the

averment of the performance of conditions precedent may be general. Dimick *v.* Metropolitan L. Ins. Co., 67 N. J. L. 367.

1001. 1. Provable by Circumstantial Evidence. — Ames *v.* Coffin, 89 Me. 300. Request Provided for in Contract. — Arnold *v.* Hart, 176 Ill. 442, citing 2 ENCYC. OF PL. AND PR. 1001.

In an Action for Money Had and Received, no allegation of demand is necessary. Field *v.* Brown, 146 Ind. 293.

1002. 1. Smoot *v.* McGraw, 48 W. Va. 144, holding that a declaration on a promissory note which has been assigned should allege that it has not been paid to any of those who had authority to receive payment.

3. In Connection the common counts may be used only when one or more of them is an appropriate statement of the plaintiff's cause of action. Goodrich *v.* Alfred, 72 Conn. 257.

1003. 2. Spruance *v.* Myerdirck, 2 Penn. (Del.) 205, holding that when a bill of particulars is insufficient the court may, at the defendant's request, require a fuller bill of particulars to be filed.

Virginia and West Virginia. — The bill of particulars is not a part of the declaration. Booker *v.* Donohoe, 95 Va. 359.

1006. 1. McCormick Harvesting Mach. Co. *v.* Cusack, 116 Mich. 647.

Delivery of Goods. — Bullock *v.* Ueberroth, 121 Mich. 293.

1008. 5. Ames *v.* Coffin, 89 Me. 300, holding that the action will not lie where the services were rendered neither for the defendant nor at his request.

1009. (2) *When there Is Special Contract.* — See note 1.

1010. (3) *Quantum Meruit.* — See notes 1, 2.

1011. See note 2.

1012. *g. MONEY PAID* — (1) *Allegation and Proof of Request.* — See note 1.

1013. (2) *Request Implied.* — See note 3.

1014. (3) *When Count Will Not Lie.* — See note 1.

1016. *h. MONEY LENT* — (2) *Nature of Loan — Benefit of Defendant.* — See note 2.

Loan for Illegal Purpose. — See note 3.

1017. *i. MONEY HAD AND RECEIVED* — (1) *Nature of Consideration to Be Shown* — (a) *In General.* — See notes 1, 2.

1009. 1. *Foster v. McKeown*, 192 Ill. 339; *Chicago v. Chicago, etc.*, R. Co., 186 Ill. 300; *Nicol v. Fitch*, 115 Mich. 15; *Strome v. Lyon*, 110 Mich. 680.

Where there has been a substantial compliance with the terms of a building contract except the furnishing of an architect's certificate, which the architect refuses to give, the plaintiff may declare upon the common counts and introduce proof as to the excuse for not furnishing the certificate. *Foster v. McKeown*, 192 Ill. 339.

Work Performed and Accepted. — *Weymouth v. Beatham*, 93 Me. 454, citing 2 ENCYC. OF PL. AND PR. 1009.

Where work has been performed and accepted by the defendant without objection, he is estopped to deny full execution of the contract. *Strome v. Lyon*, 110 Mich. 680.

Statute of Frauds. — There can be no recovery in assumpsit on an oral contract within the statute of frauds for labor and materials, where the articles made are not received by the vendee, and no benefit has accrued to him. *Banker v. Henderson*, 58 N. J. L. 26.

1010. 1. *Goud v. Portland*, 96 Me. 125, holding that in the absence of a special contract there can be no recovery on a *quantum meruit* for services which were not rendered to or for the benefit of the defendant.

2. *French v. Cunningham*, 149 Ind. 632, citing 2 ENCYC. OF PL. AND PR. 1010.

Work Done After Repudiation. — There can be no recovery on a *quantum meruit* for work done after the defendant has repudiated the contract and ordered the work to stop. *De Prosse v. Royal Eagle Distilleries Co.*, 135 Cal. 408.

Work Abandoned by Plaintiff. — *Coch-*

ran v. Balfe, 12 Colo. App. 75; *Homer v. Shaw*, 177 Mass. 1.

1011. 2. *Columbus Safe Deposit Co. v. Burke*, (C. C. A.) 88 Fed. Rep. 630; *Crane Elevator Co. v. Clark*, (C. C. A.) 80 Fed. Rep. 705.

Special Contract. — *Loranger v. Davidson*, 110 Mich. 605.

1012. 1. *Chicago v. Chicago, etc.*, R. Co., 186 Ill. 300. See also *Warford v. Hankins*, 150 Ind. 489, each citing 2 ENCYC. OF PL. AND PR. 1012.

1013. 3. *Sureties.* — *Weeks v. Parsons*, 176 Mass. 570.

1014. 1. *Chicago v. Chicago, etc.*, R. Co., 186 Ill. 300, citing 2 ENCYC. OF PL. AND PR. 1014.

1016. 2. *Atherton v. Goldsmith*, 22 R. I. 376, holding that the action will lie although the money is loaned to carry out a joint enterprise, the profits of which the lender and borrower are to share.

3. *Edman v. Charleston State Bank*, 101 Ill. App. 83, holding that where illegality of purpose is relied upon as a defense to an action for money loaned, the plea must allege that the money was actually so used.

1017. 1. *Snapp v. Stanwood*, 65 Ark. 222.

2. *Mumford v. Wright*, 12 Colo. App. 214; *Pease v. Bamford*, 96 Me. 23, per *Wiswell, C. J.*; *Wiley v. Connelly*, 179 Mass. 360. See also *Kostuba v. Miller*, 137 Mo. 161; *Leete v. Pacific Mill, etc., Co.*, 88 Fed. Rep. 957, each citing 2 ENCYC. OF PL. AND PR. 1017. See also *Richolson v. Moloney*, 195 Ill. 575.

This count will not lie unless one party has received money which in good conscience belongs to the other. *Sacramento County v. Southern Pac. Co.*, 127 Cal. 217.

To Recover Office Fees Collected by Another. — Assumpsit will lie by one

1018. (6) *Money Paid by Mistake, Etc.* — See note 2.

1019. See note 1.

1020. See note 1.

1021. (2) *Privity Necessary.* — See notes 1, 2, 3.

Actual Receipt Necessary — Money Received by Defendant. —

See note 4.

1022. (3) *As Waiver of Tort.* — See note 1.

rightfully entitled to an office, to recover fees illegally collected by an intruder. *Booker v. Donohoe*, 95 Va. 359.

To Recover Trust Funds. — The legal successor of a trustee whose trust has terminated may maintain assumpsit to recover trust funds remaining in his hands. *Barre Town School Dist. v. Cook*, 68 Vt. 88. Assumpsit will not lie to recover trust funds in the hands of the guardian of a deceased ward until there has been a final settlement and an order of payment by the probate court. *Semmig v. Merrihew*, 67 Vt. 38.

1018. 2. *Eufaula Grocery Co. v. Missouri Nat. Bank*, 118 Ala. 408.

Mistake of Law. — *Taber v. New Bedford*, 177 Mass. 197; *Strafford Sav. Bank v. Church*, 69 N. H. 582.

1019. 1. *Newberry Land Co. v. Newberry*, 95 Va. 111; *Hughes v. Frum*, 41 W. Va. 445.

Personal Property — Defective Title. — Where the defendant has received the entire consideration for personal property to which he represents that he has title, but to which in fact he has not, the amount may be recovered from him as money had and received. *Fitzpatrick v. Hoffman*, 104 Mich. 228.

Void Contract. — *McCann v. Metropolitan L. Ins. Co.*, 177 Mass. 280; *National Granite Bank v. Tyndale*, 176 Mass. 547.

Contract Rescinded. — This count will lie to recover money paid under a contract subsequently rescinded by the other party. *Buena Vista Co. v. McCandlish*, 92 Va. 297.

Unenforceable Contract. — A grantee who receives land under an oral agreement which is not enforceable under the statute of frauds, and afterwards disposes of the property, is liable to the grantor in an action for money had and received. *Peabody v. Fellows*, 177 Mass. 290.

1020. 1. *Payment under Protest.* — *Whitlock Mach. Co. v. Holway*, 92 Me. 414; *Cramer v. Bremen*, 91 Me. 508.

The mere fact of payment under

protest is not ground for recovery where the plaintiff fails to show that the amount was justly due or that the means used to enforce payment were unlawful. *Meacham v. Newport*, 70 Vt. 67.

Usury. — *Baum v. Thoms*, 150 Ind. 378, *citing* 2 ENCYC. OF PL. AND PR. 1019, 1020.

But Money Paid on an Execution which is valid upon its face cannot be recovered in assumpsit from the officer who enforces the execution, even where the judgment on which the execution issues is invalid. *Miller v. Hahn*, 116 Mich. 607.

Assumpsit for money had and received will not lie against a justice to recover the amount of a judgment for costs rendered by him and from which he has refused to appeal. *Raymond v. Lowe*, 87 Me. 329.

1021. 1. *Shultz v. Boyd*, 152 Ind. 166 [*citing* 2 ENCYC. OF PL. AND PR. 1021]; *Labadie v. Detroit, etc., R. Co.*, 125 Mich. 419; *Newberry Land Co. v. Newberry*, 95 Va. 111.

2. Money Misapplied. — Where money is placed in the hands of a person to be applied to a particular purpose, and he applies it to a different purpose, it may be recovered from him as money had and received. *Gray v. Callender*, 181 Ill. 173.

3. *Newberry Land Co. v. Newbury*, 95 Va. 111.

4. *Compare Snapp v. Stanwood*, 65 Ark. 222.

Action Against Either Principal or Agent — Election. — Where money has been received by an agent which, *ex aequo et bono*, belongs to a third party, the latter may recover it in an action for money had and received either against the principal or against the agent, by giving him notice of the election before the money is paid over to his principal. *Eufaula Grocery Co. v. Missouri Nat. Bank*, 118 Ala. 408, *citing* 2 ENCYC. OF PL. AND PR. 1021.

1022. 1. *Nelson v. Kilbride*, 113 Mich. 637. *Compare Newman v. Olney*, 118 Mich. 545.

- 1022.** *Necessity of Contractual Relation.* — See note 2.
- 1024.** *Finality of Election.* — See note 1.
j. ACCOUNT STATED — (1) *What Necessary to Make.* — See note 2.
- 1025.** (2) *Admission.* — See note 2.
- 1026.** *k. USE AND OCCUPATION* — (1) *Origin of Action.* — See note 1.
 (2) *What Plaintiff Must Show.* — See notes 2, 3.
- 1028.** *V. PLEAS* — 1. *General Issue* — *a. ITS SCOPE* — *Extension of Its Limitations.* — See note 1.
- 1029.** See note 1.
- 1030.** *b. NOTICE OF SPECIAL DEFENSE* — *In General.* — See note 1.
- 1032.** 2. *Special Pleas* — *a. TENDER, LIMITATIONS, ETC.* — See note 6.

Comp. Laws Mich., §§ 11207-11208, authorizing a waiver of the tort and an action in assumpsit to recover damages for trespass on lands, do not authorize such an action against the purchaser of timber cut by a trespasser. *St. John v. Antrim Iron Co.*, 122 Mich. 68.

Property Converted into Money. — *Quimoy v. Lowell*, 89 Me. 547; *Grinnell v. Anderson*, 122 Mich. 533; *St. John v. Antrim Iron Co.*, 122 Mich. 68, *per* Montgomery, J.; *Williams v. Rogers*, 110 Mich. 418, *per* Montgomery, J. See also *Phelps v. Church of Our Lady Help of Christians*, (C. C. A.) 99 Fed. Rep. 683, in which case the property was not sold by the defendant, but was applied to his own beneficial use and converted into such a form that it could not be reclaimed.

1022. 2. McCormick Harvesting Mach. Co. v. Waldo, 128 Mich. 135.

Tenants in Common — Michigan. — *Williams v. Rogers*, 110 Mich. 418.

Fraud. — *Hanrahan v. National Bldg., etc., Assoc.*, 66 N. J. L. 80; *Robinson v. Welty*, 40 W. Va. 385.

Where one agrees to sell to another goods at the price they cost him, and misrepresents the price so paid, the purchaser may recover the difference as money had and received. *Hidey v. Swan*, 111 Mich. 161.

Treating Action as Both Tort and Contract. — Where one has been induced through fraud to enter into a contract, he cannot disaffirm the original contract, asserting fraud, and in the same action maintain assumpsit for an implied contract different from the first. *Reed v. Ismond*, 110 Mich. 16; *Warnes v. Brubaker*, 107 Mich. 440; *Bedler v.*

Fuller, 106 Mich. 342; *Emerson v. Detroit Steel, etc., Co.*, 100 Mich. 127.

1024. 1. Cooper v. Smith, 109 Mich. 458; *Thomas v. Watt*, 104 Mich. 201.

An ineffectual attempt to recover in assumpsit before the amount sued for is due is not a conclusive waiver of the tort. *Bryant v. Kenyon*, 123 Mich. 151.

2. To Enforce Award. — Assumpsit will lie to enforce an award, and a count on an account stated is sufficient. *Macdonald v. Bond*, 105 Ill. 122.

1025. 2. Partners. — *Willey v. Renner*, 8 N. Mex. 641.

1026. 1. See Atkinson v. Winters, 47 W. Va. 226.

2. Young v. Downey, 145 Mo. 261 [quoting 2 ENCYC. OF PL. AND PR. 1026]; *Burdin v. Ordway*, 88 Me. 375; *Emery v. Emery*, 87 Me. 281; *Blake v. Preston*, 67 Vt. 613.

Adverse Occupation. — *Burdin v. Ordway*, 88 Me. 375.

3. Emery v. Emery, 87 Me. 281; *Blake v. Preston*, 67 Vt. 613.

1028. 1. Payment or Accord and Satisfaction. — *O'Brien v. O'Brien*, 75 Ill. App. 263, citing 2 ENCYC. OF PL. AND PR. 1027, 1028.

1029. 1. O'Brien v. O'Brien, 75 Ill. App. 263.

1030. 1. In New Jersey, under the Practice Act (Gen. Stat., p. 254, par. 126), the defendant cannot enter a general denial of the performance of conditions precedent, but must specify the condition the performance of which he intends to contest. *Dimick v. Metropolitan L. Ins. Co.*, 67 N. J. L. 367.

1032. 6. Affidavit of Defense. — Under Act Pa. May 25, 1887, the ac-

1034. b. AMOUNTING TO GENERAL ISSUE. — See note 1.

tions of assumpsit for which judgment may be taken where no affidavit of defense is filed are those arising purely out of contract, and do not include those *ex delicto* or of a mixed nature. *Corry v. Pennsylvania R. Co.*, 194 Pa. St. 516.

An affidavit of defense to an action of assumpsit on a foreign judgment which alleges neither want of jurisdiction nor that the judgment has been legally satisfied is insufficient. *Hughes v. Schreiner*, 202 Pa. St. 488.

In an action of assumpsit an affidavit of defense which merely alleges payment without setting out the facts is sufficient. *Ridings v. McMenemy*, 1 Penn. (Del.) 15.

In an action on a note an affidavit of

defense stating that the note was never protested according to law is sufficient without setting out the facts. *Stoeckle v. Gray*, 1 Penn. (Del.) 117.

In Virginia. — Under Code Va., § 3286, in an action of assumpsit on contract express or implied, where the plaintiff has filed an affidavit with his declaration, any plea in bar must also be accompanied by an affidavit unless the requirement is waived by the plaintiff. *Spencer v. Field*, 97 Va. 38.

1034. 1. Emmons v. Home Ins. Co., 1 Penn. (Del.) 83, holding that where a defendant pleads both the general issue and a special plea amounting to the same thing, the special plea should be stricken out.

ATTACHMENT.

3. I. IN GENERAL. — See note 1.

4. II. AFFIDAVIT — 2. Effect of Failure to Give Required Affidavit. — See note 1.

5. 3. When to Be Made. — See note 1.

7. 4. Before Whom to Be Made. — See note 1.

3. 1. *Beltaire v. Rosenberg*, 129 Cal. 164; *Rudolph v. Saunders*, 111 Cal. 233; *Smith v. Armour*, 1 Penn. (Del.) 361; *American Hydraulic Dredging Co. v. O. S. Richardson Fueling Co.*, 90 Ill. App. 376; *Parker v. Scheller*, 60 Ill. App. 621; *U. S. Capsule Co. v. Isaacs*, 23 Ind. App. 533; *Rodde v. Hollweg*, 19 Ind. App. 222; *Bryant v. Duffy*, 128 Mo. 18; *Penoyar v. Kelsey*, 150 N. Y. 77; *Dickson v. Back*, 32 Oregon 217; *Deseret Nat. Bank v. Little*, 13 Utah 265; *Jones v. McQueen*, 13 Utah 178; *McAllister v. Guggenheimer*, 91 Va. 317; *Barth v. Graf*, 101 Wis. 27; *Ritchie v. Sayers*, 100 Fed. Rep. 520.

4. 1. *Duxbury v. Dahle*, 78 Minn. 427, wherein the court cited 3 ENCYC. OF PL. AND PR. 4, and held that if no affidavit be filed, or if one be filed which wholly fails to set out some fact made essential by the statute, such as the ground of attachment, the proceedings are null and void and may be assailed collaterally. See also *Mentzer v. Ellison*, 7 Colo. App. 315; *Blincoe v. Head*, 103 Ky. 106. But a merely voidable affidavit would not make the proceeding void as one without jurisdiction. *Miller v. White*, 46 W. Va. 67.

Presumption as to Affidavit. — The presumption is, in the absence of any showing to the contrary, that the proper affidavit was filed. *Brown v. Tidrick*, 14 S. Dak. 249.

One Affidavit Sufficient. — Where property has been seized under the original writ, and a second or alias writ is issued for the purpose of summoning the defendants, a new affidavit is not required. *Van Benschoten v. Fales*, 126 Mich. 176.

Failure to Attach Affidavit to Writ. — Where the property is seized under a writ of attachment without there being attached thereto an affidavit as required

by statute, the seizure may be discharged on motion, but the writ cannot be set aside on the ground that it was improvidently granted. *Gallun v. Weil*, (Wis. 1903) 92 N. W. Rep. 1091.

Effect of Judgment. — An attachment, void because of the insufficiency of the affidavit, is not made valid by the subsequent rendition of a judgment for the plaintiff. *Maguire v. Bolen*, 94 Wis. 48.

5. 1. *Kesler v. Lapham*, 46 W. Va. 293, wherein the court held that a delay of two days between making the affidavit and issuing the writ was not unreasonable, quoting *obiter* 3 ENCYC. OF PL. AND PR. 5.

In Maryland the statute does not require the affidavit to be made at or near the time of the suing out of the writ, and a delay of several months between the two steps in the proceeding does not affect the jurisdiction of the court. *Hadden v. Linville*, 86 Md. 210.

7. 1. *Harbour-Pitt Shoe Co. v. Dixon*, (Ky. 1901) 60 S. W. Rep. 186, citing 3 ENCYC. OF PL. AND PR. 7, in which the court held that the affidavit need not be taken before the issuing officer, but might be made before a notary public or other officer entitled to take affidavits.

Clerk of Court. — In Georgia a clerk of the Superior Court, though having power to administer oaths generally, is not permitted to take an affidavit in attachment. *Heard v. National Bank*, 114 Ga. 291.

Need Not Be in Same County. — The affidavit need not be sworn to before an officer of the county where the attachment is issued. *Kesler v. Lapham*, 46 W. Va. 293.

Foreign Notary. — In the District of Columbia attachments may be granted upon affidavits made before notaries

7. 5. Affiant — Statutory Provisions. — See note 2.

9. Agent or Other Person as Affiant. — See note 1.

10. 6. Form of Affidavit — a. IN GENERAL — Language of Statute. — See note 2.

in other jurisdictions. *Howard v. Citizens' Bank, etc., Co.*, 12 App. Cas. (D. C.) 222. Otherwise in *Florida*. *Chatanooga First Nat. Bank v. Willingham*, 36 Fla. 32.

Where the affidavit is made before a notary in another state, and his certificate does not have the further certificate of a clerk or other officer of a court of record verifying the genuineness of the notary's signature and his authority to administer oaths, the affidavit is bad for want of due authentication. But the court should permit the further certificate to be added by way of amendment. *Bohn v. Zeigler*, 44 W. Va. 402.

7. 2. Corporation Plaintiff.—In *North Dakota* the affidavit may be entitled in the corporate name of the plaintiff, and need not state that the plaintiff is in fact a corporation. *Citizens' Bank v. Corkings*, 10 S. Dak. 98, *overruling* 9 S. Dak. 614.

Attorney.—In *Kentucky* an attorney may make the affidavit when his client is not in the county. *Harbour-Pitt Shoe Co. v. Dixon*, (Ky. 1901) 60 S. W. Rep. 186, in which case the court held that if the client was actually within the county when the affidavit was made, it was error to refuse to allow his affidavit to be filed after the attorney discovered the fact.

9. 1. West v. Berg, 66 Minn. 287 [citing 3 ENCYC. OF PL. AND PR. 9]; *Stockbridge v. Fahnestock*, 87 Md. 127; *Godman v. Gordon*, 61 Mo. App. 685. See also *Bauer Grocery Co. v. Smith*, 61 Mo. App. 655.

In *New York* an affidavit is defective which does not allege or show that deponent is the agent or attorney of the plaintiff, or authorized in any way to speak for him. *Biddle v. McLoughlin*, (N. Y. City Ct. Gen. T.) 39 N. Y. Supp. 837.

Description of Affiant — Wisconsin.—Where the affidavit recites that the affiant "for and on behalf of the firm of R. T. & S., hereinafter named, being duly sworn, on oath doth say," but such recital is not sworn to, the affidavit is insufficient. *Maguire v. Bolen*, 94 Wis. 48.

The Affidavit May Be Amended to State the Agency of the affiant where it is

otherwise sufficient. *Kirkville Sav. Bank v. Spangler*, 59 Mo. App. 172.

Affidavit on Behalf of Corporation.—An affidavit verified by an officer of a corporation is *prima facie* sufficient where there is no averment by the defendant that the chief officer thereof, who is authorized by law to make affidavits, is absent from the county. *Kentucky Jeans Clothing Co. v. Bohn*, 104 Ky. 387. But see *Northern Lake Ice Co. v. Orr*, 102 Ky. 586.

Where the person deposing is described in the affidavit as the vice-president of the plaintiff, but the affidavit does not state in direct terms that he is such vice-president, the defect is remedied by a proper verification to the complaint. *Yellow Pine Co. v. Atlantic Lumber Co.*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 164, *affirmed* 22 N. Y. App. Div. 629.

10. 2. Illinois.—*Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582.

Nebraska.—*McDonald v. Marquardt*, 52 Neb. 820; *Burnham v. Ramge*, 47 Neb. 175.

Pennsylvania.—*Werner v. Gross*, 174 Pa. St. 622.

Wisconsin.—*Barth v. Burnham*, 105 Wis. 548.

Wyoming.—*C. D. Smith Drug Co. v. Casper Drug Co.*, 5 Wyo. 510.

United States.—*Nevada Co. v. Farnsworth*, 89 Fed. Rep. 164.

Probative Facts.—In the *District of Columbia* an affidavit is sufficient if it states the ultimate fact substantially in the terms of the statute. *Cissell v. Johnston*, 4 App. Cas. (D. C.) 335; *Wielar v. Garner*, 4 App. Cas. (D. C.) 329.

In *North Carolina* probative facts must be set forth when the allegation of the grounds of attachment is a mere assertion of belief, such as that the defendants are "about to assign or dispose of their property with intent to defraud the plaintiffs." *Judd v. Crawford Gold Min. Co.*, 120 N. Car. 397.

In *West Virginia* the material facts of the case are required to be stated in the affidavit, and they must, regarded as evidence, be sufficient to prove the proposition asserted as a ground of attachment. *Goodman v. Henry*, 42 W. Va. 526. See also *Sommers v. Allen*,

11. Substantial Compliance. — See note 1.

12. b. FORMAL DEFECTS — Their Effect. — See note 3. See also AFFIDAVITS.

13. See notes 1, 2, 3.

14. See notes 1, 2. See also AMENDMENTS.

44 W. Va. 120; *Roberts v. Burns*, 48 W. Va. 92.

Collateral Attack. — The affidavit, if good on its face, cannot be attacked collaterally except for fraud or collusion. *Barth v. Burnham*, 105 Wis. 548.

11. 1. Kentucky. — *Cabell v. Patterson*, 98 Ky. 520.

Nevada. — *Pratt v. Stone*, 25 Nev. 365.

West Virginia. — *Lively v. Southern Bldg., etc., Assoc.*, 46 W. Va. 180.

Equivalent Averment. — A statute requiring that the affidavit state "that the claim is believed to be just" and "to the best of affiant's belief, that the defendant is converting," is substantially complied with where the affiant swears "that the claim is believed to be just" and "that the defendant is converting." *Clinch River Mineral Co. v. Harrison*, 91 Va. 122.

Where the title of the action, prefixed as a heading to the affidavit, characterizes the plaintiff as "receiver, etc.," and then the affiant, without so further characterizing himself, swears that he "is the plaintiff in the above entitled action" and that the "defendant in said action is indebted to him," there is sufficient compliance with the statutory requirement that the affidavit shall show "that the defendant is indebted to the plaintiff." *O'Connor v. Witherby*, 112 Cal. 38; *O'Connor v. Roark*, 108 Cal. 173.

"Upon" for "Of." — An affidavit stating that the debt has not been secured by a pledge "upon personal property" sufficiently complies with a statute using the word "of" instead of "upon." *O'Connor v. Witherby*, 112 Cal. 38.

"And" for "Or." — Where the statute requires the affidavit to specify the amount of the indebtedness "over and above all legal setoffs or counterclaims" and the language of the affidavit is "over and above all legal setoffs and counterclaims," there is not such a departure from the statutory requirement as will make the affidavit ineffectual. *O'Connor v. Witherby*, 112 Cal. 38; *O'Connor v. Roark*, 108 Cal. 173.

"Has Absconded or Concealed Himself."

— An allegation that "the defendant * * * has left the state * * * with intent to cheat and defraud his creditors" is not equivalent to charging, in the language of the statute, that the defendant "has absconded or concealed himself." *Severn v. Giese*, 6 N. Dak. 523.

"Entitled to Recover." — The substitution of "should" for "entitled to" in the phrase "entitled to recover" is not a substantial compliance with the statute. *Sommers v. Allen*, 44 W. Va. 120.

12. 3. Reputed Names. — In *Illinois*, by statute, defendants may be designated by their reputed names and joint defendants by their separate or partnership names or by such names, styles, or titles as they are usually known, and this provision applies equally to heirs, executors, and administrators of deceased defendants. *Nester v. Carney Bros. Co.*, 98 Ill. App. 630. And see NAMES.

13. 1. S. C. Herbst Importing Co. v. Hogan, 16 Mont. 384; *Fisher v. Bloomberg*, 74 N. Y. App. Div. 368; *Reedy Elevator Co. v. American Grocery Co.*, (N. Y. City Ct. Spec. T.) 48 N. Y. Supp. 619; *Kesler v. Lapham*, 46 W. Va. 293.

Effect of Notary's Seal. — The omission of the venue from the affidavit will not render the same void when the notary's seal is affixed showing that the affidavit was taken within his jurisdiction. *Englehart-Davidson Mercantile Co. v. Burrell*, 66 Mo. App. 117.

2. Savage v. Atkins, 124 Ala. 378.

3. Signature. — The omission of the signature of the officer before whom the affidavit was made renders the warrant of attachment absolutely void. *Doty v. Boyd*, 46 S. Car. 39.

14. 1. Arkansas City Lumber Co. v. Scott, 5 Kan. App. 636. See also *Dittman Boot, etc., Co. v. Mixon*, 120 Ala. 206; *Bellah v. Hilles*, 2 Penn. (Del.) 34; *Brumby v. Rickoff*, 94 Ga. 429; *Emerson v. Converse*, 106 Iowa 330; *Citizens Nat. Bank v. Converse*, 105 Iowa 669; *Schlicht v. Callcott*, 76 Miss. 487; *S. C. Herbst Importing Co.*

15. 7. Substantial Averments — b. STATEMENT OF PLAINTIFF'S CLAIM — Must State Amount. — See notes 1, 2.

Accuracy of Statement. — See note 3.

v. Hogan, 16 Mont. 384; *Coyle Mercantile Co. v. Nix*, 7 Okla. 267; *Symms Grocer Co. v. Burnham*, 6 Okla. 618; *Jaffray v. Wolf*, 4 Okla. 303; *Maguire v. Bolen*, 94 Wis. 48.

14. 2. Amendments. — The entire want of an essential jurisdictional fact cannot be supplied by amendment. *Mentzer v. Ellison*, 7 Colo. App. 315; *Blair v. Winston*, 84 Md. 356; *Blyth, etc., Co. v. Swensen*, 7 Wyo. 303.

But the court has full power to permit amendments for the curing of defects and such as do not give life to that which is void. *Emerson v. Thatcher*, 6 Kan. App. 325; *Newell v. Whitwell*, 16 Mont. 243; *Cook v. New York Corundum Co.*, 114 N. Car. 617; *Dunn v. Drummond*, 4 Okla. 461; *Miller v. Zeigler*, 44 W. Va. 484; *Bohn v. Zeigler*, 44 W. Va. 402; *Sommers v. Allen*, 44 W. Va. 120.

In *California* neither the affidavit nor the undertaking on attachment is amendable. *Tibbet v. Sue*, 122 Cal. 206.

At What Time Amendment Allowed. — The affidavit may be amended after the commencement of the trial and before final judgment. *Moore v. Harrod*, 101 Ky. 248; *Northern Lake Ice Co. v. Orr*, 102 Ky. 586. And, in some jurisdictions, even upon appeal. *Sloan v. Hudson*, 119 Ala. 27; *Finch v. Gregg*, 126 N. Car. 176. See also *Hanger v. Ives*, 69 Ark. 52.

An amendment may be permitted before a plea in abatement going to defects in the affidavit has been passed upon by the court. *Simpson v. East*, 124 Ala. 293.

But not after the defendant has appealed from an order of the court denying his motion to dissolve the attachment on the ground of the insufficiency of the affidavit. *Brandenstein v. Way*, 17 Wash. 293.

An affidavit in an action for a debt not due may be amended after the maturity thereof, by setting up a ground of attachment not existing at the time of the issuance. *Hey v. Harding*, (Ky. 1899) 53 S. W. Rep. 33.

A Supplemental Affidavit may be filed showing other facts coming to the knowledge of the affiant since the filing of the first affidavit. *Goodman v. Henry*, 42 W. Va. 526. But it need

not expressly state that the new facts it gives came to the knowledge of the affiant after he made the first affidavit. *Miller v. Zeigler*, 44 W. Va. 484. It must relate back to the commencement of the action and will be insufficient if the averments be in the present tense. *Sommers v. Allen*, 44 W. Va. 120. And it may be made by some credible person other than the first affiant. *Lewis v. Bragg*, 47 W. Va. 707. But leave to file an additional affidavit will not be granted when the defects complained of are jurisdictional. *Cremins v. East Lake Woolen Co.*, (Supm. Ct. Spec. T.) 25 Civ. Pro. (N. Y.) 365.

Where the Original Affidavit Is Sufficient, an order permitting an amendment, if error, is error without prejudice. *Ask v. Armstrong*, 9 S. Dak. 265.

No Appeal Lies from an order allowing an amendment. *Cook v. New York Corundum Co.*, 114 N. Car. 617.

15. 1. Moore v. Harrod, 101 Ky. 248.

Failure to State Amount. — An affidavit which fails to state the amount sued for is defective but not void, as the omission can be supplied by amendment. *Coyle Mercantile Co. v. Nix*, 7 Okla. 267.

2. See Teague v. Lindsey, (Tex. Civ. App. 1903) 71 S. W. Rep. 573.

3. Grotte v. Nagle, 50 Neb. 363 [*citing* 3 ENCYC. OF PL. AND PR. 15]; *Byrne v. Lake Charles First Nat. Bank*, 20 Tex. Civ. App. 194; *Hereford Cattle Co. v. Powell*, 13 Tex. Civ. App. 496; *Rogers v. East Line Lumber Co.*, 11 Tex. Civ. App. 108; *Gallatin First Nat. Bank v. Wallace*, (Tex. Civ. App. 1901) 65 S. W. Rep. 392.

Statement of Excessive Amount. — If the plaintiff claims a larger amount than is afterwards decreed by the court to be due, the attachment is good as to the amount so decreed. *Williams v. Louisiana Lumber Co.*, 105 La. 99; *Newell v. Whitwell*, 16 Mont. 243.

Gross Sum. — It is permissible to state in the affidavit a gross sum due for rent and advances. *Ragsdale v. Kinney*, 119 Ala. 454.

Amount and "Interest." — An affidavit stating the indebtedness to be "five hundred dollars and interest and attorney's fees, money of the United

16. See note 1.

17. Nature of Debt. — See note 1.

States," directly alleges the specific indebtedness of five hundred dollars, and to that extent at least will sustain the writ of attachment. *Tibbet v. Sue*, 122 Cal. 206.

16. 1. **Unliquidated Damages.** — *James v. Signell*, 60 N. Y. App. Div. 75; *Delafield v. J. K. Armsby Co.*, 58 N. Y. App. Div. 432, 62 N. Y. App. Div. 262; *Haskell v. Osborn*, 33 N. Y. App. Div. 127; *Mallon v. Rothschild*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 8; *Roth v. American Piano Mfg. Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 509; *Story v. Arthur*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 244; *McLoughlin v. Naugle*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 385; *Farquhar v. Wisconsin Condensed Milk Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 270; *Foster v. Scurich*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 25; *White v. Goodson Type Casting, etc., Mach. Co.*, (Supm. Ct. Spec. T.) 24 Civ. Pro. (N. Y.) 411.

In *Illinois*, in all actions of trespass, the plaintiff or his agent must be examined under oath, in regard to the amount of damages, and such amount shall be indorsed upon the affidavit; but the examination need not be held in open court, and it will be presumed, in the absence of a contrary showing, that the examining judge heard such evidence and made such examination as the law requires. *Jacobs v. Marks*, 183 Ill. 533.

17. 1. *Illinois.* — *Britton v. Gregg*, 96 Ill. App. 29.

New York. — *Axford v. Seguire*, 70 N. Y. App. Div. 228. See also *Lewisohn v. Kent, etc., Co.*, 87 Hun (N. Y.) 257.

Collateral Attack. — An affidavit which does not state the nature of the indebtedness is not void but merely voidable, and cannot be called in question in a collateral action. *Hogue v. Corbit*, 156 Ill. 540.

Reference to Petition. — *Grotte v. Nagle*, 50 Neb. 363.

In *Indiana*, where the affidavit alleges that the claim of the plaintiff is for a balance due on a judgment and for goods sold and delivered "as described in the complaint," reference may be had to the complaint to ascertain the precise nature of the plaintiff's claim. *U. S. Capsule Co. v. Isaacs*, 23 Ind. App. 533.

In *New York*, where the complaint is

not referred to in either the affidavit or the warrant, and there is nothing in the record to show that it was before or considered by the judge at the time the warrant was issued, the attachment cannot be sustained by a reference thereto. *People v. St. Nicholas Bank*, 44 N. Y. App. Div. 313. Otherwise where the attachment was granted upon a verified complaint as well as upon an affidavit. *Washburn v. Carthage Nat. Bank*, 86 Hun (N. Y.) 396, *affirmed* 155 N. Y. 690. But where the complaint is made on information and belief, and does not state the source of the information or the grounds of belief, the papers are fatally defective. *Altworth v. Flynn*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 106, *reversing* (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 838. An allegation that "deponent will allege in his complaint herein" is not the statement of any fact, as defendant might change his mind and conclude not to allege it or might aver something else. *Axford v. Seguire*, 70 N. Y. App. Div. 228. See also *Romeo v. Garafalo*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 166, *affirmed* 25 N. Y. App. Div. 191.

In *South Carolina* a complaint cannot be considered upon an application for an attachment unless it is duly verified, attached to the affidavit, and therein referred to as a part thereof. *Chitty v. Pennsylvania R. Co.*, 62 S. Car. 526; *Addison v. Sujette*, 50 S. Car. 192. Nor can a defective affidavit be supported by reference to affidavits submitted at the hearing of a motion to vacate the attachment. *Addison v. Sujette*, 50 S. Car. 192. See also *Ferst Powers*, 58 S. Car. 398.

Allegation of Contract. — Where the allegation is that the plaintiff's claim is for goods sold and delivered, but there is no statement that said goods were in fact sold and delivered, there is not a sufficient disclosure of the cause of action. *Chambers, etc., Glass Co. v. Roberts*, 2 N. Y. App. Div. 181; *Mitchell v. Anderson*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 13. But see *Plummer v. Struby-Estabrooke Mercantile Co.*, 23 Colo. 190, holding that the affidavit sufficiently states the nature of the action by alleging it to be for "goods, wares and merchandise" sold by the plaintiff to the defendants,

18. See note 1.

19. Qualifying Words. — See note 1.

Express or Implied Contract. — If it sufficiently appears from the affidavit that there is an indebtedness arising on contract for the direct payment of money, it need not be stated whether the contract was express or implied. *Flagg v. Dare*, 107 Cal. 482. *Freer v. Hamilton*, 127 Mich. 381. Compare *S. C. Herbst Importing Co. v. Hogan*, 16 Mont. 384.

The affiant's conclusion, to the effect that the defendant is indebted to the plaintiff in a certain sum upon an express and implied contract for the payment of money, is sufficient, as reference may be had to the complaint to ascertain the precise nature of plaintiff's claim. *Newell v. Whitwell*, 16 Mont. 243.

Allegation of Promissory Note. — An affidavit which alleges that the defendants are liable upon a promissory note, but which does not aver that the plaintiffs are entitled to the note either as payees or indorsees, is bad for indefiniteness. *Sommers v. Allen*, 44 W. Va. 120. See also NEGOTIABLE INSTRUMENTS.

An allegation that the negotiable paper was given for logs sold by the plaintiff to the defendant is not indefinite, as it justifies the conclusion that the plaintiff was the payee. *Miller v. White*, 46 W. Va. 67.

Professional Services. — A mere allegation that the claim is for "professional services" does not state the nature of the debt with sufficient legal definiteness. *Kesler v. Lapham*, 46 W. Va. 293.

Two Causes of Action. — Where the plaintiff joins two causes of action in one affidavit, he must show statutory grounds for an attachment to exist as to both claims or the attachment will be vacated in its entirety. *Vollmer v. Spencer*, (Idaho 1897) 31 Pac. Rep. 609.

18. 1. *Kerns v. McAulay*, (Idaho 1902) 69 Pac. Rep. 539; *Minck v. Levey*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 315; *Lederer v. Rosenthal*, 99 Wis. 235. See also *Mosher v. Farmers, etc.*, Nat. Bank, 51 Neb. 55.

Kentucky — Attachment of Specific Property. — An affidavit to secure an attachment, according to the statute, against property on which the plaintiff has a lien or in which he has some in-

terest, need not allege that the debt is due. *Schnabel v. Jacobs*, 105 Ky. 774.

In Texas it is not required that the affidavit shall state what part of the debt is due or that it is due. *Gimbel v. Gomprecht*, 89 Tex. 497; *Cohen v. Grimes*, 18 Tex. Civ. App. 327; *Tootle v. Alexander*, 13 Tex. Civ. App. 615. See also *Gallatin First Nat. Bank v. Wallace*, (Tex. Civ. App. 1901) 65 S. W. Rep. 392.

In West Virginia the affidavit for an attachment in equity, in case the claim or debt be not due, must show when it will become due. *Roberts v. Burns*, 48 W. Va. 92.

Maturity Sufficiently Shown. — An affidavit alleging the existence of an agreement between plaintiff and defendant that the note in suit should immediately become due upon the insolvency of the defendant, and that affiant had been informed by the latter's president of its insolvency, sufficiently shows that the debt is due. *Merchants' Nat. Bank v. Columbia Spinning Co.*, 21 N. Y. App. Div. 383. See also *National Shoe, etc., Bank v. New York L. Ins., etc., Co.*, (Supm. Ct. App. Div.) 53 N. Y. Supp. 360.

Effect of Misstatement. — Where an attachment is issued for the recovery of a sum claimed to be past due, and on the trial it appears that part of the sum was not due when the attachment was taken out, the writ will be quashed in the absence of a motion by the plaintiff to amend the affidavit and writ. *Weissinger v. Studebaker Bros. Mfg. Co.*, 73 Miss. 480.

But in *Nebraska* and *Wisconsin* the attachment will be discharged merely as to undue items. *Grotte v. Nagle*, 50 Neb. 363; *Hubbard v. Haley*, 96 Wis. 578.

And where the cause for attachment is proven and found to have existed as to part of the debt and not as to the remainder, the attachment will be sustained as to the former amount. *Teweles v. Lins*, 98 Wis. 453.

19. 1. *Moore v. Harrod*, 101 Ky. 248.

Justness of Claim — Kentucky. — See *Hey v. Harding*, (Ky. 1899) 53 S. W. Rep. 33.

Omission of Word "Justly." — *Sommers v. Allen*, 44 W. Va. 120.

20. See note 1.

21. *c.* STATEMENT OF GROUNDS OF ATTACHMENT — (1) Generally. — See notes 1, 2.

(2) *Allegation of Knowledge and Belief.* — See note 3.

Negating Existence of Counterclaims. — *Kerns v. McAulay*, (Idaho 1902) 69 Pac. Rep. 539.

20. 1. **Unnecessary Allegations.** — *That Defendant Is an Adult* need not be alleged in the affidavit, as the law presumes such to be the fact until the contrary is shown. *Hall v. Anderson*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 270.

That Plaintiff Is a Resident of the state is not a necessary allegation, *Hawkins v. Pakas*, 39 N. Y. App. Div. 506; although the allegation of residence is necessary when the defendant is a foreign corporation, *Ladenburg v. Commercial Bank*, 87 Hun (N. Y.) 269. The affidavit need not allege that the nonresident defendant has property within the state. *Foushee v. Owen*, 122 N. Car. 360.

Inconsistency. — An allegation that the defendant "has" assigned his property is not inconsistent with another allegation that defendant "is about" to assign, etc., where the two statements are not in the disjunctive. *Blackinton v. Rumpf*, 12 Wash. 279; *Deseret Nat. Bank v. Little*, 13 Utah 265.

21. 1. *Raymond v. Nix*, 5 Okla. 656.

2. **One Sufficient.** — *Sauerwein v. Renard Champagne Co.*, 68 Mo. App. 29; *Lindquist v. Johnson*, 12 S. Dak. 486. See *Hasler v. Schopp*, 70 Mo. App. 469.

3. *Kesler v. Lapham*, 46 W. Va. 293, citing 3 ENCYC. OF PL. AND PR. 21, note 3, and holding that under the statute relating to attachments before justices of the peace, which requires merely a statement of the amount of the claim, an affidavit saying that affiant "believes" plaintiff ought to recover a certain sum is sufficiently positive.

District of Columbia — *Supporting Affidavit.* — Where the statute requires that the affiant in a supporting affidavit must have "personal knowledge" of the truth of the facts alleged, it is not necessary that the affiant state in words that he has "personal knowledge" of the facts where he makes a direct and positive statement which implies personal knowledge. *Wielar v. Garner*, 4 App. Cas. (D. C.) 329.

And while under ordinary circumstances a supporting affidavit will not be sufficient which merely states the witness's belief of the existence of a fact, yet, in a case where the basis of the attachment was an assignment for the benefit of creditors, an affidavit of the attorney of the attaching creditor stating that in his opinion the assignment was fraudulent, was held sufficient. *Cissell v. Johnston*, 4 App. Cas. (D. C.) 335.

In Illinois a statement upon belief only, unaccompanied by showing as to whether such belief is founded upon knowledge or information, cannot be accepted as a substitute for positive averment. *Syndicate des Cultivators v. Currie*, 72 Ill. App. 122.

In Michigan the requisite facts, except the fact of indebtedness, may be shown on information and belief as well in a case where the debt is not due as under the statutes relating to attachments generally. *Mosher v. Bay Circuit Judge*, 108 Mich. 503.

New York — *Allegations upon Information and Belief.* — Unless the sources of the information and the grounds of the belief be stated, and be sufficient to show to the satisfaction of the judge that the alleged cause of action and grounds of attachment exist, an affidavit on information and belief is insufficient to authorize the granting of a warrant of attachment. *Rallings v. McDonald*, 76 N. Y. App. Div. 112; *Doheny v. Worden*, 75 N. Y. App. Div. 47; *Sizer v. Hampton, etc., R., etc., Co.*, 67 N. Y. App. Div. 547; *Barrell v. Todd*, 65 N. Y. App. Div. 22; *DeLafield v. J. K. Armsby Co.*, 62 N. Y. App. Div. 262; *Hunt v. Robinson*, 52 N. Y. App. Div. 539; *Merchants' Nat. Bank v. Columbia Spinning Co.*, 21 N. Y. App. Div. 383; *Hoosick Falls First Nat. Bank v. Wallace*, 4 N. Y. App. Div. 382; *Boyd v. Miller*, 88 Hun (N. Y.) 617; *Everitt v. Park*, 88 Hun (N. Y.) 368; *Acker v. Saynisch*, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 415, affirmed 26 Misc. (N. Y.) 836; *Weehawken Wharf Co. v. Knickerbocker Coal Co.*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 683; *Harroway v. Flint*, (County Ct.) 19 Misc. (N. Y.) 411;

Minck v. Levey, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 315; *Nevada Bank v. Cregan*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 241; *Monette v. Chardon*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 165; *Muller v. Hatch Cutlery Co.*, (N. Y. City Ct. Gen. T.) 12 Misc. (N. Y.) 202.

Allegations upon Personal Knowledge.

— The rule is that a mere statement of facts positively or as of personal knowledge is not sufficient; there must be something to show that the affiant actually did have knowledge or that his information was derived from satisfactory sources. *Hayden v. Mullins*, 76 N. Y. App. Div. 69; *James v. Signell*, 60 N. Y. App. Div. 75; *Martin v. Aluminum Compound Plate Co.*, 44 N. Y. App. Div. 412; *Lacker v. Dreher*, 38 N. Y. App. Div. 75; *Wallace v. Baring*, 21 N. Y. App. Div. 477; *Shuler v. Birdsall, etc., Mfg. Co.*, 17 N. Y. App. Div. 228; *Lehmaier v. Buchner*, 14 N. Y. App. Div. 263; *Tucker v. E. L. Goodsell Co.*, 14 N. Y. App. Div. 89; *Randolph v. Susquehanna Water Power, etc., Co.*, 12 N. Y. App. Div. 479; *Belmont v. Sigua Iron Co.*, 12 N. Y. App. Div. 441; *Hoormann v. Climax Cycle Co.*, 9 N. Y. App. Div. 579, *affirming* 17 Misc. (N. Y.) 734; *Hanson v. Marcus*, 8 N. Y. App. Div. 318; *Taintor v. Charles Beseler Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 720, *affirmed* 62 N. Y. App. Div. 617; *Foster v. Rogers*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 14; *Herman v. Bailey*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 94; *Einstein v. Climax Cycle Co.*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 88, *affirmed* 13 N. Y. App. Div. 624; *Steele v. R. M. Gilmour Mfg. Co.*, 77 N. Y. App. Div. 199.

But the defendant will not be allowed to come into court and, without denying the truth of the facts alleged, show by proof *aliunde* that the affiant could have had no personal knowledge of them. *Ladenburg v. Commercial Bank*, 5 N. Y. App. Div. 219.

Affidavit of Personal Knowledge Not Available. — Where plaintiff relies for his information as to the grounds of attachment upon an affidavit made upon personal knowledge and filed in another action and it is impossible to obtain such original affidavit, extracts therefrom may be embodied in the plaintiff's affidavit and may be utilized and considered by the court. And it is not necessary that the plaintiff should

state in so many words that he made certain allegations on information and belief instead of producing the affidavit of the informant because the latter is impracticable, if from all the papers such impracticability fairly appears. *Levy v. Goldstein*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 639.

But where no effort appears to have been made to procure the affidavit of the informant, and no explanation is made why such affidavit was not procured, the attachment cannot be sustained. *Sill Stove Works v. Scott*, 62 N. Y. App. Div. 566; *New Rochelle Coal, etc., Co. v. McGraw*, 3 N. Y. App. Div. 252; *Abrams v. Lavine*, 90 Hun (N. Y.) 566.

Allegations as to Written Instruments.

— Where a party alleges upon information and belief, and states that the sources of his information are certain writings, the court is entitled to know what the writings are in order to see whether the affiant is justified in his belief or not. *Ladenburg v. Commercial Bank*, 87 Hun (N. Y.) 269.

But it is not necessary that an agreement or other written instrument relied upon by plaintiff to justify the attachment should be set out in full in the affidavit, the affiant's statement of the purport thereof being sufficient if it constitutes such legal evidence as will prove to the satisfaction of the court the facts alleged. *Merchants' Nat. Bank v. Columbia Spinning Co.*, 21 N. Y. App. Div. 383.

In *Tennessee* the allegations in the affidavit may be made according to the best of affiant's knowledge and belief. *Phipps v. Burnett*, 96 Tenn. 175.

Information by Telephone. — Where the basis of affiant's belief as to the existence of a sufficient cause of action to entitle the plaintiff to an attachment consists alone of a statement over the telephone by a person in another city, who, though his voice is recognized by the affiant, simply says that somebody else told him of the existence of the fact tending to prove a cause of action, the affidavit is insufficient. *Andrews v. Schofield*, 27 N. Y. App. Div. 90.

Information by Cable. — It was intimated in *Ladenburg v. Commercial Bank*, 148 N. Y. 202, that information communicated to the plaintiffs by their correspondent in a foreign country by cable in the ordinary course of business, where such information could not be communicated promptly in any

24. (3) *Disjunctive Statements.* — See notes 1, 2.

25. See note 1.

26. (4) *Statutory Phrases and Clauses.* — See note 1.

other way, may furnish evidence upon which an attachment should be granted.

Sources of Information. — An affidavit, taken before a notary in another state, though not signed by the deponent, sufficiently shows to the court the source of plaintiff's information and belief. *Hawkins v. Pakas*, 39 N. Y. App. Div. 506.

But a mere allegation by an affiant that certain persons not parties to the action had made certain statements to him does not make such statements evidence. *Haskell v. Osborn*, 33 N. Y. App. Div. 127; *Abrams v. Lavine*, 90 Hun (N. Y.) 566.

Presumption of Knowledge. — The relation to a bank of its vice-president is clearly such that the inference of knowledge can fairly be drawn. *National Shoe, etc., Bank v. New York L. Ins., etc., Co.*, (Supm. Ct. App. Div.) 53 N. Y. Supp. 360. And so with the cashier of a bank. *Merchants' Nat. Bank v. Columbia Spinning Co.*, (Supm. Ct. App. Div.) 53 N. Y. Supp. 1109.

Where the affiant is the secretary and treasurer of the plaintiff corporation, and swears to the sale and delivery of the goods of his own personal knowledge, the affidavit is sufficient, although it does not in terms state that he was an officer of the corporation at the time the goods were sold. *Anthony v. Fox*, 53 N. Y. App. Div. 200, reversing 30 Misc. (N. Y.) 637.

"Over and Above All Counterclaims," Etc. — An affidavit made by plaintiff's attorney stating the amount of plaintiff's claim over and above all counterclaims and set-offs "known to deponent" is insufficient, as it is not the knowledge of the agent or attorney which the statute requires but the knowledge of the plaintiff. *Mitchell v. Anderson*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 13.

And the same is true as to affidavits made by the salesman or by the assignor of the plaintiff. *Smith v. Holt*, 37 N. Y. App. Div. 24.

But the plaintiff's agent is competent to make the allegation if the facts of the case are shown to have been within his own knowledge. *Hanson v. Marcus*, 8 N. Y. App. Div. 318;

Washburn v. Carthage Nat. Bank, 86 Hun (N. Y.) 396, affirmed 155 N. Y. 690; *Steele v. R. M. Gilmour Mfg. Co.*, 77 N. Y. App. Div. 199. See also *Bloomingtondale v. Cook*, 35 N. Y. App. Div. 360; *Livingston v. Lakwitz*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 119; *Weehawken Wharf Co. v. Knickerbocker Coal Co.*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 683; *Herzberg v. Boiesen*, (N. Y. City Ct. Spec. T.) 53 N. Y. Supp. 256.

24. 1. *Roberts v. Burns*, 48 W. Va. 92 (wherein the court *obiter* quoted the text), holding that an affidavit in which affiant stated that he believed that "some one or more of the following grounds exist for an attachment" and then set forth five different statutory grounds, was in the disjunctive and was bad for indefiniteness. See also *Shanks v. Magnolia Metal Co.*, 89 Hun (N. Y.) 486.

2. In *Louisiana* an affidavit in the disjunctive is justified by statute. *Coleman v. Teddlie*, 106 La. 192.

United States. — An allegation that defendant "has" disposed of his property is not inconsistent with a further allegation, stated separately, that he "is about" to dispose, etc., as the word "property" need not be taken to mean all of the defendant's property. *Salmon v. Mills*, (C. C. A.) 68 Fed. Rep. 180.

25. 1. *Kansas.* — *Cook v. Burnham*, 3 Kan. App. 27.

New York. — *Stewart v. Lyman*, 62 N. Y. App. Div. 182; *Sturz v. Fischer*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 410; *Herzberg v. Boiesen*, (N. Y. City Ct. Spec. T.) 53 N. Y. Supp. 256.

Wisconsin. — *Winner v. Kuehn*, 97 Wis. 394, *distinguishing* *Klenk v. Schwalm*, 19 Wis. 111.

26. 1. *O'Connor v. Sherley*, (Ky. 1899) 52 S. W. Rep. 1056; *Hey v. Harding*, (Ky. 1899) 53 S. W. Rep. 33.

Allegation of Nonresidence — *Corporation.* — Under a statute providing that a creditor may have an attachment "where the debtor is not a resident of this state," it is sufficient to use the exact language of the statute in referring to a corporation defendant. *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, reversing 77 Ill. App. 59. And where a statute provides that an

27. To Vex, Harass, Etc. — See note 1.

8. Variance. — See note 2. And see VARIANCE.

28. See note 1.

III. BOND OR UNDERTAKING — 1. In General. — See note 3.

attachment may issue against a foreign corporation unless it has complied with the laws of the state relative to the appointment of agents upon whom service of process may be made, the affidavit in attachment need merely allege that the defendant is a foreign corporation, and the burden thereupon rests upon the defendant to establish that it is not subject to attachment because of its compliance with the laws of the state. *Bradley v. Interstate Land, etc. Co.*, 12 S. Dak. 28.

Allegation of Joint Wrong. — An affidavit reciting that two partners "have assigned, disposed of, and concealed their property with intent to defraud their creditors" sufficiently charges both defendants with a wrong. *Van Benschoten v. Fales*, 126 Mich. 176.

Insufficient Allegations as to Intent. — Where the allegations contained in the affidavit are equally as consistent with an honest intent on the part of the defendant as a dishonest one, the attachment will be vacated. *Shuler v. Birdsell, etc., Mfg. Co.*, 17 N. Y. App. Div. 228; *Hoosick Falls First Nat. Bank v. Wallace*, 4 N. Y. App. Div. 382; *Bernhard v. Cohen*, (Supm. Ct. App. T.) 58 N. Y. Supp. 363.

Municipal Court of New York. — An allegation that "defendant M. keeps herself concealed with intent to avoid the service of the summons" states a sufficient ground for attachment under the statutes relating to the Municipal Court of New York city. *Finn v. Mehrbach*, (Municipal Ct.) 30 Civ. Pro (N. Y.) 242.

Misstatement as to Residence. — An attachment based on an affidavit of the nonresidence of the debtor, if such statement is untrue, is wrongful and the proceedings are void. *German Nat. Bank v. Kauter*, 55 Neb. 103.

Misstatements as to Joint Defendants. — Where two or more persons are sued jointly on an alleged contract, and the contract, attached as an exhibit to the declaration, shows that only one of the defendants is liable, the attachment may be dismissed on motion. *Cox v. Henry*, 113 Ga. 259. So where the affidavit alleges that the two defendants are jointly bound on the

notes sued on, while the notes themselves show separate and distinct liabilities as maker and indorser. *Blair v. Winston*, 84 Md. 356. And an attachment against three partners jointly should be quashed if the debt is not shown to be joint. *Boyd v. Wolff*, 88 Md. 341.

27. 1. Several Defendants. — Where there is more than one defendant the affidavit should deny in express terms the intent to injure or harass, not only as to both defendants, but as to either of them. *Kildare Lumber Co. v. Atlanta Bank*, 91 Tex. 95.

2. In California the affidavit and writ should state the same amount of indebtedness, which may, nevertheless, be a smaller amount than that demanded in the complaint. *De Leonis v. Etchepare*, 120 Cal. 407.

In Illinois no advantage can be taken of a variance except where the declaration counts upon a different cause of action from that stated in the affidavit, and where the variance is merely in the declaration laying damages at a sum larger than the sum sworn to, a demurrer to the declaration will not lie. *Hughes v. Foreman*, 78 Ill. App. 460.

Failure to Claim Interest. — Where the affidavit differs from the complaint and writ, in that it does not claim interest from a certain date upon the amount of indebtedness, there is no substantial variance. *O'Connor v. Witherby*, 112 Cal. 38; *O'Connor v. Roark*, 108 Cal. 173.

28. 1. Longyear v. Minnesota Lumber Co., 108 Mich. 645.

In New York where different inferences can be drawn as to the nature of the cause of action stated in the complaint, that inference which will support rather than destroy the action or remedy sought will be made. *Foote v. Foulke*, 55 N. Y. App. Div. 617.

3. See De Morris v. Wilbur Lumber Co., 98 Wis. 465.

In West Virginia no bond is necessary unless the officer is required to take the property into actual possession. *Bowlby v. De Wit*, 47 W. Va. 323.

An Undertaking Given Instead of a Bond is sufficient under the statutes of *Min.*

- 29.** 2. Failure to Give Bond Required. — See note 1.
30. 4. Form of Bond — *a.* IN GENERAL. — See note 2.
 Statutory Form. — See note 4.
32. *c.* APPROVAL OF BOND. — See note 6.
33. 5. Amount of Indemnity. — See note 1.
 May Be for More than Statutory Amount. — See note 2.

nesota. Schweigel *v.* L. A. Shakman Co., 78 Minn. 142.

A Pauper Oath in Lieu of the Bond is sufficient if taken and subscribed before a justice of the peace of the county, although the attachment is issued out of the Circuit Court. Phipps *v.* Burnett, 96 Tenn. 175.

29. 1. Blincoe *v.* Head, 103 Ky. 106; Lederer *v.* Rosenthal, 99 Wis. 235.

Arkansas. — The failure to file the bond is such a jurisdictional error as would dissolve the attachment upon motion of the defendant; but where the giving of the bond is waived by the defendant, a junior attaching creditor cannot intervene and object to the attachment on such ground. Austin *v.* Goodbar Shoe Co., 60 Ark. 444.

Liability of Issuing Officer. — A justice of the peace who issues an attachment without first requiring the execution of a proper bond is liable in damages to the defendant. Head *v.* Levy, 52 Neb. 456.

30. 2. Omission of Affidavit of Sureties. — Where the statute requires that an undertaking on attachment should be accompanied by an affidavit to the effect that the sureties are either householders or freeholders within the state, a writ issued upon an undertaking unaccompanied by such an affidavit should be discharged upon application. Tibbet *v.* Sue, 122 Cal. 206.

Objection After Judgment. — Where a bond is filed at the institution of the suit and duly approved and no objection is made thereto before judgment, it is too late to make such objection upon a motion for a new trial. Englehart-Davidson Mercantile Co. *v.* Burrell, 66 Mo. App. 117.

4. Gallatin First Nat. Bank *v.* Wallace, (Tex. Civ. App. 1901) 65 S. W. Rep. 392; Lively *v.* Southern Bldg., etc., Assoc., 46 W. Va. 180.

Insufficient Compliance — Effect on Proceedings. — A bond conditioned for the payment of any judgment recovered for defendant, but not for costs and damages "if the writ shall be set aside or vacated," as provided by the statute,

does not sufficiently comply therewith, but the defect is not jurisdictional and will not render the proceedings void. Schweigel *v.* L. A. Shakman Co., 78 Minn. 142.

32. 6. Approval of Second Bond. — No authority is conferred on the clerk to receive or approve a second bond after the attachment writ has been issued, where the bond taken in the first instance is insufficient. State *v.* Finke, 66 Mo. App. 238.

33. 1. In California reference must be had to the affidavit and not to the complaint to determine the amount of the undertaking. Baldwin *v.* Napa, etc., Wine Co., 137 Cal. 646.

Attachment for Amount Less than Claimed. — Where the writ of attachment issues for less than the sum demanded in plaintiff's petition, the bond for attachment may be given for an amount corresponding with the writ. Immanuel Presb. Church *v.* Riedy, 104 La. 314; Hughes *v.* Mattes, etc., State Co., 104 La. 218.

De Minimis Non Curat Lex. — A bond, too small by three dollars, held good. Aldrich *v.* Columbia R. Co., 39 Oregon 263.

Unlimited Amount. — An undertaking in which no amount is inserted binds the surety in an unlimited amount and does not affect the validity of the attachment. Tischler *v.* Fishman, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 172.

2. Wigmore *v.* Buell, 122 Cal. 144.

Court May Increase Penalty of Bond — New York. — Security upon an attachment is intended to be an indemnity to the defendant against his costs, disbursements, and damages, and where the defendant incurs disbursements in excess of the amount of the undertaking given, or where the latter is manifestly insufficient, the court will increase the security. Fuerstenberg *v.* American Soda Fountain Co., 21 N. Y. App. Div. 501; Manda *v.* Etienne, 13 N. Y. App. Div. 237; Ives *v.* Ellis, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 333, affirmed 67 N. Y. App. Div. 619.

- 34. Substituted Bonds.** — See notes 2, 3. See AMENDMENTS.
6. Parties to Bond — *a.* PRINCIPAL OR OBLIGOR. — See note 4.
35. Bond by Agent or Attorney. — See note 1.
36. *b.* SECURITY OR SURETIES. — See note 1.
37. *c.* OBLIGEE. — See note 2.
38. IV. WRIT — **1. Formalities and Requisites** — *a.* FORMALITIES — In Name of State. — See note 1.

34. 2. In *Illinois* the bond may be amended under the statute, and therefore no defect in it will render the proceeding void. *Schmitt v. Devine*, 63 Ill. App. 289.

3. See *Addison v. Sujette*, 50 S. Car. 192; *Hood v. Fay*, 15 S. Dak. 84.

Additional Bond. — A plaintiff who desires to file an additional affidavit setting forth additional grounds for an attachment should offer to file therewith a new bond conditioned for the prosecuting with effect, etc., the additional cause set forth. *Page v. Dillon*, 61 Ill. App. 282.

Refusal to Give New Bond. — Upon refusal of the plaintiff to give a new bond when so ordered by the court it is proper to dismiss the attachment. *Springfield Engine, etc., Co. v. Glazier*, 65 Mo. App. 616.

4. *Contra.* — *Storz v. Finklestein*, 50 Neb. 177; *Shakman v. Koch*, 93 Wis. 595.

Partners. — In *Illinois* there is no absolute requirement in the statute that the attachment bond shall be signed by all the plaintiffs, and a bond not so signed, if defective, cannot be objected to for the first time on appeal. *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582.

Where the Cause of Action Is Assigned after the execution of an attachment bond by the plaintiff and his surety, the bond goes along with the action as continuing security and the surety continues liable for the substituted plaintiff. *Brown v. Tidrick*, 14 S. Dak. 249.

35. 1. Power of Attorney under Seal — *Florida.* — Where the agent executes the bond without a due power of attorney under seal, a subsequent sealed ratification of the bond by the principal is sufficient to sustain the suit. *Pollock v. Murray*, 38 Fla. 105.

Authority by Telegram. — The name of the plaintiff may be signed by a third party as his agent under the authority of a telegram from the plaintiff which is attached to the undertaking. *Ferst v. Powers*, 58 S. Car. 398.

36. 1. In *New York* the question as to whether one or more sureties shall execute an undertaking is to be determined by the judge granting the attachment to whom the undertaking is presented for approval, although it is the usual practice to require two sureties, unless a surety company executes the bond in lieu thereof. *Goldmark v. Magnolia Metal Co.*, 28 N. Y. App. Div. 264.

Surety Company. — In *Oregon* the statute allowing a surety company to become surety upon any bond or undertaking required to be given by the laws of the state is applicable to an undertaking for an attachment. *Aldrich v. Columbia R. Co.*, 39 Oregon 263.

And in *Missouri* trust companies are proper sureties on attachment bonds. *Steppacher v. McClure*, 75 Mo. App. 135.

Failure to Name Sureties. — Where the names of all the sureties do not appear in the body of the bond, but the bond binds "the undersigned," the latter term includes and embraces all the signers in the obligation assumed. *Gallatin First Nat. Bank v. Wallace*, (Tex. Civ. App. 1901) 65 S. W. Rep. 392.

37. 2. Where the Defendant Is Not Correctly Designated in the bond, he may thereafter be identified as the obligee without enlarging the obligations of the sureties. *Ermeling v. Bargh*, 121 Mich. 167.

Several Defendants. — An attachment bond need not be made payable to the grantee, in an alleged fraudulent conveyance, who is made a party to the suit for the sole purpose of subjecting the property to the debt. *Archenhold v. B. C. Evans Co.*, 11 Tex. Civ. App. 138.

38. 1. *Harper v. Turner*, 101 Tenn. 686, holding that a writ which does not run in the name of the state is void and not subject to amendment on appeal.

39. Signature and Seal. — See note 2.

40. Summons. — See note 1.

41. Statutory Requisites. — See note 1.

b. PARTIES. — See note 3.

42. Partners. — See note 2.

c. RECITALS — (1) *Cause of Action and Grounds of Attachment.* — See note 4. See AMENDMENTS.

43. See note 2.

39. 2. Defective Attestation — Signature by Deputy. — The failure of a deputy clerk who issues the attachment to sign his name as deputy is a mere amendable irregularity. *Wimberly v. Boland*, 72 Miss. 241.

Supplying Signature. — In *West Virginia* an order of attachment is not void for want of the clerk's signature but merely voidable. And, therefore, as such defect could be corrected by amendment on a motion to quash, a writ to which the clerk attached his signature after issuance and before such motion made was held good. *Miller v. Zeigler*, 44 W. Va. 484.

40. 1. Mellen v. Battey, 22 R. I. 395.

41. 1. Emerson v. Thatcher, 6 Kan. App. 325; *Standard Cotton Seed Oil Co. v. Mathison*, 47 La. Ann. 710.

3. Misnomer. — No *Massachusetts* statute provides that an attachment of real estate shall be ineffectual or void if the defendant is wrongly named in the writ, nor does any statute or decision require in terms that the documents which show the attachment shall state the correct name of the defendant. *Norris v. Anderson*, 181 Mass. 308.

The Affidavit and Bond May Be Looked To in aid of the writ itself when the latter is wanting in certainty as to the person against whom it was intended it should issue. *Moore v. Brewer*, 94 Ga. 260.

42. 2. A Misnomer of One of the Individuals Composing a Partnership will not invalidate the attachment when service is made upon the proper co-partners. *Herman v. Bailey*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 94.

Nor will a mistake in the given name of one partner, where the parties are sufficiently identified. *Van Benschoten v. Fales*, 126 Mich. 176.

4. Illinois — Ground of Attachment. — An omission in the writ to state the ground of the attachment is merely an amendable irregularity. *Cline v. Pat-*

terson, 88 Ill. App. 360; which, however, may be taken advantage of on appeal where the defendant did not appear in the trial court. *Cline v. Paterson*, 191 Ill. 246.

New York — Nature of Action. — Nothing in the statute requires that the nature of the cause of action shall be stated in the attachment or that a mistake in the warrant as to the nature of the cause of action shall be fatal to the attachment. *Fox v. Mays*, 46 N. Y. App. Div. 1.

A recital that the action is for "wrongful detention" rather than for "wrongful conversion," where the real cause of action can be easily ascertained from the complaint and the affidavit, is an irregularity and not a jurisdictional defect. *Rallings v. McDonald*, 76 N. Y. App. Div. 112.

Grounds of Attachment. — A failure to fully state the grounds for the attachment will not necessarily render the attachment void, as the court has the inherent power to permit an amendment. *Stone v. Pratt*, 90 Hun (N. Y.) 39. Such power may be exercised even pending a motion to vacate the warrant because of such defect. *King v. King*, 59 N. Y. App. Div. 128.

And there is no difference in the power of the court to allow such amendment as against the defendant and as against a person who claims to have acquired an interest in the property attached under the warrant. *King v. King*, 68 N. Y. App. Div. 189. See also *Galligan v. Groten*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 428.

43. 2. Stone v. Pratt, 90 Hun (N. Y.) 39; *Williams v. Rightmyer*, 88 Hun (N. Y.) 372, *following Cronin v. Crooks*, 143 N. Y. 352, but holding also that a sufficient statement of a ground for attachment is not vitiated by the fact that an insufficient statement is conjunctively attached.

Consistent Allegations. — A warrant reciting "that the defendant is concealing his property to defraud his

44. (2) *Amount*. — See note 2.

45. (3) *Other Recitals*. — See note 3.

46. *d. WHEN AND WHERE RETURNABLE — Time*. — See notes 1, 2.

Place. — See note 3.

creditors, and that the defendant is about to dispose of his property and goods with the like intent," does not allege inconsistent grounds, as the word "concealing" is equivalent to the statutory term "secrete," and the recital of the warrant is synonymous with the statement that the defendant is about to sell his concealed property. *Jurgens v. Tum Suden*, 32 N. Y. App. Div. 1.

Statement in Conjunctive. — A warrant stating that the defendant conceals himself with intent to defraud his creditors and to avoid service of summons is sufficient, although the terms of the statute are in the alternative. *Hall v. Anderson*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 270.

44. 3. In California the writ must issue for the amount stated in the affidavit, but such amount may be less than the demand set forth in the complaint. *Baldwin v. Napa, etc., Wine Co.*, 137 Cal. 646; *Tibbet v. Sue*, 122 Cal. 206; *De Leonis v. Etchepare*, 120 Cal. 407. See also *Wigmore v. Buell*, 122 Cal. 144.

In Georgia the declaration cannot demand a larger amount than that set forth in the attachment. *Casey, etc., Mfg. Co. v. Dalton Ice Co.*, 94 Ga. 407.

A Mistake of the Clerk in issuing the writ for a sum larger than that stated in the affidavit will not invalidate the same when the attachment is sustained by an order of the court for the correct amount before the appearance of defendant. *Lee v. Smyser*, 96 Ky. 369.

In an Action for Unliquidated Damages the court should exercise judicial discretion as to the damages likely to be recovered, and fix the amount for which the attachment issues accordingly. *Rouge v. Rouge*, (N. Y. Super. Ct. Spec. T.) 14 Misc. (N. Y.) 421. And the amount may be reduced upon the application of either party. *Cohen v. Walker*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 114; *Sulzbacher v. Cawthra*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 545.

Writ Voidable as to Excess in Amount. — Where an affidavit sets forth several

distinct causes of action, but fails to show sufficient grounds for attachment in all of them, a writ which states the amount of each demand separately and also the aggregate of all the demands is not void because issued for too large an amount, but voidable merely as to the demands not properly included therein. *Wilson v. Barbour*, 21 Mont. 176.

45. 3. Sufficiency of Description. — In *New Hampshire* the description is sufficient, if it will enable the officer to find the property by the exercise of reasonable diligence. *Hopkins v. Rays*, 68 N. H. 164.

Surplusage. — A direction which may be improper and invalid, contained in a writ otherwise valid, but not acted upon, should be treated as surplusage and will not render the writ void. *Raymond v. Nix*, 5 Okla. 656. See also **SURPLUSAGE, IRRELEVANT OR REDUNDANT MATTER**.

46. 1. See *Kirk v. Elmer H. Dearth Agency*, 171 Ill. 207; *Edwards v. Haring*, 59 Ill. App. 147.

The Pennsylvania Statute requiring attachments to be made returnable to the first return day after the issuing thereof does not apply to those counties wherein the courts have adopted rules creating additional return days to which writs may be made returnable at the election of the plaintiff. *Slingluff v. Sisler*, 193 Pa. St. 264.

2. Failure to State Exact Time of Return. — A writ is not void because it directs the sheriff to "make return of this order with your proceedings thereon when fully executed or discharged," instead of directing him to return it in ten days as required by statute. *Raymond v. Nix*, 5 Okla. 656.

3. In Alabama an attachment against a nonresident should be made returnable to the county where the property levied on is located. *Kress v. Potter*, 132 Ala. 577.

In Georgia an Attachment Against a Nonresident, where the debt exceeds one hundred dollars, may be made returnable to the Superior Court of any county, without respect to whether or not the debtor has effects therein either

47. 2. Issuance — *a. WHO MAY ISSUE.* — See note 1.

48. See notes 1, 2.

Officer of Another Court. — See note 3.

49. Formal Entry of Order. — See note 2.

in the form of property subject to levy or of credits subject to garnishment. Nashville, etc., R. Co. v. Cleghorn, 94 Ga. 413.

Place of Return as Depending upon Amount Sued For. — In *Georgia* where the amount sued for is not in excess of the limit of jurisdiction of a justice's court the attachment is returnable to the latter court. And, it seems, the writ may be amended so as to make it returnable to the proper court. Pickett v. Smith, 95 Ga. 757.

Virginia. — Under Code Va. (1887), § 2965, as amended by Acts of Assembly 1893-94, c. 436, an attachment issued in a pending suit must be made returnable to a term of the court in which the same is pending, or to some rule day thereof. As to the proper practice before such amendment see *McAllister v. Guggenheimer*, 91 Va. 317, and *Clinch River Mineral Co. v. Harrison*, 91 Va. 122.

47. 1. See in support of the text *Remington v. Benoit*, 19 R. I. 698.

Justice of the Peace. — In *Arkansas* the authority of a justice of the peace to issue attachments is not confined to cases of nonresident debtors. *Merriman v. Sarlo*, 63 Ark. 151.

In *South Carolina* a magistrate may issue a writ of attachment against the property of a nonresident. *Bird v. Sullivan*, 58 S. Car. 50; *Burckhalter v. Jones*, 58 S. Car. 89.

Judge. — In *Florida*, prior to the adoption of the Revised Statutes of 1892, an attachment issued by a county judge could not be levied upon real estate. *Collier v. Anderson*, 36 Fla. 635.

In *Nebraska*, where an attachment issued out of a District Court is signed by a judge of another district, it will be presumed that the order was granted while the District Court was in regular session and that the judge holding the same was acting at the instance of the proper district judge. *Cox v. Peoria Mfg. Co.*, 42 Neb. 660.

In *Oklahoma* a probate judge may issue an attachment, in an action pending in a District Court, during the absence of the district judge from the county. *Central L. & T. Co. v. Campbell Commission Co.*, 5 Okla. 396, *affirmed* 173 U. S. 84.

Jurisdiction to Issue. — The jurisdiction to grant an attachment does not involve a preliminary determination by the officer to whom application for the writ is made, where in law the case presented will entitle the plaintiff to the relief he asks. It is sufficient to authorize such officer to grant the writ that it appears that the action is brought for one of the causes where attachment may issue, and the other facts are shown which authorize the process to be issued. *Van Camp v. Searle*, 147 N. Y. 150. See *Central L. & T. Co. v. Campbell Commission Co.*, 173 U. S. 84.

And where the evidence presented to the judge who passes upon the application in the first instance is sufficient to call upon him to exercise his judgment as to its sufficiency, his conclusion thereon will be binding upon the appellate court. *Blakeslee v. Cattelain*, 86 Hun (N. Y.) 574.

48. 1. See, in support of the text, *Bates v. Shelton*, 99 Ga. 164.

In *West Virginia* the clerk may issue a writ of attachment without an order of the court and whether the court is in session or during vacation. *Abney v. Ohio Lumber, etc., Co.*, 45 W. Va. 446.

2. *Payton v. McQuown*, 97 Ky. 757.

3. A Justice of the Peace has in *Alabama* no authority to issue an attachment returnable before another justice of the same or another county. *Mitchell v. Lawrence*, 123 Ala. 498. But the judge of the City Court of Mobile may issue an attachment returnable to any county in the state. *Lowenstein v. Martin*, 105 Ala. 668.

A Clerk of the Circuit Court may in *Alabama* take the affidavit, approve the bond, and issue a writ of attachment returnable to a court of another county. *Meridian Fertilizer Factory v. Bush*, 77 Miss. 697.

49. 2. In *Georgia*, if no order has been granted directing the attachment to issue, the original petition or other testimony taken before the issuing judge stands in place of such order, and the court may, upon the trial of the action, entertain a motion to dismiss the attachment upon the ground that the facts set up in such petition or

50. *b.* TIME OF ISSUANCE. — See notes 1, 2, 3.

51. See note 1.

Interval Between Filing Papers and Issuing Writ. — See note 3.

shown by such testimony were not sufficient to authorize the issuing of the attachment. *Blackwell v. Compton*, 107 Ga. 764.

50. 1. See in support of the text *Gallun v. Weil* (Wis. 1903) 92 N. W. Rep. 1091.

2. *Hoagland v. Wilcox*, 42 Neb. 138, which case supports the text.

In *Montana* a writ of attachment issued at the same time as or subsequent to the issuance of a void summons is itself void. *Sharman v. Huot*, 20 Mont. 555.

In *Nebraska*, if property has been seized under a writ of attachment regularly issued and levied, the court requires jurisdiction over the property so far at least as to render the custody by its officers lawful, and jurisdiction to that extent is not lost, so long as the action remains pending, by failure to serve process in the main action upon the defendant. *Rachman v. Clapp*, 50 Neb. 648; *Darnell v. Mack*, 46 Neb. 740. See also *Brown v. Bose*, 55 Neb. 200.

In *New York* in the Municipal Court the attachment must accompany the summons. *Finn v. Mehrbach*, (Municipal Ct.) 30 Civ. Pro. (N. Y.) 242.

In *Oklahoma* the action is commenced, for the purpose of issuing the attachment, by filing a petition and procuring a summons to be issued, or by filing a petition with an affidavit for publication, where the service by publication is duly perfected by commencing the same within sixty days. *Raymond v. Nix*, 5 Okla. 656.

In *Washington*, for the purpose of the issuance of a writ of attachment, the action is deemed to have been commenced by the filing of the complaint with the clerk. *Schwabacher v. Abrahams Grocery Co.*, 14 Wash. 225; *Cosh-Murray Co. v. Tuttlch*, 10 Wash. 449.

In *West Virginia*, where the statute provides that a writ of attachment may be issued by a justice of the peace at the commencement of the action or at any time during its pendency, the action is not legally commenced or pending when the summons is not signed by the justice, and the attachment will not be sustained. *Colburn v. Booth*, 41 W. Va. 289.

In *Wisconsin*, where the statute provides that the writ may be issued by the clerk on request, but that an attorney may obtain a blank signed and sealed process to be filled up and used as occasion may require, the writ really issues in contemplation of the statute when it is delivered to the officer for execution. *Barth v. Burnham*, 105 Wis. 548.

Attachment Falls with Summons. — In *New York* personal service of the summons must be made or publication thereof commenced within thirty days after the granting of the attachment, and if the service is not so made, or publication commenced, the attachment falls. *Peetsch v. Sommers*, 31 N. Y. App. Div. 255. And so, if the summons or the service thereof is set aside as irregular, and no stay is granted pending an appeal therefrom and no new service is made. *Martin v. Smith*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 425. But a defect in the summons which may be corrected on motion does not afford a sufficient ground to vacate the attachment. *Thomson v. Tilden*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 513. The form of service, to be sufficient to sustain the attachment, must be sufficient to support the judgment. *Kieley v. Central Complete Combustion Mfg. Co.*, 147 N. Y. 620.

Where a Writ of Attachment Is Vacated because the summons was not served within the time required by statute a second writ may issue thereafter without making new service. *Parke v. Gay*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 329.

3. See *White v. Johnson*, 27 Oregon 282.

Warning Order. — The issuing of a void warning order does not "commence" the action. *Redwine v. Underwood*, 101 Ky. 190.

51. 1. *Maguire v. Bolen*, 94 Wis. 48.

3. **When Affidavit to Be Filed.** — In *South Carolina* the affidavit is required by statute to be filed at the time of issuing the warrant or within forty-eight hours thereafter. *Ferst v. Powers*, 58 S. Car. 398. But the statute has no application to proceedings to enforce an agricultural lien. *Blair v. Morgan*,

52. Sundays and Holidays. — See note 1. See also SUNDAYS AND HOLIDAYS.

c. TO WHOM DIRECTED. — See note 3.

53. d. JURISDICTION AND NUMBER OF WRITS. — See notes 1, 2, 3.

59 S. Car. 52. Compare *Townsend v. Sparks*, 50 S. Car. 380; *Doty v. Boyd*, 46 S. Car. 39.

52. 1. See *Richards v. Schreiber, etc., Co.*, 98 Iowa 422.

3. In *Missouri* a writ issued out of a justice's court to attach property in an adjoining township may be directed to a constable of either township; but it can only be served by the officer selected and designated therein. *Friar v. McNama*, 70 Mo. App. 581.

Unjustified Appointment of Special Officer. — In *Mississippi* a justice of the peace has no power to specially appoint a private person, in a case of emergency, to execute a writ of attachment in another county. *Miller v. Edwards*, 75 Miss. 739.

In *New Jersey* a writ of attachment issued by a justice of the peace holding court for the trial of small causes must be directed to a constable, and no authority exists in the justice to appoint a private citizen to execute the writ and make a return. *Orenstine v. Schaffer* 58 N. J. L. 344.

53. 1. *State Bank v. Maxson*, 123 Mich. 250; *Flohrs v. Forsyth*, 78 Minn. 87. See *Bates v. Kaesner*, 69 Ill. App. 620; *Tennent-Stribbling Shoe Co. v. Hargadine-McKittrick Dry Goods Co.*, 58 Ill. App. 368; *Campbell v. Triplett*, 74 Miss. 367.

In *Missouri* an attachment before a justice of the peace must be brought in the township where the property attached is found or in an adjoining township, or in the township where the defendant resides or in an adjoining township. *Belshe v. Lamp*, 91 Mo. App. 477; *Rocheport Bank v. Doak*, 75 Mo. App. 332.

In *Oklahoma* the court has no jurisdiction of the proceeding when the defendant is not personally served and no property belonging to him is attached. *Central L. & T. Co. v. Campbell Commission Co.*, 5 Okla. 396.

Against Absconding Debtor. — In *Nebraska* the action is properly instituted in the county of the debtor's former residence and where his property may be found. *Smith v. Johnson*, 43 Neb. 754.

Against Nonresident. — Actual attachment of property within the state gives the court jurisdiction against a nonresident. *Earle v. Sayre*, 99 Ga. 617; *National Bank v. Mascoma Flannel Co.*, 70 N. H. 227. See *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468. *Contra*, *Wilmerding v. Corbin Banking Co.*, 126 Ala. 268.

In *Oregon* there is no statute making the seizure under an attachment or otherwise of the property of a nonresident an essential or necessary jurisdictional prerequisite in an action against him. *Colfax Bank v. Richardson*, 34 Oregon 518.

The judgment of a superior court against a nonresident cannot be attacked collaterally for any defect in the attachment proceedings, where such proceedings are not by statute made jurisdictional, unless the record affirmatively shows a want of jurisdiction. *White v. Ladd*, 41 Oregon 324; *Schlosser v. Beemer*, 40 Oregon 412; *Colfax Bank v. Richardson*, 34 Oregon 518. And see *Van Wageningen v. Carpenter*, 27 Colo. 444.

Against National Bank. — No attachment can issue from a state court against a national bank. *Dennis v. Seattle First Nat. Bank*, 127 Cal. 453. Nor from a United States court. *Willard Mfg. Co. v. Merchants Nat. Bank*, 130 N. Car. 609. But otherwise as to property of a third person in the custody of the bank. *Com. v. Chestnut St. Nat. Bank*, 189 Pa. St. 606.

Transfer of Cause to Another Court. — Jurisdiction having been once obtained before the Circuit Court of one county the attachment suit may be transferred to the Circuit Court of another county by consent of parties. *Wessinger v. Mausur, etc., Implement Co.*, 75 Miss. 64.

2. *Hoagland v. Wilcox*, 42 Neb. 138.

3. *Chapman v. Reddick*, 41 Fla. 120; *Barton v. Hanauer*, 4 Kan. App. 531; *Skeels v. Oceana Circuit Judge*, 119 Mich. 290; *Perkins v. Meilicke*, 66 Minn. 409.

In *Illinois* the mere finding of property or credits in the county in which the suit is brought, without the court

54. Successive Writs. — See note 1.

V. EXECUTION OF WRIT — 1. In General. — See note 2.
See also EXECUTIONS AGAINST PROPERTY.

having acquired jurisdiction to render any judgment against said property, does not authorize the attachment of property of the defendant found in another county. *Buck v. Coy*, 73 Ill. App. 160.

In *Missouri* a county court must attach property of the defendant within its own county in order to acquire jurisdiction to issue a writ of attachment to the county of the defendant's residence. *Monarch Rubber Co. v. Bunn*, 82 Mo. App. 603.

54. 1. Harbour-Pitt Shoe Co. v. Dixon, (Ky. 1901) 60 S. W. Rep. 186, quoting 3 ENCYC. OF PL. AND PR. 54.

In *Illinois* an *alias* writ is unauthorized. *Carr v. Keeley Brewing Co.*, 94 Ill. App. 225, affirmed 198 Ill. 492; *American Hydraulic Dredging Co. v. O. S. Richardson Fueling Co.*, 90 Ill. App. 376. And the filing of a new affidavit and bond will not authorize the issuing of a second writ in the same action. *Pack v. American Trust, etc.*, Bank, 172 Ill. 192, affirming 70 Ill. App. 177; *Buck v. Coy*, 73 Ill. App. 160.

In *Kansas*, where the attachment has been released by the plaintiff and dissolved by the court on the ground that the levy was made by one without authority, a new attachment may issue upon the original affidavit. *J. V. Brinkman Co. Bank v. Gustin*, 63 Kan. 758.

In *New Jersey* there is no statutory authority for reaching property not attached under the writ by an *alias* writ. *Watson v. Noblett*, 65 N. J. L. 506.

In *New York*, where an attachment is defective or fails for any reason, there is nothing which prohibits an application for a new one. *Ladenburg v. Commercial Bank*, 5 N. Y. App. Div. 219.

In *Rhode Island*, while it is proper for the plaintiff to attach a sufficient amount to satisfy his claim on the first writ, either by succeeding attachments thereon within the time allowed for the service and before the return day thereof, or by a writ of mesne process issued after the entry thereof in court, yet it is an abuse of legal process to go as far as he can on the first writ and then, without entering that, to sue out

another for the same cause of action, and attach the same or an additional amount to satisfy his claim. *McNally v. Wilkinson*, 20 R. I. 315.

In *Washington*, if the first writ has been dissolved on motion, and an amended affidavit filed showing new or different grounds for attachment, a second writ may issue. *Bingham v. Keylor*, 25 Wash. 156.

In *West Virginia* a second affidavit may be filed and a new attachment issued thereon in the same action. *Miller v. White*, 46 W. Va. 67.

Obtaining Jurisdiction by Second Writ. — A second attachment in the same suit cannot impart jurisdiction where the first one has failed to give it. *Miller v. White*, 46 W. Va. 67.

Effect of Order of Dissolution. — Where two writs of attachment are issued in the same action and both of them are levied upon the same property, an order of dissolution made after both levies has the effect of dissolving both attachments, unless the order shows conclusively that it is limited to one of the writs. *Pennsylvania Mortg. Invest. Co. v. Gilbert*, 18 Wash. 667; *Pennsylvania Mortg. Invest. Co. v. Gilbert*, 13 Wash. 684.

2. Ames v. Parrott, 61 Neb. 847 [citing 3 ENCYC. OF PL. AND PR. 54]; *Graham v. Reno*, 5 Colo. App. 330; *Pittman v. Rotan Grocery Co.*, 15 Tex. Civ. App. 676. See also *Barthell v. Hencke*, 99 Wis. 660.

Levy Should Conform to Seizure under Execution. — *Woldert v. Nedderhut Packing Provision Co.*, 18 Tex. Civ. App. 602.

Statutory Notice of Levy. — In *Iowa* a notice of a levy upon property in possession of a third person, required by statute to be given to the defendant and to such third person, is only essential in order to complete the levy. The lien is created at the time of the actual seizure of the property and is effectual until the expiration of a reasonable time within which to give such notice. *Schoonover v. Osborne*, 111 Iowa 140; *Anderson v. Moline Plow Co.*, 101 Iowa 747. What is a reasonable time must depend upon the circumstances of the case. *Schoonover v. Osborne*, 108 Iowa 453; *Citizens Nat.*

- 55.** 2. Diligence Necessary in Levy. — See note 1.
 3. Order of Levy — Priority of Writs. — See note 2.
56. 4. Duration of Authority to Levy. — See note 2.
 5. By Whom Executed. — See note 3.
57. 6. Justification of Officer. — See note 1.

Bank v. Converse, 101 Iowa 307. The notice must be given in the case of a levy as well upon personal property as upon real property, and must be in writing. *Hamilton v. Hartinger*, 96 Iowa 7. Where the tenant in possession has actual notice and receipts for the property, a written notice to him is not necessary. *Foster v. Davenport*, 109 Iowa 329.

55. 1. See *Barth v. Loeffelholz*, 108 Wis. 562.

Plaintiff's Instructions. — See *Connelley v. Eisman*, (Ky. 1901) 60 S. W. Rep. 372.

The Officer May Refuse to Levy the Attachment, notwithstanding the execution to him of an indemnifying bond, if he knows of the existence of valid liens upon the property in excess of its value. *Phelps v. Skinner*, 63 Kan. 364.

2. Niagara Grape Market Co. v. Wygant, 1 N. Y. App. Div. 588, holding that a copy of a warrant delivered to the sheriff instead of the original is not entitled to priority of service over another warrant subsequently delivered. See also *Atchison, etc., R. Co. v. Schwarzschild, etc., Co.*, 58 Kan. 90.

Writ Accompanied by Full Instructions Should Be Served First. — Where the sheriff receives two writs on the same day, the second one being accompanied by the proper instructions as to the levy, and the first one not being accompanied by such instructions, it is the duty of the sheriff to execute the second writ before the first. *Remington v. Weber*, 11 Utah 181.

Levy on Sunday — Amendment. — Where two attachments were placed in the sheriff's hands, one on Saturday night and the other on Sunday morning, and the petition in the second one showed the facts necessary to a service on Sunday, and the other petition did not, it was held that an amendment to the first attachment setting forth such required facts entitled it to prior service. *Richards v. Schreiber, etc., Co.*, 98 Iowa 422.

56. 2. Successive Attempts to Levy. — An ineffectual attempt by the sheriff

to make a levy does not prevent him from making an effectual levy at any time before he returns the writ. *Dolan v. Wilkerson*, 57 Kan. 758.

3. Delegation of Authority to Execute. — The execution of the writ cannot be partly performed by one officer and the further execution delegated to another. *Cary v. Everett*, 107 Mich. 654.

Waiver of Service. — The writ must be served by a duly authorized officer in order to create a lien on the funds in the hands of a trustee, and a waiver of service by the latter is not valid as against third persons. *Creed v. Gilman*, 169 Mass. 562.

57. 1. *California.* — See *Sullivan v. Johnson*, 127 Cal. 230; *Brown v. Cline*, 109 Cal. 156.

Georgia. — See *Haslett v. Rodgers*, 107 Ga. 239.

Kansas. — See *Mills v. Talbott*, 63 Kan. 14; *Huey v. Brimer*, 9 Kan. App. 149; *Holdredge v. McCombs*, 8 Kan. App. 663.

Missouri. — *State v. O'Neill*, 151 Mo. 67.

Nebraska. — See *Horkey v. Kendall*, 53 Neb. 522; *Eickhoff v. Eikenbary*, 52 Neb. 332.

New York. — See *Van Dewater v. Gear*, 21 N. Y. App. Div. 201.

Oregon. — See *Fisher v. Kelly*, 30 Oregon 1.

South Dakota. — See *Howard v. Dwight*, 8 S. Dak. 398.

Utah. — See *Munns v. Loveland*, 15 Utah 250; *Jones v. McQueen*, 13 Utah 178.

Effect of Ratification by Plaintiff. — *H. D. Lee Mercantile Co. v. Chapman*, 9 Kan. App. 374; *Omaha Nat. Bank v. Robinson*, 56 Neb. 590; *Cole v. Edwards*, 52 Neb. 711. See *Guillfoyle v. Seeman*, 41 N. Y. App. Div. 516.

Property in Possession of Defendant. — When an officer proceeds to execute an attachment, he is authorized to seize any personalty found in the defendant's possession, if he have no reason to suppose it to be the property of another. *George H. Fuller Desk Co. v. McDade*, 113 Cal. 360,

57. 7. Attachment of Real Estate. — See note 2. See also EXECUTIONS AGAINST PROPERTY.

59. Not Necessary to Enter upon Land. — See note 1.

8. Attachment of Personalty. — See note 2. See also EXECUTIONS AGAINST PROPERTY.

57. 2. Nebraska. — *Westervelt v. Hagge*, 61 Neb. 647.

Oregon. — *Colfax Bank v. Richardson*, 34 Oregon 518; *Dickson v. Back*, 32 Oregon 217.

Service. — In *Colorado* the defendant must be served, but where the real property is held by or stands on the records of the county in the name of some other person than the defendant, such person must be served. *Thompson v. White*, 25 Colo. 226; *Graham v. Reno*, 5 Colo. App. 330.

The mere fact that the notice was served the day preceding the levy will not defeat the levy. *Kilham v. Western Bank, etc., Co.*, (Colo. 1902) 70 Pac. Rep. 409.

In *Georgia* service by mail is not sufficient, *Smith v. Brown*, 96 Ga. 274; nor is an oral notice by plaintiff's attorney to the defendant in person, *Baker v. Aultman*, 107 Ga. 339.

And where the defendant is a non-resident an entry on the writ of notice to the "tenant in possession" will not suffice as notice to the defendant unless the return connects the latter with the land attached and shows that he was, at the time of the levy, in possession of the land either in person or by tenant. *New England Mortg. Security Co. v. Watson*, 99 Ga. 733.

In *Idaho* service upon the owner is not sufficient without service on the occupant, if there is one. *Williams v. Olden*, (Idaho 1900) 61 Pac. Rep. 517.

In *Missouri* and *Rhode Island* service on the occupant is not necessary if the defendant be personally served. *Walter v. Scofield*, 167 Mo. 537; *Remington v. Benoit*, 19 K. I. 698.

Certificate. — The failure of the sheriff to file the certificate with the recorder of the county is fatal to the attachment. *Bryant v. Duffy*, 128 Mo. 18.

The certificate must describe the property sufficiently to enable a purchaser to identify it. *Hailey First Nat. Bank v. Sonnelitner*, (Idaho 1898) 51 Pac. Rep. 993.

The failure of the recorder to properly record the certificate is only material when there are other attaching

creditors or the rights of third parties have intervened, and the validity of the levy between the parties to the action is not affected thereby. *Richards v. Harrison*, 71 Mo. App. 224.

And a mere clerical error by the clerk in copying will not defeat the lien. *Schlusser v. Beemer*, 40 Oregon 412.

59. 1. Schoonover v. Osborne, 111 Iowa 140; *Poling v. Flanagan*, 41 W. Va. 191.

2. Inman v. Schloss, 122 Ala. 461; *Hamilton v. Maxwell*, 119 Ala. 23; *Meyer v. Missouri Glass Co.*, 65 Ark. 286; *Moore v. Brown, etc.*, Furniture Co., 107 Ga. 139; *Gardner v. Anthon Nat. Bank*, 57 Kan. 619; *Dodson v. Wightman*, 6 Kan. App. 835; *Norton v. Thiebes Stierling Music Co.*, 82 Mo. App. 216; *Grand Island Banking Co. v. Costello*, 45 Neb. 119.

Levy Prevented by Misrepresentation. — Where the sheriff is prevented from taking actual possession because of the false statements made to him by the agent of the defendant, the court will not perfect the lien by allowing the levy to be completed. *Robinson v. Columbia Spinning Co.*, 23 N. Y. App. Div. 499.

Property in Several Parcels. — Where property capable of delivery is in several parcels it must be actually taken into custody by separate and distinct seizures. *Maxwell v. Bolles*, 28 Oregon 1.

Property in Possession of Third Person. — In *Texas*, where the possession of property by a third person is claimed by the plaintiff in attachment to be fraudulent, actual seizure thereof should be made; but in case of possession under a recognized right to an interest therein, a levy by notice is sufficient. *Kessler v. Half*, 21 Tex. Civ. App. 91.

Second Levy upon Same Property. — Where two attachments were issued, the second for the purpose of correcting a mistake in the first one, the officer may levy upon property already in his hands by virtue of the first attachment without returning the same to the owner. *Brady v. Royce*, 180 Mass. 553.

Property Incapable of Manual Delivery.

— In *New York* property incapable of manual delivery may be attached by leaving a certified copy of the warrant and a notice showing the property attached with the person holding the same, and a failure to duly certify the copy served will invalidate the levy. *Courtney v. Eighth Ward Bank*, 154 N. Y. 688, *reversing* (Brooklyn City Ct. Gen. T.) 14 Misc. (N. Y.) 386; *Well v. Gallun*, 75 N. Y. App. Div. 439; *People v. St. Nicholas Bank*, 44 N. Y. App. Div. 313.

In *Oregon* property found in the possession of third persons claiming title under a purported bill of sale may be attached as property not capable of manual delivery, by leaving a copy of the writ and a notice specifying the property attached with the persons in possession. *Barr v. Warner*, 38 Oregon 109; *Sabin v. Michell*, 27 Oregon 66.

Ponderous Articles.— In *Maine* articles of bulk which cannot be immediately removed are attached by recording a copy of the officer's return in the office of the town clerk, or, if the attachment is made in an unincorporated place, in the office of the clerk of the oldest adjoining town in the county; and if the return is not filed with the clerk of the proper town, the lien of the attachment is lost. *Cookson v. Parker*, 93 Me. 488; *Stevens v. Thatcher*, 91 Me. 70; *Grant v. Albee*, 89 Me. 299.

But where the property is attached in an unincorporated place and there is no adjoining organized town, the officer may take actual possession and leave the property in the control of a keeper appointed by him. *Laughlin v. Reed*, 89 Me. 226.

A Bond and Mortgage must be taken into actual custody or there is no levy. *Fiske v. Parke*, 77 N. Y. App. Div. 422, *affirming* 39 Misc. (N. Y.) 157.

Books of Account.— A levy on books of account is not a levy on the debts charged therein. *Smith v. Sioux City Nursery, etc., Co.*, 109 Iowa 51.

Corporate Stock.— In *Arkansas* an attachment may be levied upon shares of corporate stock by delivering to one of the officers or agents of the corporation a notice in writing or a certificate specifying the shares so attached, and a mere delivery by the attaching officer of a copy of the writ of attachment to an officer of the company is not a good levy. *H. B. Claflin Co. v. Bretzfelder*, 69 Ark. 271.

And the delivery of such a certificate at a time subsequent to the return and filing of the writ of attachment is of no effect. *Deutschman v. Byrne*, 64 Ark. 111.

In *New Hampshire* the attachment is made by leaving an attested copy of the writ and of the officer's return thereon with a director of the corporation. *Abbot v. Kimball*, 68 N. H. 303.

In *New York* certificates of stock of a foreign corporation belonging to a nonresident of the state and in possession of a pledgee within the state may be levied upon under a warrant of attachment by service of a notice upon the pledgee. *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, *affirming* 47 N. Y. App. Div. 17.

Insurance Policies.— *Life-insurance Policies* are not within the meaning of a statute requiring "an instrument for the payment of money" to be taken into the sheriff's actual custody. *Kratzenstein v. Lehman*, 19 N. Y. App. Div. 228, *affirming* 19 Misc. (N. Y.) 600, and (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 590.

Fire-insurance Policies.— And the same is equally true of fire-insurance policies. *Trepagnier v. Rose*, 18 N. Y. App. Div. 393, *affirmed* 155 N. Y. 637.

Promissory Notes.— The proper method of attaching promissory notes is for the officer to take them into his actual possession instead of garnishing them as debts due defendant. *Nordyke v. Charlton*, 108 Iowa 414.

Unharvested Crops.— Where the return states that the officer attached the property "by taking into my custody," but the property being a growing crop not capable of delivery could only be attached by service of the writ and a notice of attachment as provided by law, the return is insufficient to show a valid levy of the attachment. *Rudolph v. Saunders*, 111 Cal. 233.

Undivided Interest in Chattels.— To attach the interest of one tenant in common in personal property for his individual debt, the officer may take all the property into his custody. *Sharp v. Johnson*, 38 Oregon 246.

Range Levy.— In *Arizona* the officer making a range levy must file a copy of the writ and notice of levy with the recorder, and no lien is created upon the property until that requirement is complied with. *Steinfeld v. Menager*, (Ariz. 1898) 53 Pac. Rep. 495.

60. VI. CUSTODY OF ATTACHED PROPERTY — 1. Bailee — a. IN GENERAL. — See note 2.

61. See note 1.

b. DEFENDANT. — See note 3.

62. 2. Continuity of Possession. — See note 1.

VII. RETURN OF WRIT — 1. In General — Within Reasonable Time. — See note 2.

63. Should State Facts. — See note 1.

Under the range levy act of *New Mexico* (Laws 1889, c. 54) it is necessary for the sheriff in attaching cattle to round up only such cattle as he may be able to get without interfering with the herds of other owners, and then to file with the clerk of the probate court of the proper county a certified copy of the writ. *Schofield v. Territory*, 9 N. Mex. 526.

60. 2. Deering v. Wisherd, 46 Neb. 720.

61. 1. Sinsheimer v. Whitely, 111 Cal. 378; *Gallun v. Well*, (Wis. 1903) 92 N. W. Rep. 1091. See *Aigeltinger v. Whelan*, 133 Cal. 110; *Chapman v. Reddick*, 41 Fla. 120; *Citizens' Nat. Bank v. Loomis*, 100 Iowa 266.

3. Barnard v. Towne, 70 N. H. 154.

Excluding Defendant from Premises. — See *Holland v. Anthony*, 19 R. I. 216.

That the Defendant Is Allowed Access to the building where the attached property is situated in the possession of the agent of the sheriff does not divest the latter of his custody. *Hamilton v. Hartinger*, 96 Iowa 7.

Where the Property Attached Is Not Separated from other property in possession of the defendant, and it does not appear that the officer even touched the attached property or ever had any possession distinct from that of the defendant, the appointment of the defendant as custodian of the articles attached is not sufficient to make a valid levy and establish a lien thereunder. *Gottlieb v. Barton*, 13 Colo. App. 147.

62. 1. Inman v. Schloss, 122 Ala. 461.

Possession of Successor in Office. — A writ of attachment cannot be said to be wholly executed when property is seized thereunder, as it also requires the officer to "safely keep" the property attached, and where the officer's term expires while the property is still in his possession it becomes the duty of his successor to complete the execution of the writ by safely keeping the property until the writ is discharged. *Wood v. Lowden*, 117 Cal. 232.

Abandonment of Levy. — Where the officer levied upon personal property and took it into his actual possession, but left it in its original place for a short time while he went to consult with an attorney, it was held that there was a valid levy and no intention on the part of the officer to abandon the property. *Nicholson v. Merstetter*, 68 Mo. App. 441.

Removal of Property by Third Person. — The removal of the attached property from the county by a third person claiming title is not an abandonment of the levy as to him. *Brown v. Hudson*, 14 Tex. Civ. App. 605.

2. Not Fatal to Attachment. — *Southern California Fruit Exch. v. Stamm*, 9 N. Mex. 361. *Contra*, under Pub. Stat. N. H., c. 220, § 36, *Munroe v. St. Germain*, 69 N. H. 200.

In *Texas* the failure of the sheriff to return a copy of the attachment and the levy indorsed thereon to the county clerk for registration does not affect the validity of the levy as against the defendant, as the statute requiring such registration provides only a mode of giving notice thereof to third parties. *Woldert v. Nedderhut Packing Provision Co.*, 18 Tex. Civ. App. 602.

Return After Return Day. — In *Illinois* the failure of the officer to make return on or before the return day will not affect the lien of the plaintiff under the attachment. *Hogue v. Corbit*, 156 Ill. 540.

63. 1. Anderson v. Moline Plow Co., 101 Iowa 747. See also *Winningham v. Trueblood*, 140 Mo. 572.

Substantial Compliance. — A return showing a substantial compliance with the statute providing the manner in which real or personal property may be attached is sufficient. *White v. Ladd*, 41 Oregon 324; *Schlosser v. Beemer*, 40 Oregon 412; *Colfax Bank v. Richardson*, 34 Oregon 518; *Sabin v. Michell*, 27 Oregon 66.

"I Have This Day Levied" implies the legal seizure by the officer of the prop-

63. 2. Recitals — When, How, and By Whom Levy Made. — See note 2.

64. See note 1.

3. Schedule or Inventory. — See note 3.

erty described in his entry, and raises a presumption that there was a valid and legal seizure. *Hiles Carver Co. v. King*, 109 Ga. 180.

An Attachment of All the Right, Title, and Interest which the debtor has in lands is a good attachment of the land itself. *Parker v. Prescott*, 87 Me. 444.

Return of Attachment Against Partners. — A return reciting the levy of an attachment against partners, designated by the firm name only, is sufficient to show a levy upon the property of the individuals composing the firm, where the writ described the defendants both as a firm and individually. *Fleischman v. Bowser*, (C. C. A.) 62 Fed. Rep. 259.

Seizure of Property as That of Defendant. — In *Georgia* the levy of an attachment against a nonresident is invalid if the return fails to state that the property was seized as that of the defendant. *New England Mortg. Security Co. v. Watson*, 99 Ga. 733. And this rule is equally applicable to attachments of realty and of personalty. *Tuells v. Torras*, 113 Ga. 691.

Contra, in *Illinois* and *Oregon*. *Hogue v. Corbit*, 156 Ill. 540; *Colfax Bank v. Richardson*, 34 Oregon 518.

63. 2. Date Fraudulently Changed. — Where the date of the return was fraudulently changed after filing, it was held proper to allow the officer to amend the same. *Weston v. Mt. Desert, etc., Land Co.*, 88 Me. 306.

64. 1. Watson v. Dingman, 120 Mich. 443. See also *Brown v. Hudson*, 14 Tex. Civ. App. 605.

Return Conclusive. — See *Sinsheimer v. Whitely*, 111 Cal. 378; *Gottlieb v. Barton*, 13 Colo. App. 147; *Bishop v. Poundstone*, 11 Colo. App. 73; *Citizens' Nat. Bank v. Loomis*, 100 Iowa 266; *Remick v. Wentworth*, 89 Me. 392; *Whiteside v. Lowney*, 171 Mass. 431; *Shanklin v. Francis*, 59 Mo. App. 178.

The Manner of Service of the writ must be stated substantially in the terms of the statute. *Proctor v. Whitchee*, 15 N. Y. App. Div. 227.

But where the return omits to state in detail the service of the writ as required by law, such omission is a mere

irregularity, and not jurisdictional. *Pomeroy v. Rand*, 157 Ill. 176; *Littlestone v. Goldenberg*, 66 Ill. App. 673; *Schweigel v. L. A. Shakman Co.*, 78 Minn. 142.

Place of Execution. — The return need not show that the attachment was executed within the sheriff's bailiwick, as he is without authority to execute it elsewhere and the presumption is in favor of a legal execution. *Guarantee Co. of North America v. Lynchburg First Nat. Bank*, 95 Va. 480.

Bulky Articles. — In *Massachusetts* the return need not state why the officer proceeded under the statute providing for the levying of an attachment upon articles of bulk without removing them immediately. *Davis v. Leary*, 177 Mass. 526.

3. Particularity of Description. — See *Stearns v. Silsby*, (Vt. 1902) 52 Atl. Rep. 115.

The return must show what property was attached by sufficiently describing it, as no lien attaches to any other property. *Harding v. Guaranty L. & T. Co.*, 3 Kan. App. 519.

The failure of the return to describe particularly a number of feet of lumber levied upon is an amendable defect and will not invalidate the attachment. *Stout v. Brown*, 64 Ark. 96.

A return stating the making of a levy upon two thousand head of cattle in different brands specified was held not to be void for failing to state how many were in each brand, where there was nothing to rebut the presumption that the cattle levied on included all the cattle in the different brands. *Brown v. Hudson*, 14 Tex. Civ. App. 605.

Description of Real Property. — In *Kentucky* the sheriff must describe real property with sufficient certainty to identify it, and any words which clearly designate and comprehend the property are sufficient. *Price v. Taylor*, (Ky. 1901) 62 S. W. Rep. 270.

Thus, a return referring to "said property" contains a sufficient description where the petition for the attachment describes the tract of land sought to be subjected. *Norfleet v. Logan*, (Ky. 1900) 54 S. W. Rep. 713. See also

66. VIII. DISSOLUTION — 1. Who May Move to Dissolve — a. DEFENDANT. — See note 1.

Defendant Disclaiming Interest. — See note 3.

Welch v. Spragins, 98 Ky. 279. But a return referring to a certain deed is not sufficient where the deed contains no description of the property. *Price v. Taylor*, (Ky. 1900) 57 S. W. Rep. 255.

In *Massachusetts* the description given in the return is sufficient if the same description would be sufficient to pass the land in a grant by the owner. *Norris v. Anderson*, 181 Mass. 308.

In *Vermont* a return describing the property attached as the debtor's, as all the real estate in a certain town with the appurtenances and the debtor's right in equity to redeem the same, was held sufficient to create a lien upon all the land in the town owned by the defendant as appeared of record. *Clemons v. Clemons*, 69 Vt. 545.

Valuation of Property. — In *Indian Territory* it has been held that since the officer's duty is to attach property enough to cover the claim sued upon, he should designate in his return the approximate value of the property seized, thereby showing how in this regard he has discharged his duty. *Barton v. Ferguson*, 1 Indian Ter. 263.

Appraisement. — In *Kansas*, where the sheriff is required to call in two disinterested persons to appraise the property attached, a failure of the officer to participate in the appraisement is not material error. *Emerson v. Thatcher*, 6 Kan. App. 325. Nor need the appraisement be immediately made. *Dodson v. Wightman*, 6 Kan. App. 835. And the appraisement of chattels which the appraisers are not able to see and examine will not render the levy wholly invalid. *Dodson v. Wightman*, 6 Kan. App. 835.

Property Already in Possession of Officer. — *German Sav. Bank v. Capital City Oatmeal Co.*, 108 Iowa 380.

Failure to Serve the Inventory upon the defendant does not affect the validity of the levy. *West v. Berg*, 66 Minn. 287.

Amendment of Return. — The return, including the inventory, may be amended so as to show the facts. *Hannon v. Bramley*, 65 Conn. 193; *Chaffee v. Runkel*, 11 S. Dak. 333; *Foster v. Davenport*, 109 Iowa 329; *Dunn v. Arkenburgh*, 48 N. Y. App. Div. 518, *affirmed* 165 N. Y. 669.

Especially, where the amendment relates to matters which occurred after the entry of the writ. *Harding v. Riley*, 181 Mass. 334. But the amendment must be made in the cause in which the writ issued, and when made it becomes the return. *Bishop v. Poundstone*, 11 Colo. App. 73. The amendment may be allowed even after an appeal has been taken in the action. *Tennent-Stribbling Shoe Co. v. Hargardine-McKittrick Dry Goods Co.*, 58 Ill. App. 368.

And in *Washington* and *New Jersey*, where the statute requires an inventory, the omission to attach one to the return may be cured by amendment. *Pacific Postal Tel. Cable Co. v. Fleischner*, (C. C. A.) 66 Fed. Rep. 899; *Franklyn v. Taylor Hydraulic Air Compressing Co.*, (N. J. 1900) 52 Atl. Rep. 714.

66. 1. Monette v. Chardon, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 165.

Partnership. — One partner may not move to quash the writ and vacate the judgment because the attachment was erroneously issued against his co-defendants. The latter alone can take advantage of the error. *Warren v. Winterstein*, 114 Mich. 647.

And it is no ground for dissolving an attachment levied against two partners, on motion of one of them, that the property attached was his individual property, that he was not a partner, and did not owe the debt. *Rosenberg v. Burnstein*, 60 Minn. 18.

In *New Mexico* an attachment levied upon partnership property will not be quashed because the suit is brought against one of the partners individually. *Curran v. William Kendall Boot, etc., Co.*, 8 N. Mex. 417.

8. Whitney v. Sherin, 74 Minn. 4. See also *Crudgington v. Hogan*, 105 Tenn. 448.

In *Georgia* the defendant need not allege in his petition to dismiss the attachment, that he is the owner of the property attached. *Holmes v. Langston*, 99 Ga. 555.

In *Nebraska* the fact that the attached property does not belong to the defendant, or is encumbered for its full value, does not bar or estop him from filing a motion to discharge. *Skinner v. Pawnee City First Nat. Bank*, 59

67. Assignor. — See note 1.

b. DEFENDANT'S ASSIGNEE, RECEIVER, OR VENDEE.

— See note 2.

69. *c.* SUBSEQUENT LIEN CREDITORS. — See notes 1, 2.

70. What Must Be Shown. — See note 1.

Neb. 17; Symns Grocery Co. v. Snow, 58 Neb. 516; Kountze v. Scott, 52 Neb. 460; South Park Imp. Co. v. Baker, 51 Neb. 392; McCord v. Bowen, 51 Neb. 247. *Contra*, Kountze v. Scott, 49 Neb. 258.

And the plaintiff cannot raise the question of the defendant's lack of interest in the property. Dayton Spice-Mills Co. v. Sloan, 49 Neb. 622; Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Neb. 863.

67. 1. Tolerton v. Casperson, 7 S. Dak. 206; Teweles v. Lins, 98 Wis. 453. 2. See generally in support of the text, Ringen Stove Co. v. Bowers, 109 Iowa 175; F. O. Sawyer Paper Co. v. Continental Printing Co., 77 Mo. App. 184; Compton v. Schwabacher, 15 Wash. 306.

The Assignee of the defendant may move to vacate. Merriam v. Wood, etc., Lithographing Co., 19 N. Y. App. Div. 329; Niagara Falls Paper Co. v. Sterling, (N. Y. City Ct. Spec. T.) 25 Civ. Pro. (N. Y.) 251. But not after a motion to vacate the attachment made by the defendant has been denied and the assignee has thereupon brought an action against the sheriff to recover the value of the property. Marx v. Ciancimino, 59 N. Y. App. Div. 570.

The Receiver of a Corporation must, before he can move to vacate an attachment levied upon the property of the corporation, show by competent evidence that he was duly appointed receiver and has thus acquired a lien on or interest in the property. Belmont v. Sigua Iron Co., 12 N. Y. App. Div. 441.

Receivers of a Foreign Corporation, appointed by the court of another state, may appear specially and move to vacate the attachment on account of the dissolution of the corporation. Morgan v. New York Nat. Bldg., etc., Assoc., 73 Conn. 151.

A Trustee in Insolvency may intervene in the attachment case and make a motion to quash. Palmer v. Hughes, 84 Md. 652.

69. 1. McEldowney v. Madden, 124 Cal. 108; Kimball v. Richardson-Kimball Co., 111 Cal. 386; Daniels v. Solo-

mon, 11 App. Cas. (D. C.) 163; Alworth v. Flynn, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 106; Citizens' Bank v. Corkings, 9 S. Dak. 614; Miller v. White, 46 W. Va. 67. See also Moors v. Ladenburg, 178 Mass. 272.

2. Standard Implement Co. v. Lansing Wagon Works, 58 Kan. 125; Wichita Nat. Bank v. Wichita Produce Co., 8 Kan. App. 40 [in each of which cases the court quoted 3 ENCYC. OF PL. AND PR. 69]; Claflin v. Benjamin, 47 La. Ann. 1447; Van Camp v. Searle, 147 N. Y. 150; Hoosick Falls First Nat. Bank v. Wallace, 4 N. Y. App. Div. 382; Cook v. New York Corundum Co., 114 N. Car. 617. See also Deere v. Eagle Mfg. Co., 49 Neb. 385, holding that while the defendant may waive mere irregularities, he cannot, as against junior attaching creditors, waive a substantial departure from the legal mode of giving effect to the attachment, nor can he waive defects which prejudice the substantive rights of such creditors. Thus, the institution of an action before the claim is due, and the issuing and levying of an attachment without obtaining an order therefor from a court or judge authorized to issue the same, may be taken advantage of by a junior attaching creditor.

A Junior Attaching Creditor cannot intervene and controvert the grounds of attachment of a senior attaching creditor. Glaser v. Ft. Smith First Nat. Bank, 62 Ark. 171.

But where the first attachment is sued out upon a debt not due, a subsequent attaching creditor may intervene and show the nonexistence of the statutory grounds for an attachment in such a case. Davis v. H. B. Claflin Co., 63 Ark. 157.

70. 1. Bradley v. Interstate Land, etc., Co., 12 S. Dak. 28 [quoting 3 ENCYC. OF PL. AND PR. 70]; Ladenburg v. Commercial Bank, 148 N. Y. 202; Sill Stove Works v. Scott, 62 N. Y. App. Div. 566; Hamerschlag v. Cathoscope Electrical Co., 16 N. Y. App. Div. 185; Ladenburg v. Commercial Bank, 2 N. Y. App. Div. 477; Grob v. Metropolitan Collecting

70. d. CLAIMANTS AND OTHER INTERESTED PARTIES. — See note 2.

72. 2. Time of Moving to Dissolve. — See notes 1, 2.

After Pleading to Merits. — See note 3.

73. See note 1.

Before and After Entry of Judgment. — See note 2.

74. See note 1.

Agency, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 314. See also Corn Exch. Bink v. Marckwald, (Supm. Ct. Spec. T.) 57 N. Y. Supp. 458; Miller v. White, 46 W. Va. 67; Barth v. Graf, 101 Wis. 27.

70. 2. See generally in support of the text Smith v. Sioux City Nursery, etc., Co., 109 Iowa 51; Harding v. Guaranty L. & T. Co., 3 Kan. App. 519; Ford v. Calhoun, 53 S. Car. 106; Littell v. Julius Lansburg Furniture, etc., Co., 96 Va. 540.

Claimant. — In *West Virginia* before a third party claiming an interest in the property attached can be permitted to dispute the validity of the attachment he must show by his petition that he has an interest in the controversy. Smith v. Parkersburg Co-operative Assoc., 48 W. Va. 232.

Garnishee. — Mere defects or irregularities in the process against the defendant in attachment are not available to a garnishee. White v. Simpson, 107 Ala. 386.

A Mortgagee of chattels cannot move to dissolve an attachment levied thereon. Meyer v. Keefer, 58 Neb. 220. *Contra*, Symms Grocer Co. v. Lee, 9 Kan. App. 574.

Nor can he attack the attachment in an independent action after a motion to dissolve has been denied. Nagle v. Omaha First Nat. Bank, 57 Neb. 552.

A Prior Attachment Creditor May Move to discharge a subsequent attachment upon the same property. Barton v. Hanauer, 4 Kan. App. 531.

72. 1. A General Appearance is required under the *Washington* statutes before a defendant can move to dissolve. Feurer v. Stewart, 82 Fed. Rep. 204.

Notice of Motion. — A reasonable notice of the hearing of a motion to discharge an attachment is such notice as is meet and fair in view of the circumstances and conditions existing at the time in the matter to be presented. Sterling Mfg. Co. v. Hough, 49 Neb. 618.

2. Sparks v. Bell, 137 Cal. 415.

3. Hughes v. Mattes, etc., Slate Co., 104 La. 218; see *State v. Hopper*, 72 Mo. App. 171.

New Jersey. — After a general appearance in an attachment suit, it is too late to move to quash the writ for insufficiency of the affidavit, Connelly v. Lerche, 56 N. J. L. 95; or for insufficiency of the proof to support an attachment, Watson v. Noble, 65 N. J. L. 506.

But, it seems, although the writ will not be quashed, the property may be released from the lien of the attachment where it is undisputed that the action is prosecuted against a person not subject to attachment or for a demand for which attachment will not lie. Moore v. Richardson, 65 N. J. L. 531; Sullivan v. Moffat, (N. J. 1902) 52 Atl. Rep. 291.

In Texas a plea in abatement may be filed after the plea to the merits, but such a length of time may elapse between appearance and pleading in abatement as will constitute a waiver of the defects complained of. Wallace v. Gallatin First Nat. Bank, (Tex. 1901) 65 S. W. Rep. 180, *overruling*, on first point, (Tex. Civ. App. 1901) 65 S. W. Rep. 392.

73. 1. In West Virginia the failure of the defendant to plead to the merits of the action will not debar him from filing a plea in abatement denying the existence of the grounds for attachment. Miller v. Fewsmith Lumber Co., 42 W. Va. 323.

2. In Florida and Iowa the motion may be made at any time before trial. Pollock v. Murray, 38 Fla. 105; Clark v. Tull, 113 Iowa 143.

Nebraska — *Motion Made but Not Ruled upon Before Judgment.* — Herman v. Hayes, 58 Neb. 54, *overruling* Stutzner v. Printz, 43 Neb. 306.

74. 1. Andrews v. Schofield, 27 N. Y. App. Div. 90; Story v. Arthur, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 244.

New York — *After Attachment Withdrawn.* — A defendant is entitled to

75. More than One Motion. — See note 1.

On Appeal from Justice. — See note 2.

3. To Whom Application Should Be Addressed — Discretion of Court. — See note 3.

76. Submission to Jury. — See note 1.

move for and obtain a formal order vacating the attachment even after the same has been withdrawn by the plaintiff. *Corn Exch. Bank v. Bossio*, 8 N. Y. App. Div. 306.

Setting Aside Irregular Judgment. — See *Corn Exch. Bank v. Applegate*, 97 Iowa 67.

Kansas — After Judgment and Sale. — A motion to discharge the lien of the attachment may be made even after judgment and sale by a stranger to the suit claiming title to the land attached. *Knight v. Rhoades*, 10 Kan. App. 38.

75. 1. See *Compton v. Schwabacher*, 15 Wash. 306.

Motion on New Grounds. — A defendant who has been defeated in his application to vacate an attachment upon the papers on which it was granted may again move without leave of the court, upon affidavits, to vacate the warrant. *Hawkins v. Pakas*, 44 N. Y. App. Div. 395.

Rehearing After Order of Dissolution Granted. — The court has power to grant a rehearing upon a motion to dissolve an attachment and to rescind the order of dissolution previously made. *Guernsey v. Cherryvale First Nat. Bank*, 63 Kan. 203. See also *Cabell v. Patterson*, 98 Ky. 520; *Woldert v. Nedderhut Packing Provision Co.*, 18 Tex. Civ. App. 602. But see *Slingluff v. Sisler*, 196 Pa. St. 121; *Com. v. Sisler*, 196 Pa. St. 147.

Changing Order After Judgment. — It is error to reopen a case for the purpose of considering a motion to quash where such a motion has been adversely ruled upon before judgment. *Rogers v. East Line Lumber Co.*, 11 Tex. Civ. App. 108.

An Adjudication by One Justice of the Peace overruling a motion to dissolve an attachment cannot be reversed by another justice before whom the action is pending by change of venue. *Nixon v. Johnson*, 7 Kan. App. 239.

Second Attachment — Res Judicata. — When an attachment has been quashed because the court out of which it was issued had no jurisdiction to issue it, the decision of that issue can in no way preclude some other court

from sustaining a similar attachment, whether anteceded or subsequently issued. *Johnson v. Stockham*, 89 Md. 358.

2. Objections Not Made in the Trial Court come too late when raised in the appellate court. *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582.

After General Motion Overruled. — Where the court has overruled a general motion to discharge made upon the face of the papers, and without stating any specific grounds, the defendant cannot, upon final hearing, take advantage of technical defects in the affidavit. *Kentucky Jeans Clothing Co. v. Bohn*, 104 Ky. 387.

On Appeal in Action Against Sheriff. — An objection to the regularity of the attachment proceedings cannot be raised for the first time on appeal in an action against the attaching officer to recover the attached property. *Hipsley v. Price*, 104 Iowa 282.

3. Authority to Dissolve. — In *Rhode Island* no jurisdiction exists in any court to dissolve an attachment of real estate when regularly and properly made, but when excessive damages are claimed or an excessive levy is made, the court may release a portion of the property attached. *Wood v. Watson*, 20 R. I. 223. Compare *Mellen v. Battey*, 22 R. I. 395.

76. 1. *Miller v. Fewsmith Lumber Co.*, 42 W. Va. 323.

In Indian Territory the matter of the rightfulness of the attachment should be tried and determined by the court upon the issues raised. *Martin v. Berry*, 1 Indian Ter. 399.

And if the attachment is dissolved, a jury, if desired, may determine the damages. *Barton v. Ferguson*, 1 Indian Ter. 263.

Trial of the Traverse. — In *Georgia*, when an attachment case comes on for trial and there is a pending traverse of the ground of attachment, not previously disposed of, the whole case should be tried together. *Perryman v. Pope*, 94 Ga. 672. See *Brumby v. Rickoff*, 94 Ga. 429.

In Illinois the statute distinctly warrants the trial of the attachment issue

76. At Chambers. — See note 2. See also CHAMBERS AND VACATION.

Judge Granting Attachment. — See note 3.

77. 4. Mode of Dissolving — *a.* IN GENERAL. — See notes 1, 2.

78. *b.* BY TRAVERSE OF AFFIDAVIT — Nature and Effect of Traverse. — See note 1.

before the hearing upon the case to which it is an adjunct. Page *v.* Dillon, 61 Ill. App. 282.

But the issues on the merits and the attachment may properly be tried together. Voss *v.* Evans Marble Co., 101 Ill. App. 373.

In Missouri the defendant is not obliged to plead to the merits of the action until the issue on the plea in abatement has been disposed of; but the fact that a trial on the merits is first held where defendant has pleaded both in abatement and to the merits is not necessarily reversible error. Coombs Commission Co. *v.* Block, 130 Mo. 668.

In Nebraska it is within the discretion of the court to permit the introduction of evidence on both sides of the question. George F. Dittman Boot, etc., Co. *v.* Graff, (Neb. 1902) 91 N. W. Rep. 188.

76. 2. Findlay Rolling-Mill Co. *v.* National Bank of Commerce, 57 Ohio St. 115, holding that an order discharging an attachment made by a judge in chambers has the same effect and is subject to the same provisions for review as though made by the court in a regular session. See also Blair *v.* Anderson, 58 Kan. 97; Moffett *v.* Boydston, 4 Kan. App. 406.

3. Application to "Court" and to "Judge." — See Sturz *v.* Fischer, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 410.

In Nebraska the County Court has power and authority to hear a motion to dissolve the attachment. George F. Dittman Boot, etc., Co. *v.* Graff, (Neb. 1902) 91 N. W. Rep. 188.

77. 1. Gallun *v.* Weil, (Wis. 1903) 92 N. W. Rep. 1091.

In Texas the truth of an affidavit for attachment cannot be traversed for the purpose of dissolving the process, the remedy of the defendant being against the attaching creditor and the sureties on his bond, by way of an action for damages or a plea in reconvention. Gimbel *v.* Gomprecht, 89 Tex. 497; Mallette *v.* Ft. Worth Pharmacy Co., 21 Tex. Civ. App. 267;

Waples-Platter Grocer Co. *v.* Basham, 9 Tex. Civ. App. 638.

A Petition for the Removal of the Attachment Is Properly Treated as a Traverse of the grounds of the attachment when it expressly denies that such grounds are true and contains a prayer that it should be used and considered as a traverse. Cooley *v.* Abbey, 111 Ga. 439.

Equity Attachments. — Rev. Stat. Fla., § 1656, regulating the dissolution of attachments at law by traverse of the affidavit, has no application to an attachment issued by a court of equity in aid of the foreclosure of a mortgage upon personal property, such court having full power to discharge or dissolve, under the rules of chancery practice, writs improperly issued. Weston *v.* Jones, 41 Fla. 188.

2. Grounds of Motion to Be Specified. — Both the motion and the notice of motion to dissolve must specify the particular grounds wherein it is claimed the attachment was improperly issued. Omaha Upholstering Co. *v.* Chauvin-Fant Furniture Co., 18 Mont. 468; Cupit *v.* Park City Bank, 11 Utah 427.

Prior Action Pending. — Ferst *v.* Powers, 58 S. Car. 411.

Property Wrongfully Attached. — It is not a sufficient or proper ground for a motion to vacate an attachment that the property levied upon was not subject to attachment. Northwestern Wheel, etc., Co. *v.* Salt Lake City Copper Mfg. Co., 11 Utah 404.

78. 1. Miller *v.* Fewsmith Lumber Co., 42 W. Va. 323. See also Logan *v.* Sibley, 67 Ill. App. 579; John Henry Shoe Co. *v.* Gilkerson-Sloss Commission Co., 47 La. Ann. 860.

In Tennessee, in cases of general attachment, where the bill does not seek to set aside a conveyance but simply seeks to subject the property attached to sale, the attachment is essential to jurisdiction, and the ground of attachment can only be controverted by plea in abatement. Templeton *v.* Mason, 107 Tenn. 625; Doran *v.* O'Neal, (Tenn. Ch. 1896) 37 S. W. Rep. 563.

False Statements in the affidavit will

78. Must Deny All Grounds of Attachment. — See note 2.

79. See note 1.

Must Not Put Merits of Cause in Issue. — See notes 2, 3.

dissolve the attachment, and the filing of an amended complaint upon the hearing of the motion to discharge will not cure the defect. *Fisk v. French*, 114 Cal. 400.

Traverse by Answer. — In *Indiana*, where the facts in the affidavit are denied by an answer, the answer is in bar of the proceedings in attachment and not in abatement of the writ, and the issue thus formed must be tried together with the issues in the principal or main action. *U. S. Capsule Co. v. Isaacs*, 23 Ind. App. 533.

Effect of Sustaining Plea. — Where a plea in abatement is sustained it is error to dismiss the main action. *Tootle v. Lysaght*, 65 Mo. App. 139. See *King v. Randall*, 95 Ga. 449.

But where the lack of jurisdiction is alleged and sustained on a motion to dissolve, the original action must also be dismissed. *Wood v. Baily*, 77 Miss. 815.

Thus, the dissolution of an attachment, issued on a claim before due, terminates the action. *Dayton Spice-Mills Co. v. Sloan*, 49 Neb. 622; *Augir v. Foresman*, 23 Wash. 595.

Plaintiff Entitled to Trial on Merits after Interplea. — In *Missouri*, where an interpleader obtains a final judgment for all the attached property, the cause stands as if no attachment had ever issued, and the plaintiff has the right to dismiss his attachment voluntarily and proceed without regard thereto. *Brownwell, etc., v. Barnard*, 139 Mo. 142.

78. 2. Watson v. Loewenberg, 34 Oregon 323 [citing 3 ENCYC. OF PL. AND PR. 78]; *Lindquist v. Johnson*, 12 S. Dak. 486.

Traverse Should Be Complete Denial. — Where the affidavit stated that the defendant "is about to remove his property from said county, * * * and refuses and neglects to pay or secure payment of this debt, with intent to defraud his creditors," a denial that defendant was about to remove his property from the county with intent to defraud his creditors or that he was indebted to the plaintiff in any sum was held to be not as broad as the charge. *Stock v. Reynolds*, 121 Mich. 356.

Denial in Conjunctive. — A denial of two grounds for attachment in conjunc-

tion is not a denial of either. *Bane v. Keys*, 115 Mich. 244.

79. 1. When Motion Must Be Supported by Affidavit. — A motion to dissolve an attachment is sufficient in itself to call to the attention of the court or judge defects in the affidavit apparent by reason of a failure to comply with the statutory provisions regarding the same, but where the truth of the allegations contained in the affidavit is to be called in question by the traverse, the motion should be supported by affidavit which negatives such allegations in no uncertain terms. *Bank of Commerce v. Latham*, 8 Wyo. 316.

Denial upon Information and Belief. — Where the affidavit of attachment is positive and certain in its terms, a motion to dissolve, verified upon information and belief and not accompanied by any affidavit in support thereof, is insufficient. *Barnhart v. Foley*, 11 Utah 191.

A Denial in the Present Tense of the existence of the ground for attachment is sufficient, as it relates retrospectively to the time when the affidavit for the attachment was made. *Park v. Armstrong*, 9 S. Dak. 269; *Finch v. Armstrong*, 9 S. Dak. 255.

Denial by One of Joint Defendants. — Where the affidavit charges two defendants jointly with the fraudulent disposition of their property, a traverse by one defendant, whose property has been attached, denying the existence of the grounds of attachment as to her individually, is a sufficient denial of the affidavit to warrant a dissolution of the attachment. *Cottrell v. Hatheway*, 108 Mich. 619.

2. Stock v. Reynolds, 121 Mich. 356 [citing 3 ENCYC. OF PL. AND PR. 79]; *Moffett v. Boydston*, 4 Kan. App. 406; *Ruggles v. Muskegon Circuit Judge*, 124 Mich. 472; *Sauerwein v. Renard Champagne Co.*, 68 Mo. App. 29; *McDonald v. Marquardt*, 52 Neb. 820; *Anspach v. Spring Lake*, 58 N. J. L. 136; *Ex p. Rountree*, 57 S. Car. 75; *Gallun v. Weil*, (Wis. 1903) 92 N. W. Rep. 1091; *Jenks v. Richardson*, 71 Fed. Rep. 365. See also *S. K. Martin Lumber Co. v. Menominee Circuit Judge*, 116 Mich. 354, holding that a trial cannot be avoided by a motion to

79. Burden of Proof. — See note 4.

80. See note 1.

quash the attachment based upon the merits, even if it be accompanied by a stipulation of fact.

When Merits Considered. — Unless the moving papers show that the plaintiff must ultimately fail, the merits of the action will not be inquired into on a motion to vacate an attachment. *Good-year v. Commercial F. Ins. Co.*, 58 N. Y. App. Div. 611; *Guarantee Sav. Loan, etc., Co. v. Moore*, 35 N. Y. App. Div. 421; *Romeo v. Garofalo*, 25 N. Y. App. Div. 191; *Furbush v. Nye*, 17 N. Y. App. Div. 325; *Story v. Arthur*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 244; *Thorn v. Alvord*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 456, *affirmed* 54 N. Y. App. Div. 638; *Peck v. Brooks*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 48, *affirmed* 51 N. Y. App. Div. 640; *Knight v. Hatfield*, 129 N. Car. 191.

Questions Which Cannot Be Raised upon a Motion to Dissolve, as involving the merits of the action, include the maturity of the debt sued upon, *Omaha Upholstering Co. v. Chauvin-Fant Furniture Co.*, 18 Mont. 468; *Newell v. Whitwell*, 16 Mont. 243; the existence or amount of the debt, *Teweles v. Lins*, 98 Wis. 453; the ownership of the property attached, *Exchange Nat. Bank v. Clement*, 109 Ala. 270; *McDonald v. Marquardt*, 52 Neb. 820; *Foushee v. Owen*, 122 N. Car. 360; and the validity of a conveyance by the defendant, *Landauer v. Mack*, 43 Neb. 430. See also *South Park Imp. Co. v. Baker*, 51 Neb. 392; *Kountze v. Scott*, 49 Neb. 258.

In Florida the defendant may traverse the affidavit by denying the alleged debt, and it is thereupon the duty of the court to require the formal pleadings in the suit to be made up and the issues therein settled and tried by the court or a jury, together with the special issue raised by the traverse. *Weston v. Jones*, 41 Fla. 188.

79. 3. *Williamson v. Eastern Bldg., etc., Assoc.*, 54 S. Car. 582 [quoting 3 ENCYC OF PL. AND PR. 79]; *Carnahan v. Gustine*, 2 Okla. 399.

4. Colorado. — *Drake v. Avanzini*, 20 Colo. 104.

Georgia. — *Moore v. Brewer*, 94 Ga. 260.

Indiana. — See *Waring v. Fletcher*, 152 Ind. 620.

Iowa. — *Reinecke v. Gruner*, 111 Iowa 731.

Michigan. — *McMorran v. Moore*, 113 Mich. 101.

Missouri. — *Bowles Live Stock Commission Co. v. Hunter*, 91 Mo. App. 333. See also *Graham Paper Co. v. Crowther*, 92 Mo. App. 273; *J. S. Merrill Drug Co. v. Knighton*, 73 Mo. App. 571.

Nebraska. — *Geneva Nat. Bank v. Bailor*, 48 Neb. 866; *George F. Dignan Boot, etc., Co. v. Graff*, (Neb. 1902) 91 N. W. Rep. 188.

South Dakota. — *German Bank v. Folds*, 9 S. Dak. 295; *Park v. Armstrong*, 9 S. Dak. 269; *Jones v. Meyer*, 7 S. Dak. 152.

Utah. — *Deseret Nat. Bank v. Little*, 13 Utah 265.

Virginia. — *Clinch River Mineral Co. v. Harrison*, 91 Va. 122.

Washington. — *Bender v. Rinker*, 21 Wash. 633.

Motion by Party Other than Defendant. — *Swofford Bros. Dry Goods Co. v. Smith-McCord Dry Goods Co.*, 1 Indian Ter. 314.

When Collusion Is Charged by judgment creditors of the defendant as a ground for the dissolution of the attachment, the rule is different, and the burden of proof rests upon such creditors to prove their charge. *Daniels v. Solomon*, 11 App. Cas (D. C.) 163.

The Burden Is upon the Defendant, a foreign corporation, to show that it has complied with the laws of the state relative to the appointment of agents upon whom service of process may be made and is not therefore subject to attachment. *Bradley v. Interstate Land, etc., Co.*, 12 S. Dak. 28.

80. 1. *Johnson v. Stockham*, 89 Md. 358. See also *Mansur, etc., Implement Co. v. Davis*, 61 Ark. 627; *H. B. Claffin Co. v. Harrison*, (Fla. 1902) 31 So. Rep. 818; *Cassell v. Vincennes First Nat. Bank*, 169 Ill. 380.

In Nebraska the rule that the party upon whom lies the burden of proof shall have the opening and conclusion of the argument does not apply to issues triable by the court without a jury, as in such cases the order of argument is a matter within the discretion of the court. *Citizens State Bank v. Baird*, 42 Neb. 219.

80. c. FOR DEFECTS AND IRREGULARITIES — By Motion Most Usual Method. — See note 3.

82. See note 1.

83. Appearance and Pleading Waiver of Irregularities. — See note 1.

84. d. BY RELEASE OF ATTORNEY. — See note 1.

5. Dissolution by Giving Bond — a. BAIL BOND. — See note 2.

80. 3. Bradley v. Armstrong, 9 S. Dak. 267, *quoting* 3 ENCYC. OF PL. AND PR. 80.

The Defects Must Be Apparent on the face of the proceedings. *Winnemucca Bank v. Mullaney*, 29 Oregon 268.

Motion Should Specify Grounds for Dissolution. — Under a notice of motion to vacate the attachment upon the grounds that it was improvidently issued and is without warrant of law, the court may consider the question of the attachment having been both improvidently and irregularly issued. *Addison v. Sujette*, 50 S. Car. 192.

Notice of Motion — New York. — The notice of the motion need not specify any irregularity when the application is based upon the merits and not upon the ground that the attachment is irregular. *Andrews v. Schofield*, 27 N. Y. App. Div. 90.

The Irregularities Required to Be Specified in order to be considered are irregularities of practice merely, *Weil v. Gallun*, 75 N. Y. App. Div. 439; such as defects in the affidavit, *Kloh v. New York Fertilizer Co.*, 86 Hun (N. Y.) 266; and where no irregularity is specified, only jurisdictional defects can be considered, *Rallings v. McDonald*, 76 N. Y. App. Div. 112. See *Nevada Co. v. Farnsworth*, 89 Fed. Rep. 164.

Hearing on Motion — New York — Motion on Original Papers. — *Fox v. Mays*, 46 N. Y. App. Div. 1; *Ladenburg v. Commercial Bank*, 87 Hun (N. Y.) 269; *Lewisohn v. Kent, etc., Co.*, 87 Hun (N. Y.) 257; *Acker v. Saynisch*, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 415, *affirmed* 26 Misc. (N. Y.) 836; *Nevada Bank v. Cregan*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 241. But see *Sulzbacher v. Cawthra*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 545.

Motion on New Papers. — *Heilbronn v. Herzog*, 17 N. Y. App. Div. 416; *Hamerschlag v. Cathoscope Electrical Co.*, 16 N. Y. App. Div. 185; *Herman v. Bailey*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 94. See *Chambers, etc., Glass Co. v. Roberts*, 4 N. Y. App. Div. 20.

82. 1. In Alabama it is within the sound discretion of the court to entertain a motion to dismiss the attachment because of the insufficiency of the bond or to refuse it, thereby putting the defendants to a plea in abatement, and the exercise of such discretion cannot be controlled by mandamus. *Exp. McKissack*, 107 Ala. 493.

Defects in the writ or apparent on the face of the affidavit or bond may be raised by motion to quash or vacate, but matter in abatement requires a special plea. *Blankenship v. Blackwell*, 124 Ala. 355.

Effect of Quashing Writ. — In *Indiana* the quashing of the writ does not carry with it the complaint, as the attachment proceedings are merely ancillary to the main action. *Hartford L. Ins. Co. v. Bryan*, 25 Ind. App. 406.

83. 1. See Earle v. Sayre, 99 Ga. 617; *Wheelwright v. Dyal*, 99 Ga. 247; *Pickett v. Smith*, 95 Ga. 757; *Gorham v. Tanquerly*, 58 Kan. 233; *Stock v. Reynolds*, 121 Mich. 356; *Watson v. Noblett*, 65 N. J. L. 506; *Connelly v. Lerche*, 56 N. J. L. 95.

In New Mexico the defendant, by pleading to the merits, after a demurrer to his pleas in abatement has been sustained, is deemed to have abandoned the latter. *Curran v. William Kendall Boot, etc., Co.*, 8 N. Mex. 417.

A Misnomer in the Writ, consisting of a description of the defendant as a corporation instead of a partnership, will be waived by an appearance and pleading to the merits. *Blue Grass Canning Co. v. Wardman*, 103 Tenn. 179.

84. 1. Muir v. Orear, 87 Mo. App. 38.

In Massachusetts an attorney may release an attachment of real and personal property, and a delivery of a written release to the debtor's attorney is sufficient to dissolve before the entry is made upon the record. *Marble v. Jamesville Mfg. Co.*, 163 Mass. 171.

2. See Fitzhugh v. Hackley, 70 Ark. 54; *Curtin v. Harvey*, 120 Cal. 620; *Conard v. Ehrman*, 61 Ill. App. 128; *Berry v. Wasserman*, 179 Mass. 537; *Russia Cement Co. v. Le Page*

84. Effect of Bond. — See note 4.

85. When Bond Void. — See notes 4, 5.

86. Whether Execution of Bond Will Be Bar to Subsequent Motion to Dissolve. — See notes 1, 2.

87. b. DELIVERY BOND. — See note 1.

6. Causes of Dissolution Arising Subsequent to Attachment —

a. BANKRUPTCY OR INSOLVENCY OF DEFENDANT. — See note 3.

Co., 174 Mass. 349, *overruling* 167 Mass. 222; *Bernheimer v. Charak*, 170 Mass. 179; *Winton v. Myers*, 8 Okla. 421; *Wood v. Watson*, 20 R. I. 223.

Order of Court Not Necessary. — *Contra* in *Minnesota* under statute. *Johnson v. Dun*, 75 Minn. 533.

Seal Not Necessary. — Bonds given to release attached property are not required to be sealed. *Lynch v. Smyth*, 25 Colo. 103.

Money in Lieu of Bond. — A defendant may, in lieu of giving a forthcoming bond to release attached property, deposit with the court sufficient money to satisfy the claim and costs and have it subjected to the writ to abide the decision upon the attachment. *Solomon v. Saly*, 6 Colo. App. 170.

Real Estate. — There is no provision of law for the taking by the sheriff of a forthcoming bond for attached real estate. *Barton v. Continental Oil Co.*, 5 Colo. App. 341.

Attachment under Special Act Subject to General Rule. — In *Utah* an attachment to secure a lessor's lien may be dissolved by giving a bond in accordance with the statute relating to attachments in general, although the special act providing for the enforcement of such a lien by attachment and specifying the procedure to be followed is silent as to the discharge of the writ and the release of the property. *Woolley v. Maynes-Wells Co.*, 15 Utah 341.

84. 4. Nichols v. Chittenden, 14 Colo. App. 49. See also *Hallack Paint, etc., Co. v. Denver Nat. Bank*, 14 Colo. App. 79; *Hughes v. Foreman*, 78 Ill. App. 460; *Bick v. Lang*, 15 Ind. App. 503; *Sanger v. Hibbard*, 2 Indian Ter. 547.

Effect on Appeal from Order Denying Dissolution. — After the attachment has been released by executing the statutory bond, the defendant cannot prosecute an appeal from an order denying a motion to dissolve. *Thomas v. Craig*, 60 Minn. 501.

85. 4. See Rosenthal v. Perkins,

123 Cal. 240; *Russia Cement Co. v. Le Page Co.*, 174 Mass. 349.

Where the Attachment Is Discharged in Part the bond should be discharged only as to the extent of the property released therefrom. *Bowling v. Davis*, 103 Ky. 187.

A Judgment of Nonsuit will dissolve the attachment and discharge the obligation of the sureties upon the bond, and a subsequent reversal of such judgment upon appeal will not revive their liability. *Hamilton v. Bell*, 123 Cal. 93.

Judgment in Favor of One Defendant. — Where an action is brought against several defendants and a bond given to release property attached, the bond is not discharged by the fact that no judgment is rendered in the action against the particular defendant to whom the attached property belongs. *McCormick v. National Surety Co.*, 134 Cal. 510; *Prior v. Pye*, 164 Mass. 316. **5. Kildare Lumber Co. v. Atlanta Bank**, 91 Tex. 95.

86. 1. New York. — *Lawlor v. Magnolia Metal Co.*, 2 N. Y. App. Div. 552.

2. Gould v. Baker, 12 Tex. Civ. App. 669, *citing* 3 ENCYC. OF PL. AND PR. 84, 85, 86. See also *Bick v. Lang*, 15 Ind. App. 503, *Fenner v. Boutte*, 72 Miss. 271.

87. 1. Dewey v. Kavanaugh, 45 Neb. 233, holding that a delivery bond does not discharge the attachment, that its only effect is to take the place of the attached property, and that it can be approved only by the officer holding the writ of attachment. See also *Nichols v. Chittenden*, 14 Colo. App. 49; *Valley Bank v. Shenandoah Nat. Bank*, 109 Iowa 43; *Ayres, etc., Co. v. Dorsey Produce Co.*, 101 Iowa 141; *Deposit Bank v. Thomason*, (Ky. 1902) 66 S. W. Rep. 604; *Dickson v. Back*, 32 Oregon 217; *Smith v. Packard*, (C. C. A.) 98 Fed. Rep. 793.

3. Watschke v. Thompson, 85 Minn. 105. See also *New Orleans Acid, etc., Co. v. Grissom*, 79 Miss. 662; *Marx v.*

88. See note 2.
Insolvency. — See note 4.
 89. See note 1.
 90. See note 1.
b. DEATH OF DEFENDANT. — See notes 2, 3.
 91. See note 1.
Civil Death of Corporation. — See note 2.
c. EFFECT OF FINAL JUDGMENT. — See note 3.

Hart, 166 Mo. 503; Powers Dry Goods Co. v. Nelson, 10 N. Dak. 580.

88. 2. In *Maine* attachments made more than four months prior to the filing of a petition in bankruptcy are not dissolved thereby. *Stickney, etc., Coal Co. v. Goodwin*, 95 Me. 246. And the rule applies to both voluntary and involuntary petitions. *Jones v. Stevens*, 94 Me. 582. See also *Belfast Sav. Bank v. Lancey*, 93 Me. 422.

4. See *Place v. Washburn*, 163 Mass. 530.

89. 1. *California.* — See *Hefner v. Herron*, 117 Cal. 473; *Crane v. Pacific Bank*, 106 Cal. 64.

Connecticut. — *Greenthal v. Lincoln*, 68 Conn. 384. See also *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 114 Fed. Rep. 659; *Morgan v. New York Nat. Bldg., etc., Assoc.*, 73 Conn. 151; *Ward v. Connecticut Pipe Mfg. Co.*, 71 Conn. 345.

New Hampshire. — A decree of insolvency against the defendant dissolves attachments upon his property levied within three months before the beginning of the insolvency proceedings. *Norway Plains Sav. Bank v. Young*, 67 N. H. 499. See also *Berry v. Flanders*, 69 N. H. 626; *Whittredge v. Maxam*, 68 N. H. 323; *Bernard v. Martel*, 68 N. H. 466; *Smith v. Hammond*, 68 N. H. 363.

New Mexico. — No attachment can be levied after an assignment for the benefit of creditors is made, and an attachment sued out after the execution of the deed of assignment, but before the filing of the assignee's bond, is properly quashed on motion. *Schofield v. Folsom*, 7 N. Mex. 601.

Oregon. — An assignment for the benefit of creditors has the effect of discharging all attachments on which judgments have not been entered; but the assignment must carry with it the property attached. *Joseph v. Furnish*, 27 Oregon 260. See also *O'Connell v. Hansen*, 29 Oregon 173.

Amendment of Attachment After Assignment. — In *Minnesota* an amendment of the affidavit and complaint which substitutes an entirely different cause of action will operate to discharge an attachment as to the intervening rights of an assignee for the benefit of creditors. *Heidel v. Benedict*, 61 Minn. 170.

90. 1. See *State v. Superior Ct.*, 14 Wash. 324.

2. In *Colorado* where the lien of the attachment has not been perfected by serving a copy of the writ upon the defendant it cannot be perfected by service upon the executrix. *Thompson v. White*, 25 Colo. 226.

In *Delaware* the rule stated in the text prevails. *Reynolds v. Howell*, 1 Marv. (Del.) 52.

3. *Wartman v. Pecka*, (Ariz. 1902) 68 Pac. Rep. 534; *Mosley v. Southern Mfg. Co.*, 4 Okla. 492; *White v. Ladd*, 34 Oregon 422; *White v. Johnson*, 27 Oregon 282.

91. 1. See *Shea v. Shea*, 154 Mo. 599.

2. **Foreign Corporation.** — In *Connecticut* an attachment levied upon the property of a foreign corporation will be dissolved by the dissolution of such corporation under the statutes of its home state. *Morgan v. New York Nat. Bldg., etc., Assoc.*, 73 Conn. 151.

But in *North Carolina* the contrary seems to be the rule. *Kruger v. Bank of Commerce*, 123 N. Car. 16.

3. *Algeltlinger v. Whelan*, 133 Cal. 110; *Stephenson v. Jones*, 84 Mo. App. 249; *Alprin v. Goodman*, (Neb. 1902) 91 N. W. Rep. 530. See also *B. M. Creel Co. v. Hill*, (Ky. 1899) 52 S. W. Rep. 798.

Irrespective of Ruling on Plea in Abatement. — *Bradbury v. Cole*, 62 Mo. App. 263.

Nonsuit. — A judgment of nonsuit dissolves the attachment, even though such judgment is set aside upon appeal. *Hamilton v. Bell*, 123 Cal. 93.

92. *Personal Judgment for Plaintiff.* — See note 1.

d. OTHER CAUSES. — See note 3.

93. See note 1.

92. 1. *Capital City Dairy Co. v. Plummer*, 20 Ind. App. 408.

In *Illinois* a judgment entered upon personal service and after appearance by the defendant need not specifically direct the sale of the property levied upon under the attachment writ in order to preserve the lien thereby acquired, and a second levy by the sheriff upon the property under a special execution neither destroys nor strengthens the existing lien. *Hogue v. Corbit*, 156 Ill. 540.

In *Kentucky* an attachment should be sustained after judgment when the grounds thereof have not been controverted and no party in interest has moved for its discharge. *Gaar v. Lyons*, 99 Ky. 672.

In *North Carolina* the plaintiff is not, it seems, entitled to a further judgment subjecting to the satisfaction of the judgment taken upon the debt the property which has been attached. *Post-Glover Electric Co. v. McEntee-Peterson Engineering Co.*, 128 N. Car. 199.

3. *Snell v. Cummins*, 67 Ark. 261.

Where the Property Is Surrendered to a Receiver under a stipulation and order of the court that such surrender shall be without prejudice to the rights of the attaching creditor, failure to issue and levy execution on the property attached, within sixty days after final judgment, does not operate to dissolve the attachment, as the receiver's possession prevents such action. *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 114 Fed. Rep. 659.

93. 1. *Abandonment — Acts of Plaintiff.* — An attachment levied against partnership property, in an action against one of the partners, is not deemed to be abandoned by the subsequent appointment, at the instance of the plaintiff, of a receiver for the partnership. *Runner v. Scott*, 150 Ind. 441.

Nor is the attachment abandoned by the act of the plaintiff in presenting his claim to, and securing its allowance by, the representative of the deceased defendant. *White v. Ladd*, 34 Oregon 422.

But an attaching plaintiff who consents to a conveyance and disposition

of the property attached according to the terms of an assignment subsequently made impliedly agrees that the attachment shall no longer be in force. *Marr v. Washburn, etc., Mfg. Co.*, 167 Mass. 35.

Acts of Officer. — It is not a relinquishment of possession for the officer to give to a third party claiming title permission to take the property, if it belongs to him. *Wheeler v. Eaton*, 67 N. H. 368.

Where a levy is made by a marshal who afterwards becomes the receiver of the defendant corporation, it cannot be abandoned by any acts of the receiver as such. *National Cash Register Co. v. Broeksmit*, 103 Iowa 271.

Amendment of Complaint. — An amendment of the petition setting up a new cause of action will dissolve the attachment. *Standard Implement Co. v. Lansing Wagon Works*, 58 Kan. 125; *Russia Cement Co. v. Le Page Co.*, 174 Mass. 349; *Holway v. American Exch. Nat. Bank*, (Neb. 1902) 89 N. W. Rep. 382; *Meyer v. Brooks*, 29 Oregon 203; *Ex p. Chase*, 62 S. Car. 353; *Boyd v. Beville*, 91 Tex 439.

As will an amendment whereby a corporation is substituted as plaintiff in place of the individual incorporators. *Fargo v. Cutshaw*, 12 Ind. App. 392.

But amendments to cure mere defects in form or clerical errors do not affect the attachment. *Norris v. Anderson*, 181 Mass. 308.

Judgment Without Contest. — Where the defendant abandons its defense, withdraws its plea, and suffers a judgment to be entered, by agreement of the parties, the lien of the attachment is not released. *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519.

General Judgment. — The appearance of the defendant in the attachment suit and the entry of a general judgment against him will not release the attachment nor constitute the lien of the judgment a general one. *Yarnell v. Brown*, 170 Ill. 362.

Satisfaction of Judgment. — Upon satisfaction of judgment in favor of the plaintiff the attachment is annulled, and with it fail a motion to vacate and an incidental reference ordered upon such a motion. *Neely v. Munnich*,

94. 7. Return of Property. — See note 1.

95. See note 1.

Effect of Appeal. — See note 3.

(Supm. Ct. App. T.) 27 Misc. (N. Y.) 507.

Return of Execution Unsatisfied. — In *New York* the attachment is not discharged by the entry of judgment against the defendant, but is merely operative thereafter to hold the lien acquired thereby until execution issues, and therefore after the return of an execution wholly unsatisfied there remains no lien upon the property by virtue of either the attachment or the execution. *Peetsch v. Sommers*, 31 N. Y. App. Div. 255.

But in *Lant v. Manley*, (C. C. A.) 75 Fed. Rep. 627, the court held that, under the *Michigan* statutes, a return of *nulla bona* on a first execution after judgment is not a surrender of the lien on real estate, and that no delay thereafter in issuing a second execution, where the rights of third parties do not intervene, will discharge the attachment if such delay falls short of clearly indicating an intention to abandon the same.

And the issuing by the plaintiff of an execution which encountered a fraudulent obstruction and was returned unsatisfied, was held not to be an abandonment of the attachment lien. *Merchants Nat. Bank v. Greenwood*, 16 Mont. 395.

94. 1. See *Smith v. Barber*, 153 Ind. 322.

The Transferee of the Title and Right of Possession to the attached property is entitled to a return thereof to him upon the dissolution of the attachment. *Webber v. Osgood*, 68 N. H. 234; *Jackson v. Burnett*, 119 N. Car. 195.

Sufficiency of Return. — Where the sheriff attached some horses at a livery stable, but did not remove them therefrom, and after the dissolution of the attachment notified the keeper of the stable of that fact, a delivery of the horses by the latter to third parties who held a contract of purchase from the owner was held to be a legal return of the property. *Dishneau v. Newton*, 96 Wis. 531.

Undertaking to Be Returned. — The officer should return the property, or, if the same has been released by giving an undertaking, he should return

such undertaking to the defendant. *Hamilton v. Bell*, 123 Cal. 93.

Where the Attached Property Has Been Sold under a lawful order of the court, and the attachment is afterwards dissolved, the court should not order it returned, but should assess damages sufficient to cover the value of the property at the time it was seized, and interest thereon to the day of trial. *Norman v. Fife*, 61 Ark. 33.

A Writ of Supersedeas will not entitle the defendant in attachment to a return of the property after a judgment has been obtained in the attachment suit and the property condemned to be sold. *Bacon v. Green*, 36 Fla. 313.

95. 1. *Stein v. Cozart*, 122 N. Car. 280.

New York. — The court has no authority, after a discharge of a levy under an attachment, to order either party to the action to pay the sheriff's poundage, the remedy of the latter being to hold his levy until the poundage is paid or to sue the party to the action liable therefor. *Treadwell v. John A. Mead Mfg. Co.*, 75 N. Y. App. Div. 478.

Where the attachment is discharged by the giving of an undertaking and such undertaking does not in terms provide for the payment of the sheriff's fees, they must be paid by the defendant before he is entitled to a return of the property. *Lawlor v. Magnolia Metal Co.*, 2 N. Y. App. Div. 552.

3. In Indiana an appeal by an attachment plaintiff from a judgment for a part only of its claim, the ordinary appeal bond being given, does not suspend the operation of the judgment so far as it has the effect to release and discharge the attachment in excess of the amount required to pay the judgment. *Waring v. Fletcher*, 152 Ind. 620.

In Kansas an appeal from a judgment for defendant in an attachment action brought before a district court will not operate to continue the lien of the attachment, nor will a reversal of such judgment on appeal revive the lien to the prejudice of an intermediate purchaser. *Miller v. Dixon*, 2 Kan. App. 445.

In New York the rendition of a judg-

96. See note 1.

ment for the defendant destroys and nullifies the warrant of an attachment, and while the defendant may be entitled to a formal order declaratory of that fact, yet, where plaintiff has obtained a stay of proceedings pending an appeal, a motion will not lie to vacate the attachment as there is nothing to vacate, the effect of the stay being not to continue the life of the attachment, but merely to suspend its annulment. *Friede v. Weissenthanner*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 518.

Cancellation of Notice.—Where plaintiff, pending an appeal from a judgment for a defendant in attachment,

procures a stay of proceedings, the notice of levy upon the real estate of the defendant required by law to be filed with the county clerk will not be canceled. *McKean v. National L. Assoc.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 511.

96. 1. In *Missouri*, where an appeal lies from the judgment of a justice of the peace and timely notice of plaintiff's purpose to take an appeal is given, the officer should hold the property in order to continue the lien until the plaintiff has had an opportunity and time in which to perfect his appeal. *Newman v. York*, 74 Mo. App. 292.

ATTEMPTS.

97. I. DEFINITION. — See note 1.

II. INDICTMENT — 1. In General. — See note 2.

98. See notes 1, 3.

3. Intent and Overt Act. — See notes 6, 7.

97. 1. *Graham v. People*, 181 Ill. 477, quoting 3 ENCYC. OF PL. AND PR. 97.

2. *Nicholson v. State*, 97 Ga. 672.
Certainty Required in Indictment for Crime Attempted. — No greater certainty or particularity should be required in describing an attempt to commit a felony than is required in a case of felony which has been actually committed. *Baker v. State*, 134 Ind. 657. See also *Proctor v. Com.*, (Ky. 1892) 20 S. W. Rep. 213.

Following Statute. — *Where the Statute Denouncing an Attempt Describes All the Material Elements of the crime*, an indictment following the statute is sufficient. *Eggart v. State*, 40 Fla. 527; *State v. Howard*, 66 Minn. 309.

Where the Statute Does Not Set Forth All the Elements of the crime, it is insufficient merely to follow the statute. *State v. Dankwardt*, 107 Iowa 707; *State v. Howard*, 66 Minn. 309. But in *Illinois* the rule is otherwise under *Starr & Curt. Annot. Stat. Ill.* (1896), c. 38, par. 591. *Graham v. People*, 181 Ill. 477; *White v. People*, 179 Ill. 356; *Maxwell v. People*, 158 Ill. 248; *Scott v. People*, 141 Ill. 195.

An Indictment Need Not Follow the Exact Words of the Statute, even though the statute sets out all of the elements of the offense. It will be sufficient if the indictment uses the words of equivalent meaning and import with those used by the statute. *State v. West*, 106 La. 274.

Allegation of Means Employed. — Where the statute prescribes the means which must be employed in order to make the attempt criminal, the employment of such means must be set out in the indictment. *Eggart v. State*, 40 Fla. 527; *State v. Dankwardt*, 107 Iowa 704; *Armstrong v. Van De Vanter*, 21 Wash. 682.

In Iowa. — Under Code Iowa (1873),

§ 4305 (Code Iowa 1897, § 5289), an indictment for an attempt is sufficient if the act charged is stated in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment in case of conviction. *State v. Dankwardt*, 107 Iowa 704.

Averment of Failure of Attempt. — The act relied upon as constituting the attempt must be averred to have fallen short of its intended purpose. *State v. Smith*, 119 Mo. 439; *Gatliff v. Territory*, 2 Okla. 523.

Name of Person Injured. — The name of the person upon whom the attempt to commit rape is made need not be alleged in the indictment. *Proctor v. Com.*, (Ky. 1892) 20 S. W. Rep. 213. See also RAPE.

98. 1. *State v. Moothart*, 109 Iowa 130.

Illinois Statute. — Under *Starr & Curt. Annot. Stat. Ill.* (1896), c. 38, par. 591, an indictment for an attempt is sufficient if it follows the language of the statute, and it need not allege the manner in which the attempt was committed. *White v. People*, 179 Ill. 356.

3. *State v. Dean*, 85 Mo. App. 473; *Cave v. State*, 33 Tex. Crim. 335.

6. Averment of Attempt Includes Intent. — Where the statute making a certain attempt criminal does so by merely providing that it shall be unlawful to attempt to do the act specified, and does not use the word "intent," the word "attempt," when charged in an indictment under such statute, necessarily includes the intent to do the act, and the intent need not be specifically charged. It will be sufficient to charge the attempt. *Scott v. People*, 141 Ill. 195. See also *Runnells v. State*, 34 Tex. Crim. 431; *Atkinson v. State*, 34 Tex. Crim. 424.

7. *Com. v. Peaslee*, 177 Mass. 267

101. 4. Particularity Required. — See note 1.

102. IV. ATTEMPTS TO COMMIT ABORTION. — See notes 1, 2, 3.

V. CONVICTION OF ATTEMPT. — See note 4.

103. See note 1.

[citing 3 ENCYC. OF PL. AND PR. 98]; State v. Frazier, 53 Kan. 87; State v. Smith, 119 Mo. 439; Gatliff v. Territory, 2 Okla. 523.

Where the doing of a certain thing with intent to produce a criminal result is made a crime by the statute, it is not necessary to charge the overt acts constituting the attempt; but if the statute merely denounces an attempt to commit a crime, the acts, etc., done pursuant to the intent to commit the crime must be alleged in the indictment. State v. Crews, 128 N. Car. 581.

101. 1. State v. Smith, 119 Mo. 439.

102. 1. Scott v. People, 141 Ill. 195; State v. Moothart, 109 Iowa 130; State v. Crews, 128 N. Car. 581.

Massachusetts Statutes. — Com. v. Surles, 165 Mass. 59.

2. State v. Moothart, 109 Iowa 130; State v. Dean, 85 Mo. App. 473; State v. Crews, 128 N. Car. 581; Cave v. State, 33 Tex. Crim. 335.

3. Cave v. State, 33 Tex. Crim. 335.

4. **Georgia.** — See 3 Code Ga. § 1035; Brownlow v. State, 112 Ga. 405; Lowe v. State, 112 Ga. 189.

Iowa. — State v. Austin, 109 Iowa 118.

Kansas. — See Gen. Stat. Kan., c. 102, § 231; State v. Frazier, 53 Kan. 87.

Michigan. — People v. Webb, 127 Mich. 29.

New Jersey. — See Gen. Stat. N. J., p. 1130, par. 52; Marley v. State, 58 N. J. L. 207.

Ohio. — See Bates's Annot. Stat. Ohio (1897), § 7316; Donaldson v. State, 5 Ohio Cir. Dec. 98; State v. Springer, 4 Ohio Dec. 169.

Texas. — McAdoo v. State, 35 Tex. Crim. 603.

Attempt May Be Charged Directly. — The fact that a conviction for an attempt may be had under an indictment for the crime attempted does not

furnish the exclusive method of charging attempts. An attempt may be charged directly as a substantive offense. West v. State, (Tex. Crim. 1893) 21 S. W. Rep. 686.

Proof of Crime under Indictment for Attempt to Commit. — It seems that an indictment for an attempt to commit a crime cannot be supported by the proof of the crime itself. Graham v. People, 181 Ill. 477.

Indictment for Assault with Intent to Commit Crime. — Under an indictment for assault with the intent to commit a crime, a conviction for an attempt to commit such crime may be had. People v. Burns, (Cal. 1902) 69 Pac. Rep. 16; People v. Gardner, 98 Cal. 127; People v. Lee Kong, 95 Cal. 666.

The two crimes, however, are different, and where there is no statute or law making a mere attempt criminal, a conviction for an attempt to commit a crime cannot be had under an indictment for an assault with the intent to commit such crime. Schmidt v. Herberth, 50 La. Ann. 375.

103. 1. In **Texas** a conviction for an attempt to rape cannot be had under an indictment for assault with intent to commit such crime. The reason is found in Pen. Code Tex., art. 640, which by its peculiar wording excludes the possibility of there being an attempt if there is an assault. Under this statute it has been held that an attempt to rape is something in the nature of preparation, etc., which falls short of either an assault with intent to rape or the accomplishment of the actual crime, and hence that when the assault commences the attempt ceases, the two crimes being blended into one. Taylor v. State, (Tex. Crim. 1902) 69 St. W. Rep. 149; Warren v. State, 38 Tex. Crim. 152; Reagan v. State, 28 Tex. App. 227; Melton v. State, 24 Tex. App. 284; Milton v. State, 23 Tex. App. 204.

ATTORNEYS.

105. 1. ACTION BY ATTORNEYS FOR FEES — 1. Form of Action.
— See note 2.

Common Counts. — See note 3.

Under Code Practice. — See note 4.

2. Action at Law - Fund in Court. — See notes 5, 6.

106. 4. Allegation of Admission to Bar. — See note 2.

107. 5. Issue. — See note 1. See also ASSUMPSIT.

105. 3. See *Funk v. Mohr*, 185 Ill. 395; *Gorrell v. Payson*, 170 Ill. 213; *Meyer v. McCumber*, 75 Ill. App. 119; *Smedley v. Grand Haven*, 125 Mich. 424; *Dawson v. Peterson*, 110 Mich. 431; *Lungerhausen v. Crittenden*, 103 Mich. 173.

Where an Attorney Is Discharged Without Cause his remedy is an action for breach of contract. A declaration upon the contract as if constructively performed is not good. Likewise, where there is an express contract and part performance, the attorney's remedy is an action for a *quantum meruit* or for a breach of contract. *Henry v. Vance*, (Ky. 1901) 63 S. W. Rep. 273.

3. See *White v. Tolliver*, 110 Ala. 300; *Humes v. Decatur Land Imp., etc., Co.*, 98 Ala. 461; *Gilbert v. Fay*, 4 App. Cas. (D. C.) 38; *People's Casualty Claim Adjustment Co. v. Darrow*, 172 Ill. 62.

4. *Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768.

Fee Pleaded as Set-off. — An attorney may plead his claim for fees as a set-off in a suit in equity for an accounting. *McCracken v. Harned*, 59 N. J. Eq. 190.

Bad Faith as Defense. — Bad faith on the part of an attorney as a defense in an action for his fees must be specially pleaded. *Ditmas v. Hitchings*, (Supm. Ct. Gen. T.) 29 N. Y. Supp. 776.

5. Trial Judge as Arbitrator Between Attorney and Client. — It seems that the matter of compensation of an attorney may be submitted to the arbitration of the judge of the court in which the case is tried, and that the award of such judge will have the effect of a judgment. *Whitney v. New Orleans*, (C. C. A.) 54 Fed. Rep. 614.

6. *Weigand v. Alliance Supply Co.*, 44 W. Va. 133. See also *Rumsey v. Peoples R. Co.*, 84 Mo. App. 508; *Campbell v. Provident Sav., etc., Soc.*, (Tenn. Ch. 1900) 61 S. W. Rep. 1090; *Clafin v. Bennett*, 51 Fed. Rep. 693, *affirmed* *Blair v. Harrison*, (C. C. A.) 57 Fed. Rep. 257.

106. 3. Quantum Meruit — California. — It seems to be unnecessary, in California, to allege in an action for a *quantum meruit* that the plaintiff is a duly qualified attorney, there being no law in that state prohibiting a recovery by persons other than attorneys of the reasonable value of their services rendered in a litigation at the defendant's request. *Miller v. Ballerino*, 135 Cal. 566, 571.

107. 1. Express Contract. — In an action on an express contract for a specific fee, the reasonable value of the services performed is not in issue. *Rockwell Stock, etc., Co. v. Castroni*, 6 Colo. App. 528. See also *Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625. But see *People's Casualty Claim Adjustment Co. v. Darrow*, 172 Ill. 62. See also *Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768.

Express Contract for Indefinite Fee. — Under a declaration upon a contract providing for the payment of a "good fee," the plaintiff may recover upon a *quantum meruit*. *Fairbanks v. Weeber*, 15 Colo. App. 268.

Express Contract for Contingent Fee. — Under a contract for contingent fees an attorney has (1) the right to an actual performance on the part of the defendant; (2) the right to compensation in damages for loss suffered by reason of the failure of the defendant to keep his contract; and either relief

107. II. ACTIONS AGAINST ATTORNEYS — 1. For Negligence.
— See note 2.

Declaration or Complaint. — See note 3.

108. 2. For Money Collected. — See note 1.

III. SUMMARY PROCEEDINGS AGAINST ATTORNEYS — 1.
Generally — On What Jurisdiction Based. — See note 2.

may be granted under a declaration averring that the plaintiff is entitled to compensation out of the proceeds of a certain judgment, that he performed the services which resulted in such judgment and recovery, and that the defendant refused to allow him to share in the proceeds so recovered. *Hazeltine v. Brockway*, 26 Colo. 291.

Quantum Meruit. — In an action for a *quantum meruit* the issue is the value of the services, and proof of a contract for a specific fee would be a variance. *Roche v. Baldwin*, 135 Cal. 522; *Gilbert v. Fay*, 4 App. Cas. (D. C.) 38; *Wells v. Haynes*, 101 Ga. 841.

The Issue Is the Customary Compensation for similar services, not the reasonable value thereof. *Levinson v. Sands*, 74 Ill. App. 273; *National Home Bldg., etc., Assoc. v. Fifer*, 71 Ill. App. 295.

The Necessity for the Services for which the compensation is claimed is also one of the issues in an action for a *quantum meruit*. *Artz v. Robertson*, 50 Ill. App. 27.

Suit in Equity upon Express Contract. — Where, in a suit in equity for the recovery of an attorney's fee under an express contract, the evidence was insufficient to justify the recovery of the whole fee, it was held that the court, under a prayer for general relief, might allow a recovery of the *quantum meruit*, although the averments of the petition would not have been sufficient to authorize such a recovery at law. *Hargis v. Louisville Gas Co.*, (Ky. 1893) 22 S. W. Rep. 85.

107. 2. Currey v. Butcher, 37 Oregon 380, citing 3 ENCYC. OF PL. AND PR 107.

Attorney Liable in Case. — *Hill v. Montgomery*, 84 Ill. App 300, affirmed 184 Ill. 220; *Goldzier v. Poole*, 82 Ill. App. 469. See also *Pinkston v. Arrington*, 98 Ala. 489; *Morrison v. Burnett*, 56 Ill. App. 129.

Negligence as Counterclaim. — Damages to a client caused by his attorney's negligence may be set up as a counterclaim in an action by the attorney for his fees. *Hinckley v. Krug*, (Cal.

1893) 34 Pac. Rep. 118; *Kruger v. Merqure*, 130 Cal. 621; *O'Halloran v. Marshall*, 8 Ind. App. 394; *Carr v. Glover*, 70 Mo. App. 242; *Patterson v. Powell*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 20; *Kissam v. Bremerman*, 44 N. Y. App. Div. 588. See also *Kepler v. Jessup*, 11 Ind. App. 241; *Cullison v. Lindsay*, 108 Iowa 124.

3. Sufficient Declaration. — An averment that the negligence was not due to a mistake of law is unnecessary. If an alleged mistake be made under a mistake of law, such fact is a matter of defense. *Humboldt Bldg. Assoc. Co. v. Ducker*, (Ky., 1901) 64 S. W. Rep. 671.

108. 1. Madden v. Watts, 59 S. Car. 81 [quoting 3 ENCYC. OF PL. AND PR. 108]; *Leigh v. Williams*, 64 Ark. 165; *Pierce v. Underwood*, 103 Mich. 62. See also *Metz v. Abney*, 64 S. Car. 254. But see *Cox v. Delmas*, 99 Cal. 104.

Set-off. — *Dale v. Richards*, 21 D. C. 312; *Bingham v. Spruill*, 97 Ill. App. 374.

2. Union Bldg., etc., Assoc. v. Soderquist, 115 Iowa 695; *Downs v. Davis*, 113 Iowa 529; *Mundy v. Schantz*, 52 N. J. Eq. 744; *Dailey v. Willbrock*, 65 N. Y. App. Div. 523.

Dishonesty Essential to Jurisdiction. — The misconduct relied on as grounds for summary proceedings must be dishonest, oppressive, or illegal. *Tate v. Field*, 60 N. J. Eq. 42; *Strong v. Mundy*, 52 N. J. Eq. 833. *Contra*, *Union Bldg., etc., Assoc. v. Soderquist*, 115 Iowa 695.

What Is Dishonesty. — False, exorbitant, and unreasonable charges made by an attorney constitute such dishonest, oppressive, and illegal conduct as will authorize summary proceedings against him. *Tate v. Field*, 60 N. J. Eq. 42.

Nature of Proceeding. — A summary proceeding is not an action, but a special proceeding. *Union Bldg., etc., Assoc. v. Soderquist*, 115 Iowa 695.

Affidavits in Support of Motion. — A motion by a client to compel his attorney to pay over moneys collected in

109. 2. When Summary Proceeding Lies. — See note 1.

110. 3. Cross-demand of Attorney. — See notes 1, 2.

4. Where to Institute Proceeding. — See note 3.

his professional capacity cannot be supported by *ex parte* affidavits; it must be supported by such evidence as would be admissible in civil actions. Union Bldg., etc., Assoc. v. Soderquist, 115 Iowa 695.

Sufficiency of Petition — Signature. — The petition in summary proceedings must be signed, if possible, by the petitioners themselves. The attorney for the petitioners cannot institute such proceedings by a petition signed by him and based upon knowledge and belief. The mere fact that the clients reside in another state and are absent will not authorize their attorney to institute such proceedings. Curtis v. Meyer, 51 N. Y. App. Div. 434.

109. 1. See Farrar v. Farrar, 104 Iowa 621; Matter of Holland Trust Co., 76 Hun (N. Y.) 323.

Discretion of Court. — Keeney v. Tredwell, 71 N. Y. App. Div. 521; Matter of Pollock, 69 N. Y. App. Div. 499.

Where there is a Conflict as to the Amount due from the attorney to his client reference may be had in summary proceedings, to the end that the court may adjudge the payment of the proper amount. Raby v. Mack, 29 N. Y. App. Div. 225.

Summary Proceedings Not Available to Enforce Stipulations. — Stipulations between an attorney and his client that the attorney shall prosecute certain actions and pay other lawyers for assistance cannot be enforced by summary proceedings. Berks v. Hotchkiss, 82 Hun (N. Y.) 27. See also Snelson v. Pickard, 18 Utah 436.

Effect of Garnishment Against Attorney. — Where the failure of an attorney to pay over to his client money collected in the latter's behalf involves no breach of legal duty on the attorney's part, he may set up as a defense, in summary proceedings by the client, the fact that the money has been garnished in his hands by a creditor of the client. Ewing v. Freeman, 103 Ga. 811.

110. 1. Jurisdiction Not Ousted by Mere Assertion of Counterclaim. — In order to prevent the exercise of the court's summary power to compel payment of money by an attorney to his client, the attorney must do something more than make assertions by way of counterclaim. The assertions must be

sufficiently supported to call for more than formal investigation. Matter of Tracy, 1 N. Y. App. Div. 113, *affirmed* 149 N. Y. 608.

Jurisdiction Not Ousted by Statute Providing for Release of Liens. — A summary proceeding is not affected by a statutory provision (Code Iowa, § 331) for the release of the attorney's lien which requires the client to proffer security for the payment of the lien before the attorney can be subjected to a penal action for withholding the money. And such security is not required before proceedings summarily for the money. Union Bldg., etc., Assoc. v. Soderquist, 115 Iowa 695.

2. Mundy v. Schantz, 52 N. J. Eq. 744; Matter of Martin, 73 N. Y. App. Div. 505; Thomasson v. Latourette, 63 N. Y. App. Div. 408; Matter of Borkstrom, 63 N. Y. App. Div. 7, *affirmed* 168 N. Y. 639.

Question Determinable by Referee. — Gillespie v. Mulholland, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 40, *affirming* (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 511.

Court's Equitable Power Available to Settle Disputes Between Attorney and Client. — Gillespie v. Mulholland, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 40.

Set-off. — In summary proceedings the court may adjust set-offs claimed by the attorney on account of fees or other professional charges for which he has a lien on the money sought to be recovered. Union Bldg., etc., Assoc. v. Soderquist, 115 Iowa 695.

3. Different Courts. — Where alimony decreed by a court of chancery in New Jersey is collected by legal proceedings in New York by the same attorney who conducted the alimony proceedings, such attorney being a solicitor in chancery in New Jersey and also an attorney at law in New York, the New Jersey Court of Chancery has jurisdiction of summary proceedings to compel him to account to his client for the money so collected. Lynde v. Lynde, (N. J. 1902) 52 Atl. Rep. 694.

Venue. — *The Proper Venue* is the county having jurisdiction of the action in connection with which the attorney was acting when he received the money. It seems, however, that there may be cases where the proceed-

111. 5. Relation of Attorney and Client Must Exist. — See note 1.

Acting in Professional Character. — See note 2.

112. 6. Action as Bar to Summary Proceeding. — See note 1.

ings may be instituted for moneys received by an attorney in transactions not connected with any proceedings in court, and in that event the proper venue is the county of the attorney's residence. *Union Bldg., etc., Assoc. v. Soderquist*, 115 Iowa 695.

Change of Venue is not available in summary proceedings against attorneys. *Union Bldg., etc., Assoc. v. Soderquist*, 115 Iowa 695.

111. 1. *Matter of Langslow*, 167 N. Y. 314; *Matter of Redmond*, 54 N. Y. App. Div. 454; *Curtis v. Meyer*, 51 N. Y. App. Div. 434; *Matter of Hillebrandt*, 33 N. Y. App. Div. 191; *Harris v. Elliott*, 19 N. Y. App. Div. 60; *Matter of Hammann* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 417. *Compare Snelson v. Pickard*, 18 Utah 436.

Where the Claim Is Merged in a Contract Debt summary proceedings will not lie to collect it. *Matter of Neville*, 71 N. Y. App. Div. 102.

A Controversy as to Whether the Relation of Attorney and Client Existed when the money was received by the attorney does not deprive the court of jurisdiction of a summary proceeding to compel the attorney to pay the money

over. *Union Bldg., etc., Assoc. v. Soderquist*, 115 Iowa 695.

Consent Cannot Confer Jurisdiction where the relationship of client and attorney does not in fact exist. *Matter of Langslow*, 167 N. Y. 314.

Summary Proceedings by Assignee. — Where, pending a suit, the plaintiff's claim is, by the advice of his attorney, assigned to a third party, but no formal assignment is executed until after judgment, the assignee may maintain summary proceedings to compel the attorney to pay the money collected upon such judgment. *Gillespie v. Mulholland*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 40.

Summary Proceedings Not Available in Controversies Between Attorneys. — Where one of two attorneys collects a fee due to both, summary proceedings will not lie to enforce a division. *Downs v. Davis*, 113 Iowa 529.

2. *Matter of Hammann*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 417.

112. 1. Judgment in Action Not Bar to Summary Proceedings. — *Gabriel v. Schillinger Fire Proof Cement, etc., Co.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 313.

AUDITA QUERELA.

- 113.** I. DEFINITION — NATURE OF PROCEEDING. — See notes I, 3.
114. II. WHEN IT WILL LIE. — See note 4.
115. See note 1.
119. III. WHEN IT WILL NOT LIE. — See note 1.
120. See note 2.
124. VIII. JUDGMENT. — See note 4.

113. 1. *Fischer v. Johnson*, 74 Mo. App. 64.

3. Justice's Judgments. — See *Sawyer v. Cross*, 65 Vt. 158.

114. 4. Subsequent Judgments Relating to Same Subject Matter. — Audita querela will not lie on account of subsequent judgments involving the subject-matter of the judgment attacked, unless such judgments constitute an adjudication of the matters involved in the judgment sought to be vacated. *Fischer v. Johnson*, 74 Mo. App. 64.

115. 1. *Sawyer v. Cross*, 65 Vt. 158.

119. 1. *Sawver v. Cross*, 66 Vt. 616.

Jurisdiction Not Conferred by Mistake Without Fraud. — Failure of the defendant to enter an appearance, due to a

misunderstanding between his agent and the plaintiff's attorney, but without fraud on the part of the attorney, will not support audita querela to vacate the judgment. *Walter v. Foss*, 67 Vt. 591.

120. 2. Erroneous Taxation of Cost. — It is doubtful whether audita querela is ever available for the correction of an erroneous taxation of cost. But if it is available it will not lie where the erroneous taxation was not procured by fraud, and where there has been no offer to pay the legal part of the judgment. *Rickard v. Fisk*, 66 Vt. 675.

124. 4. *Stroheim v. Deimel*, 46 U. S. App. 644.

AWARDS.

127. I. ACTIONS AT LAW TO ENFORCE AWARD — 1. Right to Bring Action. — See note 1.

128. See note 1.

129. 3. Forms of Action — a. ASSUMPSIT. — See notes 2, 3, 4, 5.

130. b DEBT — On Award. — See note 1.

133. 4. Declaration or Complaint in Action on Award — a. HOW TO SET FORTH AWARD. — See note 1.

b. ALLEGATIONS — In General. — See notes 2, 3, 4.

127. 1. Iowa. — See *West v. Averill Grocery Co.*, 109 Iowa 488; *Skrable v. Pryne*, 93 Iowa 691.

Submission to Ascertain Damages or Amount Due. — No action will lie upon an award under a submission to ascertain damages or merely the amount due from one of the parties to the other. In such case the action must be upon the original cause; or, if there has been a promise to pay the award, upon such promise. *Stockton Combined Harvester, etc., Works v. Glen's Falls Ins. Co.*, 98 Cal. 557; *Stockton Combined Harvester, etc., Works v. Hamburg Madgeburg F. Ins. Co.*, (Cal. 1893) 33 Pac. Rep. 638; *Stockton Combined Harvester Works v. Hamburg Madgeburg F. Ins. Co.*, (Cal. 1893) 33 Pac. Rep. 637; *Stockton Combined Harvester Works v. Hartford F. Ins. Co.*, (Cal. 1893) 33 Pac. Rep. 637.

128. 1. Contra. — *Older v. Quinn*, 89 Iowa 445. See also *Climenson v. Climenson*, 163 Pa. St. 451.

129. 2. See *Thomas v. Heger*, 174 Pa. St. 345; *Climenson v. Climenson*, 163 Pa. St. 451; *Parker v. Dorsey*, 68 N. H. 181.

A Count Based upon a Breach of a Contract May Be Joined with One upon the Award, even though the counts are for the same cause of action. *Rawlinson v. Shaw*, 117 Mich. 5.

3. Macdonald v. Bond, 195 Ill. 122, *affirming* 96 Ill. App. 116; *Rawlinson v. Shaw*, 117 Mich. 5.

4. Gray v. Reed, 65 Vt. 178. *Compare Macdonald v. Bond*, 195 Ill. 122.

5. Contra. — *Macdonald v. Bond*, 195 Ill. 122, *affirming* 96 Ill. App. 116.

130. 1. Debt. — See *Wood v. Bangs*, 2 Penn. (Del.) 435; *Macdonald v. Bond*, 195 Ill. 122; *Luther v. Medbury*, 18 R. I. 141.

133. 1. See *Macdonald v. Bond*, 195 Ill. 122.

Itemised Claim Unnecessary. — In an action upon an award it is unnecessary for the plaintiff to itemize the claim forming the subject-matter of the award. *Needham v. Blythewood*, (Tex. Civ. App. 1901) 61 S. W. Rep. 426.

Filing Copy with Complaint. — See also *Mand v. Patterson*, 19 Ind. App. 619. *Contra*, *Littleton v. Patton*, 112 Ga. 438.

2. Littleton v. Patton, 112 Ga. 438 [*citing* 3 ENCYC. OF PL. AND PR. 133]; *Mand v. Patterson*, 19 Ind. App. 619.

3. Littleton v. Patton, 112 Ga. 438 [*citing* 3 ENCYC. OF PL. AND PR. 133]; *Mand v. Patterson*, 19 Ind. App. 619.

No Allegation of Written Submission Is Necessary, although the case be one in which only a written submission would be valid, it being presumed, in the absence of any showing to the contrary, that the parties complied with the law, and hence that the submission was in writing. *Brown v. Mize*, 119 Ala. 10.

4. Littleton v. Patton, 112 Ga. 438 [*citing* 3 ENCYC. OF PL. AND PR. 133]; *Couch v. Harrison*, 68 Ark. 580.

Distinction Between Oral and Written Submission. — If the submission be oral, the substance thereof must be set out; if written, the submission itself must be made a part of the complaint. *Mand v. Patterson*, 19 Ind. App. 619.

134. See notes 1, 4.

Concurrent Acts. — See note 6.

135. *Promise to Perform.* — See note 3.

138. 6. *Pleas and Defenses to Actions on Award — b. EXCESS OF JURISDICTION.* — See note 4.

d. NO SUBMISSION. — See note 8.

141. *f. NO AWARD — When Plea Bad as Amounting to General Issue.* — See note 1.

146. 7. *Demurrer.* — See note 6.

147. II. *AWARD AS DEFENSE TO ACTION AT LAW — 1. In General.* — See note 3.

148. *American Rule.* — See note 2.

2. *How Set Forth.* — See note 3.

Allegation of Age of Parties Unnecessary. — The complaint need not allege that the parties to the submission were of age, this being presumed in the absence of any showing to the contrary. *Brown v. Mize*, 119 Ala. 10.

134. 1. *Mand v. Patterson*, 19 Ind. App. 619.

Distinction Between Oral and Written Awards. — If an award be oral, the substance thereof must be set out; if it be written, the award itself must be made a part of the complaint. *Mand v. Patterson*, 19 Ind. App. 619.

Compliance by the Arbitrators with the Rules Prescribed by the Submission and intended to govern their deliberations and control their decisions need not be alleged. *Terry v. Moore*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 285.

4. *Mand v. Patterson*, 19 Ind. App. 619.

6. *Parrish v. Higinbotham*, 39 Oregon 598.

135. 3. *Couch v. Harrison*, 68 Ark. 580. But see *Fooks v. Lawson*, 1 Marv. (Del.) 115.

Where the Submission Is Merely to Ascertain Damages, or the amount of money due between the parties, the complaint must allege a promise by the defendant to perform, that is, to pay, the action in such case being really upon the new agreement and not upon the award. *Stockton Combined Harvester, etc., Works v. Glen's Falls Ins. Co.*, 98 Cal. 557; *Stockton Combined Harvester, etc., Works v. Hamburg Madgeburg F. Ins. Co.*, (Cal. 1893) 33 Pac. Rep. 638; *Stockton, etc., Agr. Works v. American F. Ins. Co.*, (Cal. 1893) 33 Pac. Rep. 638; *Stockton Combined Harvester, etc., Works v. Hartford F. Ins. Co.*, (Cal. 1893) 33 Pac. Rep. 637.

138. 4. *Separable Awards.* — Where the arbitrators after making an award attempt to make a further award upon matters not submitted, the two awards are separable, and the excess of jurisdiction in making the second award cannot be pleaded as a defense to an action upon the first. *Allen-Bradley Co. v. Anderson, etc., Distilleries Co.*, 99 Ky. 311.

8. *Fraud in Inducing Submission* may be pleaded, but cannot be proved under a general denial. It must be specially pleaded. *Connecticut F. Ins. Co. v. O'Fallon*, 49 Neb. 740.

141. 1. See *Anderson v. Miller*, 108 Ala. 171, wherein the general issue and the plea of no award were both pleaded.

146. 6. *Excess of Jurisdiction.* — A demurrer for excess of jurisdiction will not lie where it appears that a portion of the award was within the jurisdiction of the arbitrators, and that such portion is separable from that which was in excess of jurisdiction. *Brown v. Mize*, 119 Ala. 10.

147. 3. *Award as Ground for Demurrer.* — A complaint showing that the claim sued on has been submitted to arbitration and that an award has been made is demurrable. *Robinson v. Templar Lodge No. 17*, 97 Cal. 62.

Submission Pending Action operates to discontinue the action. *Sohns v. Sloteman*, 85 Wis. 113.

148. 2. See *Fortune v. Killebrew*, (Tex. Civ. App. 1893) 21 S. W. Rep. 986.

3. *The Rule Applicable to Replication.* — The rule announced in the text is applicable also where a replication sets up an award as a bar to a set-off filed by the defendant. *Heath v. Doyle*, 18 R. I. 252.

151. III. ACTIONS TO ENFORCE SPECIFIC PERFORMANCE OF AWARD — 1. Jurisdiction — Agreement to Arbitrate. — See note 1.

154. IV. ACTIONS TO SET ASIDE AWARD — 1. Jurisdiction — Fraud and Mistake of Arbitrator or Party. — See note 3.

155. See note 1..

3. Bill — a. PARTIES — Defendants. — See note 6.

b. ALLEGATIONS. — See notes 7, 8.

156. V. AWARD AS DEFENSE TO EQUITABLE ACTION — 1. In General. — See note 5.

151. 1. Alabama. — *Brown v. Mize*, 119 Ala. 10.

Maryland. — *Witz v. Tregallas*, 82 Md. 351.

Missouri. — *Bales v. Gilbert*, 84 Mo. App. 675.

Rhode Island. — *Grosvenor v. Flint*, 20 R. I. 21.

Pennsylvania. — *McQuaide v. Pennsylvania R. Co.*, 6 Pa. Dist. 391.

Virginia. — *Rison v. Moon*, 91 Va. 384.

154. 3. Kearney v. Washtenaw Mut. F. Ins. Co., 126 Mich. 246, *citing* 3 ENCYC. OF PL. AND PR. 154. See also the following cases:

Alabama. — See *Brown v. Mize*, 119 Ala. 10; *Georgia Home Ins. Co. v. Kline*, 114 Ala. 366.

Colorado. — *Wilson v. Wilson*, 18 Colo. 615.

Illinois. — *Citizens Ins. Co. v. Hamilton*, 48 Ill. App. 593.

Maryland. — See *Witz v. Tregallas*, 82 Md. 351.

Michigan. — *Hewitt v. Reed City*, 124 Mich. 6; *Michels v. Western Underwriters Assoc.*, (Mich. 1902) 89 N. W. Rep. 56.

New York. — See *Remington Paper Co. v. London Assurance Corp.*, 12 N. Y. App. Div. 218.

Ohio. — See *Corrigan v. Rockefeller*, 10 Ohio Dec. 494.

Oregon. — *Stemmer v. Scottish Ins. Co.*, 33 Oregon 65.

South Carolina. — See *Rounds v. Aiken Mfg. Co.*, 58 S. Car. 299.

Tennessee. — *Graham v. Bates*, (Tenn. Ch. 1898) 45 S. W. Rep. 465.

Texas. — See *Royal Ins. Co. v. Parlin*, etc., Co., 12 Tex. Civ. App. 572.

Virginia. — *Coons v. Coons*, 95 Va. 434.

Washington. — See *McDonald v. Lewis*, 18 Wash. 300.

United States. — *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337;

Missouri, etc., R. Co. v. Elliott, 56 Fed. Rep. 772

155. 1. The Relief Granted must be within the scope of the bill, and hence where a bill is framed only for an attack on an award, and not for its enforcement, upon the sustaining of the award judgment cannot be entered thereon. *Graham v. Bates*, (Tenn. Ch. 1898) 45 S. W. Rep. 465.

Legal Relief May be Granted where the jurisdiction of equity has attached upon equitable grounds; and the court may decide the whole controversy and render a final decree, though all the issues be legal in their nature and capable of being tried by a court of law, and the legal remedies therefor be adequate. *Coons v. Coons*, 95 Va. 434.

6. In a Suit to Set Aside an Award of Fire Losses all the insurance companies which were parties to the submission agreement are necessary parties. *Michels v. Western Underwriters' Assoc.*, (Mich. 1902) 89 N. W. Rep. 56.

7. Alternative Allegations of Mistake and Fraud. — Where a party seeks to set aside an award for mistake or fraud, one or the other, but neither affirmatively, the averments of each ground must be sufficient, or neither will be deemed to be sufficiently averred. *Dunham Lumber Co. v. Holt*, 123 Ala. 336.

8. But see *Royal Ins. Co. v. Parlin*, etc., Co., 12 Tex. Civ. App. 572, wherein it was held that allegations of partiality and that one of the arbitrators was an employee of the defendant, were averments of material facts and not conclusions of the pleader.

156. 5. Where Submission Is Made Pending the Action it will operate as a discontinuance of the action without any formal order to that effect. *Niagara Falls, etc., R. Co. v. Brundage*, 7 N. Y. App. Div. 445.

BAIL AND RECOGNIZANCE.

- 160.** 1. **IN CIVIL CASES** — 2. **Right to Give Bail.** — See note 4.
- 161.** 3. **When Bail May Be Required** — *a.* **IN GENERAL.** — See note 1.
- 163.** *b.* **COMMON AND SPECIAL BAIL.** — See note 6.
- 164.** 4. **Proceedings to Obtain Bail** — **Affidavit.** — See note 10.
- 165.** See notes 2, 3.
- 166.** 5. **Amount and Reduction of Bail.** — See notes 2, 4, 5.
6. **Money as Bail.** — See note 7.
- 167.** See notes 4, 6.
- 168.** 7. **Qualifications of Bail.** — See note 4.
- 160.** 4. **Where a Defendant in Trover Is Unable to Produce the Property or to Give Security** for the eventual condemnation money, he may be discharged upon his own recognizance. *Garrett v. Underwood*, 102 Ga. 558.
- 161.** 1. **Bail Has Been Required in Actions For:** *Alienation of Affections of Plaintiff's Wife.* — *Sibley v. Smith*, 67 N. Y. App. Div. 514.
- Insolvency Proceedings.* — *Stout v. Quinn*, 9 Pa. Super. Ct. 179.
- Libel and Slander.* — *Renninger v. Dillon*, 2 Pa. Dist. 819.
- Malicious Prosecution.* — *Umphrey v. Emery*, 121 Mich. 184.
- Replevin.* — *Eddings v. Boner*, 1 Indian Ter. 173.
- Seduction.* — *Logan v. Lawshe*, 62 N. J. L. 567; *Yatter v. Pitkin*, 66 Vt. 300.
- Trover and Conversion.* — *Garrett v. Underwood*, 102 Ga. 558; *Reigner v. Spang*, 5 N. Y. App. Div. 237.
- 163.** 6. **Special Bail as Condition Precedent to Right to Plead.** — Under Gen. Stat. Conn., § 957, no defendant in a civil action, while at large upon bail, can appear and plead either in abatement, in bar, or by demurrer, until he has given special bail to abide the final judgment in the case, if such bail shall be required by the plaintiff. *Bergkofski v. Ruzofski*, 74 Conn. 204.
- 164.** 10. *Renninger v. Dillon*, 2 Pa. Dist. 819.
- Counter affidavits** denying the charge against the defendant set out in the plaintiff's affidavit are inadmissible to defeat the plaintiff's right to require bail, but are admissible to enlighten the court as to the character of the wrong complained of and the contention between the parties, in order that the proper amount may be determined. *Gall v. Molessa*, 3 Pa. Dist. 537.
- 165.** 2. *Gall v. Molessa*, 3 Pa. Dist. 537.
3. *Renninger v. Dillon*, 2 Pa. Dist. 819.
- Exceptions.** — In an action for tort no special circumstances need be stated to prevent a discharge on common bail, (1) where the cause of action is founded upon outrageous battery or mayhem; and (2) in actions for seduction. *Logan v. Lawshe*, 62 N. J. L. 567.
- 166.** 2. *Reigner v. Spang*, 5 N. Y. App. Div. 237.
- When Motion May Be Made.** — *Any Time Before Final Judgment* a motion may be made for a reduction of bail. *Sibley v. Smith*, 67 N. Y. App. Div. 514.
- After the Defendant's Release* upon bail, he still has the right to move for a reduction of the amount thereof. *Sibley v. Smith*, 67 N. Y. App. Div. 514.
4. *Reigner v. Spang*, 5 N. Y. App. Div. 237.
5. *Reigner v. Spang*, 5 N. Y. App. Div. 237.
7. **New York.** — *Alexander v. Creamer*, 46 N. Y. App. Div. 211.
- 167.** 4. *Compare Alexander v. Creamer*, 46 N. Y. App. Div. 211.
6. *Alexander v. Creamer*, 46 N. Y. App. Div. 211.
- 168.** 4. *Howell v. Jones*, 113 N. Car. 429.

- 172.** 8. Putting in Bail — Justifying. — See note 1.
175. 9. Bail Bonds and Recognizances — Conditions. — See note 1.
180. 12. Proceedings Against Bail — In General. — See note 5.
181. See note 1.
195. II. IN CRIMINAL CASES — 2. Power to Take Bail — a. IN GENERAL. — See note 1.
196. b. COURTS OF RECORD. — See note 2.
197. c. JUSTICES OF PEACE. — See notes 1, 2.
198. d. COMMISSIONERS — United States Commissioner. — See note 1.
State Commissioner. — See note 2.
e. CLERK OF COURT. — See notes 4, 6.

179. 1. Right and Liability of Sheriff — *North Carolina*. — A sheriff who accepts insufficient bail, and who, after exceptions, fails to give notice of the time and place when and where the bail will justify, becomes liable himself as special bail, although he acted in good faith in taking the bond, and the plaintiff was near at hand and knew what was going on when the justification was being made. *Howell v. Jones*, 113 N. Car. 429.

175. 1. *Eddings v. Boner*, 1 Indian Ter. 173.

180. 5. See *Yatter v. Pitkin*, 66 Vt. 300.

181. 1. Debt. — See *Umphrey v. Emery*, 121 Mich. 184.

195. 1. Authority to Admit to Bail Implied from Authority to Issue Writ of Habeas Corpus. — The authority to issue a writ of habeas corpus carries with it the right to admit to bail. *State v. Farris*, 51 S. Car. 176.

196. 2. Power Exhausted. — When the prisoner is before the court, the court may, if his recognizance is insufficient, order a new recognizance, and it seems that the new recognizance will not supersede the first, but that both will be valid. *Com. v. Abbott*, 168 Mass. 471.

197. 1. *State v. Bartlett*, 70 Minn. 199; *U. S. v. Sauer*, 73 Fed. Rep. 671.

2. *State v. Bartlett*, 70 Minn. 199.

Pending Examination. — Under a statute authorizing a magistrate to "examine and commit and hold to bail in all offenses," whether cognizable by such magistrate or not, it has been held that a magistrate has no authority to take bail pending an examination before him of a person accused of a crime of which he (the magistrate) has no jurisdiction except as an examining court. *In re Mantz*, 19 D. C. 595.

After Commitment. — A justice of the peace has no power to admit to bail after the prisoner has been committed. In such case the bail must be taken by two justices or by a judge. *Rupert v. People*, 20 Colo. 424; *Huston v. People*, 12 Colo. App. 271, both of which cases were decided under Gen. Stat. Colo. (1883), § 981 (*Mills's Annot. Stat. Colo.* 1891, § 1487); *People v. Cook*, 68 Ill. App. 202, decided under *Crim. Code Ill.*, div. 3, § 6 (*Starr & Curt. Annot. Stat. Ill.* 1896, c. 38, par. 480).

In Ohio a Mayor cannot take bail pending appeal except upon the order of the Court of Common Pleas or the judge thereof. *Scio v. Hollis*, 10 Ohio Dec. 99.

Power Exhausted. — The power of a justice of the peace to take recognizance is exhausted by the exercise thereof, and he cannot thereafter take a new bond in lieu of the one upon which the accused has been released. *Cox v. State*, 5 Kan. App. 539.

198. 1. *U. S. v. Dunbar*, 48 U. S. App. 531.

2. See *People v. Robb*, 98 Mich. 397.

4. Authority of Clerk in Absence of Judge — Missouri Statute. — Under *Rev. Stat. Mo.* (1889), § 4124 (*Rev. Stat. Mo.* 1899, § 2544), authorizing a clerk to fix the amount of recognizances when the judge is absent, the absence of the judge is absolutely essential to the clerk's authority to fix the amount, and a recognizance the amount of which is fixed by the clerk when the judge is not absent is absolutely void. *State v. Woodward*, 159 Mo. 680; *State v. Pratt*, 148 Mo. 402. *Compare State v. Hoidorf*, 61 Mo. App. 515.

Extent of Authority — Kentucky. — Where a clerk is authorized to take bail after the term of the court at which

198. *f. SHERIFF.* — See note 7.

199. See note 1.

200. **3. Right to Give Bail — *a.* IN GENERAL — Application.** — See note 3.

201. **At Common Law.** — See note 1.

Constitution. — See note 3.

***b.* VARIOUS OFFENSES — Capital Cases.** — See note 4.

202. See note 1.

the bail has been fixed by the court, such authority extends to and continues during subsequent terms of the court. *Wilson v. Com.*, 99 Ky. 167.

198. **6.** See *Hunt v. U. S.*, (C. C. A.) 63 Fed. Rep. 568.

7. *Rupert v. People*, 20 Colo. 424.

199. **1.** *Dunlap v. State*, 66 Ark. 105; *Havis v. State*, 62 Ark. 500.

A Recognizance for Less than the Amount Fixed by the Court cannot be accepted by a sheriff authorized to accept and approve bonds after the amount has been fixed by the court. *State v. Fraser*, 165 Mo. 242.

Specification of the Amount upon the Warrant is unnecessary, where it otherwise appears that the amount of the bond has been fixed by the court. *State v. Austin*, 69 Mo. App. 377.

After a Change of Venue the sheriff of the county *a quo* has no authority to accept a bail bond for appearance in the court to which the change is made. *Harbolt v. State*, 39 Tex. Crim. 129.

Withdrawal of Approval. — Where a sheriff has taken and approved a recognizance after the amount has been properly fixed, he cannot thereafter withdraw his approval so as to render the bond invalid. *State v. Lay*, 128 Mo. 609.

200. **3. Successive Applications.** — A denial of one application for admission to bail will not preclude a subsequent application; and if, upon the subsequent application, the circumstances require that the prisoner be bailed, the application will be granted. *Ex p. Turner*, 112 Cal. 627; *State v. Collins*, 10 N. Dak. 464.

Examining Courts with Concurrent Jurisdiction. — An order of a magistrate prescribing bail which is not given is insufficient to entitle the accused to release upon the bail thus prescribed, after a second preliminary trial has been had before another court having concurrent jurisdiction with the magistrate, and the accused has been committed by such other court. It seems,

also, that if the accused has been released on bail before the magistrate, such bail will not prevent his subsequent arrest and commitment. *Ex p. Robinson*, 108 Ala. 161.

Parties to Habeas Corpus Proceedings.

— The sheriff who has the applicant in charge need not be made a party, but the district attorney of the district in which the charge is pending should be cited to show cause why bail should not be granted, and if the district judge has already taken action in the matter, he also should be notified of the application. The applicant himself need not be present when the legality of his detention is not questioned, as, for example, when the applicant is charged with a capital offense. *State ex rel. Vickers*, 47 La. Ann. 662.

201. **1.** *Ford v. State*, 42 Neb. 418.

3. *State v. Judge*, 48 La. Ann. 95; *State v. Judge*, 48 La. Ann. 92; *People v. Burwell*, 106 Mich. 27. Compare *Ford v. State*, 42 Neb. 418.

Where Present Insanity Is Pleaded in addition to not guilty the accused is not, under the constitutional guaranty, entitled to bail until the plea of insanity has been determined and he has been declared sane. *People v. Watson*, (Ct. Gen. Sess.) 14 Misc. (N. Y.) 430.

4. *Rigdon v. State*, 41 Fla. 308; *State v. Start*, (Kan. App. 1898) 54 Pac. Rep. 22; *State v. Collins*, 10 N. Dak. 464; *Martin v. State*, 9 Ohio Cir. Dec. 621; *Ex p. Cosby*, (Tex. Crim. 1899) 54 S. W. Rep. 587; *State v. Crocker*, 5 Wyo. 385. See also *Ex p. Epps*, 35 Tex. Crim. 406.

202. **1.** *State v. Collins*, 10 N. Dak. 464; *Ex p. Epps*, 35 Tex. Crim. 406; *Ex p. Cotton*, (Tex. Crim. 1899) 53 S. W. Rep. 632.

Punishment Discretionary. — Compare *People v. Burwell*, 106 Mich. 27.

Authority of Prosecuting Attorneys. — A prosecuting attorney cannot agree with the accused in a capital case that he shall be granted bail in considera-

203. Felony — Generally. — See note 2.

Misdemeanors. — See note 4.

204. *c.* AFTER INDICTMENT. — See note 1.

d. DELAY OF TRIAL — Unnecessary Delay. — See note 2.

205. *e.* SICKNESS OR EXTRADITION PROCEEDINGS — Sickness. — See note 3.

Extradition Proceedings. — See note 4.

206. *f.* ON APPEAL FROM CONVICTION. — See notes 1, 2.

tion of his turning state's evidence. *Ex p. Greenhaw*, 41 Tex. Crim. 278.

203. 2. See *People v. Watson*, (Ct. Gen. Sess.) 14 Misc. (N. Y.) 430.

4. *People v. Watson*, (Ct. Gen. Sess.) 14 Misc. (N. Y.) 430.

204. 1. *Ex p. Robinson*, 108 Ala. 161; *State v. Madison County Ct.*, 136 Mo. 323; *State v. Crocker*, 5 Wyo. 385. See also *Ex p. Jack*, (Miss. 1897) 22 So. Rep. 188.

The Constitution of Florida provides that all persons shall be bailable except for capital offenses "where the proof is evident or the presumption great," and it has been held that the burden is upon the accused to show that the proof is not evident and that the presumption is not great. *Rigdon v. State*, 41 Fla. 308.

Previous Granting of Bail by a Magistrate after a preliminary examination is insufficient to rebut the presumption arising from the indictment. *Ex p. Robinson*, 108 Ala. 161, *overruling Ex p. Skelton*, 104 Ala. 98.

Right to Bail under Second Indictment — *Res Judicata*. — Where one who has been indicted and admitted to bail is arrested for the same offense under a new indictment, he is entitled to bail thereunder as a matter of right, the right to bail in such case being *res judicata*. *Ex p. Augustine*, 33 Tex. Crim. 1.

2. Discretion of Court. — Application on this ground is addressed to the sound discretion of the court. *State ex rel. Vickers*, 47 La. Ann. 662.

205. 3. *In re Ward*, 127 Cal. 489; *State ex rel. Vickers*, 47 La. Ann. 662; *Ex p. Wheeler*, (Miss. 1898) 24 So. Rep. 261. See also *Ex p. Turner*, 112 Cal. 627.

4. Matter of Foye, 21 Wash. 250.

206. 1. Authority of Appellate Courts — Power Implied from Power to Grant Appeal. — Courts authorized to grant appeals or issue writs of error have implied power to admit the petitioner to bail pending the appeal. *Everly v.*

State, 10 Ind. App. 15; *Hudson v. Parker*, 156 U. S. 277, *reversing* U. S. v. Hudson, 65 Fed. Rep. 68.

Colorado Statute. — Under Gen. Stat. Colo. (1883), § 972 (Mills's Annot. Stat. Colo. 1891, § 1479), the Supreme Court during the term, or one justice thereof in vacation, may admit to bail pending the determination of writ of error. *Ritchey v. People*, 22 Colo. 251.

In *South Carolina* the Supreme Court may grant bail pending appeal in capital cases. *State v. Farris*, 51 S. Car. 176.

Authority of Federal Court After Remand to State Officers. — Where an appeal is taken from a decision of a federal court dismissing a writ of habeas corpus, and pending such appeal the prisoner is remanded to the custody of state officers, such federal court cannot admit the prisoner to bail. *In re Bissert*, 113 Fed. Rep. 12. See also *In re Isagi*, 79 Fed. Rep. 755.

After Conviction and Before Appeal. — Where a statute (Gen. Stat. Nev. 1885, §§ 4331, 4333; Comp. Laws Nev. 1900, §§ 4416, 4418) requires the commitment of the accused immediately after judgment and sentence, without discretion to a trial judge as to when such judgment shall become operative, the accused cannot be admitted to bail after judgment and sentence until the appeal is taken. *State v. Murphy*, 23 Nev. 390.

Bail Pending Appeal Dependent upon Statute. — The right of bail after conviction is purely statutory and would not exist in the absence of the statute. *Shoemaker's Application*, 2 Okla. 606.

2. In Oklahoma bail cannot be granted after conviction for a crime punishable by death or life imprisonment. *Shoemaker's Application*, 2 Okla. 606. See also *Laws Okla.* 1895, c. 41, art. 2, § 1.

In Territories. — In *Territorial Cases*, under *Laws Okla.* 1895, c. 41, art. 2, § 1, persons convicted of crimes other than those punishable by death or incarceration for life may give bail pend-

207. See notes 1, 2.

208. 4. Examining Evidence — Controlling Considerations. — See note 4.

Before Indictment. — See note 5.

209. After Indictment. — See notes 1, 2.

214. 5. Amount of Bail — Reduction. — See note 3.

215. 6. Money as Bail — Authority to Take. — See note 1.

ing an appeal from conviction. Shoemaker's Application, 2 Okla. 606.

In Federal Cases. — Bail pending an appeal in a criminal case on the federal side of a territorial court will be allowed according to the territorial statutes, in the absence of any federal statute upon the subject. Matter of Raidler, 4 Okla. 417.

The Effect of a Reversal of Conviction will be to place the accused in the same position in regard to bail as if he had never been convicted. State v. Helm, 92 Iowa 540.

207. 1. Ritchey v. People, 22 Colo. 251; Ford v. State, 42 Neb. 418; *In re Boulter*, 5 Wyo. 263.

Apparent Error on Record. — Ford v. State, 42 Neb. 418.

Matters to Be Considered. — *Sickness* such as will probably cause the death of the accused in a short time, if he is not released, has been held sufficient to call for exercise of the trial court's discretion in granting bail. *In re Ward*, 127 Cal. 489. See also *Ex p. Turner*, 112 Cal. 627.

The Fact of Admission to Bail Before Conviction cannot be considered in determining the right to bail after conviction. *Ex p. Williams*, 114 Ala. 29.

Mandamus lies to compel the trial court to exercise its discretion, but not to review it when it has been exercised. *Hudson v. Parker*, 156 U. S. 277, reversing U. S. v. Hudson, 65 Fed. Rep. 68.

2. *Ex p. Turner*, 112 Cal. 627.

The Time in Which Bail May Be Given pending an appeal rests in the discretion of the trial court. Matter of Raidler, 4 Okla. 417.

In South Carolina the Supreme Court may grant bail in all cases, whether the trial court has the right to grant bail in such cases or not. State v. Farris, 51 S. Car. 176.

208. 4. Attempts to Escape. — State *ex rel. Vickers*, 47 La. Ann. 662.

5. Mississippi. — See *Ex p. Patterson*, (Miss. 1897) 22 So. Rep. 186.

Evidence as to the Grade of the Offense will not be examined. State v. Collins, 10 N. Dak. 464.

209. 1. Indiana. — See Brown v. State, 147 Ind. 28.

Ohio. — See Martin v. State, 9 Ohio Cir. Dec. 621.

Contra. — In Texas the indictment raises no presumption that the proof is evident or the presumption strong, and the accused is entitled to bail unless the state establishes these issues. *Ex p. Arthur*, (Tex. Crim. 1898) 47 S. W. Rep. 365; *Ex p. Newman*, 38 Tex. Crim. 164, overruling *Ex p. Smith*, 23 Tex. App. 100.

2. State v. Crocker, 5 Wyo. 385. See also *Ex p. Jack*, (Miss. 1897) 22 So. Rep. 188; *Ex p. Epps*, 35 Tex. Crim. 406.

Probative Force of Indictment. — The fact that an indictment has been found may be considered with other evidence, and in doubtful cases may turn the scales against the applicant. State v. Crocker, 5 Wyo. 385.

214. 3. By Habeas Corpus. — *Ex p. Douglas*, 25 Nev. 425; *Ex p. Scott*, (Tex. Crim. 1901) 62 S. W. Rep. 568; *Ex p. Ferrell*, (Tex. Crim. 1896) 37 S. W. Rep. 328; *Ex p. Tittle*, 37 Tex. Crim. 597.

By Mandamus. — An application for the reduction of bail should be first presented to the trial court, and will not be considered on mandamus until all the remedies for such reduction have been exhausted in the lower court. State v. Aucoin, 47 La. Ann. 1677.

215. 1. By Whom Deposited. — The deposit may be made by a third person. State v. Owens, 112 Iowa 403; *Arnsperger v. Norman*, 101 Ky. 208.

With Whom Deposited. — Where a state authorizes a money deposit in lieu of bail, the money must be deposited with the officer designated by the statute; but if the money is in fact deposited with another officer of the court, who takes it in good faith and thereafter pays it over to the proper

- 215.** Forfeiture. — See note 3.
 Title to Money. — See note 5.
 7. Qualifications of Bail. — See note 7.
216. 8. Recognizance — *a.* FORM AND VALIDITY — (1) *In General.* — See note 2.
217. See note 2.
218. See note 1.
 (2) *Condition and Penalty.* — See note 2.
219. See notes 1, 2.
 (3) *Appearance — Time and Place.* — See notes 4, 5.

officer, and the accused is released from custody, the officer taking the money will be considered as the agent of the proper officer in receiving the money, and the parties making the deposit cannot thereafter reclaim it. *Com. v. Leach*, 103 Ky. 389; *Arnsperger v. Norman*, 101 Ky. 208.

A Justice of the Peace in Kansas cannot accept money as bail. *Appelgate v. Young*, 62 Kan. 100, reversing 9 Kan. App. 493.

Mortgage as Bail. — Under Code N. Car. (1883), § 120, as amended by Acts 1891, c. 425, a mortgage may be executed in lieu of ordinary bail. *State v. Jenkins*, 121 N. Car. 637.

215. 3. Proceedings Against Depositor. — A deposit of money in lieu of bail by a third party does not make such party a surety for the appearance of the accused, and no proceeding against such third party is necessary in order to complete forfeiture of the money so deposited. *Arnsperger v. Norman*, 101 Ky. 208.

5. *State v. Owens*, 112 Iowa 403; *Alexander v. Creamer*, 46 N. Y. App. Div. 211; *State v. Ross*, 100 Tenn. 303.

Returning Money. — Where a party voluntarily consents to the action of the accused in depositing the money of such party in lieu of bail, he cannot reclaim it after it is vested in the commonwealth by virtue of a forfeiture. *Com. v. Leach*, 103 Ky. 389.

7. **Before Whom Justification Made.** — Sureties on a criminal bond must justify before the officer authorized to approve it. *Matter of Raidler*, 4 Okla. 417.

Statutory Method of Justification Not Exclusive. — *Pierce v. State*, 39 Tex. Crim. 343.

216. 2. Rupert v. People, 20 Colo. 424; *People v. Cook*, 68 Ill. App. 202; *Com. v. Nichols*, (Ky. 1896) 33 S. W. Rep. 946; *State v. Woodward*, 159 Mo. 680; *State v. Caldwell*, 124 Mo. 509;

State v. Murphy, 23 Nev. 390; *U. S. v. Hudson*, 65 Fed. Rep. 68.

The Venue. — Waiver of examination and asking bail is a concession of jurisdiction, and obviates the necessity of a recital of the venue in the recognizance. *Harris v. State*, 60 Ark. 209.

Illegal Arrest. — *State v. Holdorf*, 61 Mo. App. 515. Compare *Com. v. Blair County Jail Warden*, 8 Pa. Dist. 159, wherein it was held that a person entering into a recognizance waives illegality in his arrest.

Nunc pro Tunc Approval. — A bond taken by an officer having no authority to take it cannot be validated by a *nunc pro tunc* approval by the court. *State v. Caldwell*, 124 Mo. 509.

217. 2. Com. v. Nichols, (Ky. 1896) 33 S. W. Rep. 946; *Cannon v. Com.*, 96 Va. 573.

218. 1. State v. Holdorf, 61 Mo. App. 515; *Shupe v. State*, 40 Neb. 524; *Cannon v. Com.*, 96 Va. 573.

2. Material Parts. — Specification of the obligation which the accused is required to perform is a material part of the recognizance. *Cannon v. Com.*, 96 Va. 573.

219. 1. Kazda v. State, 52 Neb. 499; *Pill v. State*, 43 Neb. 23.

Substantial Compliance with the Statute is sufficient. *Kazda v. State*, 52 Neb. 499; *Pill v. State*, 43 Neb. 23.

The Omission of Conditions Not Required by statute will not invalidate the bond. *State v. Whitecotton*, 63 Mo. App. 8.

2. Kansas City v. Hiescher, 4 Kan. App. 782; *Reed v. Police Ct.*, 172 Mass. 427; *Thompson v. State*, 34 Tex. Crim. 135.

3. Contra, as to a recognizance on appeal conditioned that the defendant will render himself in execution of judgment. *State v. Murphy*, 23 Nev. 390.

5. Impossible Date. — *Sloan v. State*, 39 Tex. Crim. 63; *Moseley v. State*, 37 Tex. Crim. 18; *Bullard v. State*, 32

220. See notes 1, 2.

221. Omissions and Additions. — See note 1.

(4) *Offense Charged.* — See note 3.

222. See note 1.

Tex. Crim. 518. *Compare* State v. Lay, 128 Mo. 609.

220. 1. Kazda v. State, 52 Neb. 499; Pill v. State, 43 Neb. 23; Clark v. State, 32 Tex. Crim. 412. *Contra*, as to recognizance on appeal conditioned that the defendant will render himself in execution of judgment. State v. Murphy, 23 Nev. 390.

2. Camp v. State, 39 Tex. Crim. 142.

Next Criminal Court. — Under authority to grant bail conditioned for an appearance at "the proper court," a court may bail the defendant to appear at a term of criminal court then in session, or at the next term thereof, if not in session, or for good cause shown why the appearance should not be made at the term then in session. *Ex. p.* Hays, (Tex. Crim. 1901) 64 S. W. Rep. 1040.

Where the Court Consists of Two Divisions, each division, however, constituting a part of the same court, a bail bond taken by the judge of either division, conditioned for the appearance of the accused at the criminal court without specifying in what division thereof, will bind him to appear in either division in which his case may be pending when his appearance is required. State v. Curtis, 67 Mo. App. 431.

221. 1. State v. Moore, 2 Penn. (Del.) 299; Shupe v. State, 40 Neb. 524.

3. State v. Moore, 2 Penn. (Del.) 299. *Contra*, Kansas City v. Garnier, 57 Kan. 412; Hardesty v. State, 5 Kan. App. 780; Kansas City v. Hescher, 4 Kan. App. 782; State v. Whitecotton, 63 Mo. App. 8, in all of which cases it was held that it will be sufficient if the crime charged appears from the whole record. See also People v. Russell, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 765, affirmed 67 N. Y. App. Div. 620, holding that failure to specify the crime charged in a recognizance conditioned for appearance before a magistrate will not render the recognizance void, where a sufficient charge is made on the day set for the appearance. And see Shupe v. State, 40 Neb. 524, decided under Crim. Code Neb., § 388, and holding that an undertaking in bail is binding although the offense is

not described therein, provided the particular case to which the undertaking is applicable is manifest and that the officer taking it acts within his authority.

222. 1. *Kentucky.* — Main v. Com., (Ky. 1900) 56 S. W. Rep. 970.

Louisiana. — State v. Ruthing, 49 La. Ann. 909.

Texas. — Mara v. State, 39 Tex. Crim. 183; Camp v. State, 39 Tex. Crim. 142; McClure v. State, 37 Tex. Crim. 129; Cannady v. State, 37 Tex. Crim. 123; McMeans v. State, 37 Tex. Crim. 130; Leach v. State, 35 Tex. Crim. 449; Whitehead v. State, 35 Tex. Crim. 437; Draughan v. State, 35 Tex. Crim. 51; Allison v. State, 33 Tex. Crim. 501; Nash v. State, 32 Tex. Crim. 368; Mullinix v. State, 32 Tex. Crim. 116; Lewis v. State, (Tex. Crim. 1898) 47 S. W. Rep. 988; Allphin v. State, (Tex. Crim. 1894) 26 S. W. Rep. 61. *Compare* Morgan v. State, 32 Tex. Crim. 413; McKay v. State, 8 Tex. App. 672; State v. Murphy, 23 Nev. 390.

Name of Offense. — *Where the Offense Is a Crime Eo Nomine*, charging by name will be sufficient. Couch v. State, (Tex. Crim. 1896) 34 S. W. Rep. 942; U. S. v. Dunbar, 48 U. S. App. 531.

Where the Offense Is Not a Crime Eo Nomine, charging it by name is insufficient. Its essential elements must be set out. State v. Moore, 2 Penn. (Del.) 299; Shockley v. State, 38 Tex. Crim. 459; Jones v. State, 38 Tex. Crim. 364; Johnson v. State, 38 Tex. Crim. 26; Allison v. State, 33 Tex. Crim. 501; Mara v. State, 39 Tex. Crim. 183; Boyett v. State, (Tex. Crim. 1900) 55 S. W. Rep. 495; Fikes v. State, (Tex. Crim. 1899) 51 S. W. Rep. 248; Loveless v. State, (Tex. Crim. 1899) 50 S. W. Rep. 361; Ross v. State, (Tex. Crim. 1898) 44 S. W. Rep. 492; Strain v. State, (Tex. Crim. 1897) 42 S. W. Rep. 383; Jackson v. State, (Tex. Crim. 1897) 40 S. W. Rep. 287; Wilson v. State, (Tex. Crim. 1897) 40 S. W. Rep. 279; Blackshear v. State, (Tex. Crim. 1895) 33 S. W. Rep. 222; Pace v. State, (Tex. Crim. 1895) 32 S. W. Rep. 697; Clark v. State, (Tex. Crim. 1895) 32 S.

223. See note 1.

224. See note 1.

225. See note 1.

(5) *Amount*. — See note 4.

226. (6) *Name of Accused*. — See note 1.

b. EXECUTION — Each Person. — See note 2.

227. See note 1.

Acknowledgment. — See note 2.

W. Rep. 901; *Heath v. State*, (Tex. Crim. 1895) 31 S. W. Rep. 659; *Baizey v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 358; *Turner v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 62; *Harkey v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 423; *Heilman v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 1120; *Jackson v. State*, (Tex. Crim. 1894) 24 S. W. Rep. 902; *U. S. v. Dunbar*, 48 U. S. App. 531; *U. S. v. Sauer*, 73 Fed. Rep. 671. But see Code Crim. Pro. Tex., art. 887, as amended by Laws Tex. 1897, c. 5, § 1; *Youngman v. State*, 38 Tex. Crim. 459.

Several Indictments on Same Day. — See *State v. Fuller*, 128 Ala. 45.

Name of Injured Party. — In *Alabama* the bail bond need not specify the name of the party against whom the offense was committed. *State v. Fuller*, 128 Ala. 45.

Following the Language of the Statute, is sufficient. *Robinson v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 678.

The exact words of statute need not be used. Words of the same import will be sufficient. *Mills v. State*, 36 Tex. Crim. 71.

Where the Indictment Contains Two or More Counts a recognizance conditioned to answer the offense charged in one of them is sufficient. *Foster v. State*, 38 Tex. Crim. 374.

223. 1. *Compare Vaughan v. Candler*, 113 Ga. 9, wherein it was held that a recognizance conditioned for the appearance of the accused to answer a charge of assault with intent to kill was sufficient, although there was no such offense as assault with intent to kill, since under such a charge the accused might have been convicted of an assault or an assault and battery; *Alford v. State*, 37 Tex. Crim. 386, wherein it was held that "while it is true that the recognizance must recite an offense against the laws of the state, yet, if it recites the offense set forth in the indictment it is sufficient."

No Crime. — *Candler v. Kirksey*, 113 Ga. 309.

224. 1. *Whitehead v. State*, 35 Tex. Crim. 437; *Draughan v. State*, 35 Tex. Crim. 51; *Walker v. State*, 32 Tex. Crim. 517; *Bailey v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 116; *Kennedy v. State*, (Tex. Crim. 1894) 24 S. W. Rep. 901.

225. 1. *Compare People v. Hanaw*, 106 Mich. 421, wherein it was held that a recognizance conditioned for the appearance of the accused to answer an information on file against him for burglary is sufficient to bind him to appear to answer a charge of feloniously breaking and entering in the nighttime a building not adjoined to or occupied as a dwelling house, with the intent to commit the crime of larceny. This case was decided under How. Annot. Stat. Mich., § 9485 (Comp. Laws Mich., § 11,869), providing that actions on recognizances shall not be defeated by defects of form, etc., in the recognizance.

4. *Com. v. Riffe*, (Ky. 1899) 49 S. W. Rep. 772.

226. 1. See *State v. Fuller*, 128 Ala. 45, wherein it was held that a bail bond which does not show which of the parties signing it is the principal obligor is insufficient; *Smith v. State*, 35 Tex. Crim. 9.

2. *Invalid as to One Surety, Invalid as to All*. — A bail bond which is signed by an agent without the authority of his principal will be invalidated as to other sureties thereon, although such sureties had reason to believe that the agent had no authority, since the sureties have a right to presume that the judge taking the bond will see that the name of each surety is signed in such a way as to bind him. *Com. v. Belt*, (Ky. 1899) 51 S. W. Rep. 431.

227. 1. *In Massachusetts a Married Woman* may execute a recognizance by virtue of Pub. Stat. Mass., c. 147, §§ 2, 7 (Rev. Laws Mass., c. 153, §§ 2, 6). *Com. v. Abbott*, 168 Mass. 471.

2. *No Acknowledgment Necessary — Kansas Statute*. — Under Gen. Stat. Kan. (1899), § 5201 (Gen. Stat. Kan.

- 227.** Signing and Sealing. — See note 4.
228. See note 1.
 Approval. — See note 2.
 Recognizance Dates. — See note 4.
229. Executed on Sunday. — See note 1.
 Filing and Recording. — See notes 2, 3, 4.
230. *c.* CONSTRUCTION. — See notes 2, 3, 4.
231. *d.* AMENDMENT. — See notes 1, 2.
232. *g.* ON APPEAL — *Requisites.* — See notes 1, 2, 3.

1897), c. 102, § 135), providing that all recognizances shall be in writing and be subscribed by the parties to be bound thereby, it has been held that recognizances are not matters of record as at common law, and hence need not be acknowledged. *Kansas City v. Fagan*, 4 Kan. App. 796.

227. 4. See *Shupe v. State*, 40 Neb. 524, holding that even where a recognizance is not required to be signed, if it is signed it will not thereby be rendered void.

By Statute in Illinois (Crim. Code Ill., div. 3, § 3, *Starr & Curt. Annot. Stat. Ill.* 1896, c. 38, par. 477) a recognizance taken in a court of record in open court need not be signed. *McNamara v. People*, 183 Ill. 164.

Signature in Presence of Officer — Missouri Statute. — Under Rev. Stat. Mo. (1889), § 4127 (Rev. Stat. Mo. 1899, § 2547), authorizing officers designated to take bail to administer all oaths necessary in that behalf, recognizances must be signed in the presence of the officers taking them. *State v. Pratt*, 148 Mo. 402.

In Body. — The signature of the principal and sureties in the body of a bail bond will be sufficient, though such practice is not commended. *McHowell v. State*, 41 Tex. Crim. 227.

228. 1. *Omission of Names from Body.* — See also *Reeg v. Adams*, 113 Wis. 175.

2. *State v. Austin*, 69 Mo. App. 377.

4. See *Lindsay v. State*, 39 Tex. Crim. 468.

229. 1. *Adams v. Candler*, 114 Ga. 151; *Lindsay v. State*, 39 Tex. Crim. 468.

2. Certificate to County Commissioners — Pennsylvania Statute. — Act Pa. March 24, 1818 (*Bright. Purd. Dig. Laws Pa.* 1894, p. 910, § 11), directing that forfeitures shall be certified and estreated into the office of the county commissioners, was enacted for the

benefit of the county, and failure to comply therewith has no effect upon the validity of the recognizance. *Com. v. Hart*, 17 Pa. Co. Ct. 148.

3. Prior to Forfeiture. — A bail bond taken by the sheriff, but not certified by him to the clerk, and not filed by the clerk previous to a judgment of forfeiture, will be held void. *State v. Pratt*, 148 Mo. 402.

4. Time for Recording. — The recognizance need not be recorded on the same day it is made, but should be entered upon the record at the same term, and at all events before the succeeding term. *McNamara v. People*, 183 Ill. 164.

230. 2. *Havis v. State*, 62 Ark. 500.

3. *Smith v. State*, 35 Tex. Crim. 9.

4. *State v. Fuller*, 128 Ala. 45; *State v. Moore*, 2 Penn. (Del.) 299.

231. 1. *Vaughan v. Candler*, 113 Ga. 9.

2. *Vaughan v. Candler*, 113 Ga. 9; *Neininger v. State*, 50 Ohio St. 394.

232. 1. *McGough v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 712; *Nunn v. State*, 40 Tex. Crim. 435; *Anderson v. State*, (Tex. Crim. 1896) 36 S. W. Rep. 97; *Volney v. State*, (Tex. Crim. 1896) 35 S. W. Rep. 658; *Short v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 288.

By Statute in Texas a recognizance on appeal must be conditioned to abide the judgment of the appellate court "in this case." *Cryer v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 753; *Barela v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 397.

An Amendment by inserting a condition to abide the judgment of the Court of Criminal Appeals cannot be made on appeal. *McGough v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 712.

Upon Joint Conviction of two or more for the same offense each must execute a separate recognizance. *Goldman v. State*, 35 Tex. Crim. 436.

2. *Starr v. State*, (Tex. Crim. 1897)

233. See note 1.

40 S. W. Rep. 790; *Sturdevant v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 732; *Ray v. State*, (Tex. Crim. 1896) 35 S. W. Rep. 368; *Jones v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 627; *McAfee v. State*, (Tex. Crim. 1896) 33 S. W. Rep. 970; *Bohanon v. State*, (Tex. Crim. 1896) 33 S. W. Rep. 866; *Blackshear v. State*, (Tex. Crim. 1895) 33 S. W. Rep. 222; *Irvin v. State*, (Tex. Crim. 1895) 32 S. W. Rep. 899; *McClesky v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 800; *Barnard v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 967; *Crawford v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 629; *Anderson v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 289; *Short v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 288; *Crise v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 285; *Calhoun v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 126.

Amendment. — Where the recognizance fails properly to describe the appellate court, the defect cannot be cured by amendment after the adjournment of the term at which it was entered. *Miller v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 71.

232. 3. Time to Time. — *Forbes v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 1072.

233. 1. *Bowen v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 552; *McCormack v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1006; *McGough v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 712; *Biggins v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 109; *Alexander v. State*, (Tex. Crim. 1895) 32 S. W. Rep. 695; *Nunn v. State*, 40 Tex. Crim. 435; *May v. State*, 40 Tex. Crim. 196; *Ben-
neit v. State*, 37 Tex. Crim. 244; *Armento v. State*, 33 Tex. Crim. 539.

The Punishment Imposed must be stated. *Nunn v. State*, 40 Tex. Crim. 435; *Crowley v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 559; *Waldrip v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 555; *Standifer v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 550; *Waits v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 917; *Lindsey v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 905; *Austin v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1041; *Seguin v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 753; *Erwin v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 961; *Thomas v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 759; *Bowen v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 552; *Allred v. State*,

(Tex. Crim. 1900) 59 S. W. Rep. 273; *Cauthern v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 273; *Luke v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 44; *Cartwright v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1008; *Callicoate v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1008; *Jordan v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 176; *Johnson v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 176; *Johnson v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 587; *Secrest v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 630; *Westfall v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 629; *Allen v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 103; *Sessum v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 373; *Peck v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 229; *Howard v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 229; *Perry v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 229; *Donnelly v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 228; *Bird v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 715; *Swope v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 715; *McGough v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 712; *Ross v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 492. But see Code Crim. Pro. Tex., art. 887, as amended by Laws Tex. 1897, c. 5, § 1.

Amendment to show conviction and amount of punishment will not be allowed after the term at which conviction was had, and hence no such amendment can be made on appeal. *McGough v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 712.

Variances Between the Recognizance and the Judgment have been held fatal in the following instances:

As to Disposition of the Case, as where the recognizance recites a conviction when the judgment was dismissing an appeal from an inferior court. *Sturgeon v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1067; *Chappell v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 928.

As to the Judgment, as where the recognizance recites a conviction for the offense charged in the indictment, when the conviction was for a less offense. *Pace v. State*, (Tex. Crim. 1895) 32 S. W. Rep. 697; *Fondren v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 479; *Nichols v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 383. See also *Driggs v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 546.

2. Guill v. State, (Tex. Crim. 1897)

234. 9. Forfeiture — a. POWER. — See note 2.

42 S. W. Rep. 303; *Sheppard v. State*, (Tex. Crim. 1895) 32 S. W. Rep. 530; *Harkey v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 423; *Heilman v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 1120; *Jackson v. State*, (Tex. Crim. 1894) 24 S. W. Rep. 902.

Must Be Offense Against Law. — *Youngman v. State*, 38 Tex. Crim. 459; *Johnson v. State*, 38 Tex. Crim. 26; *Allison v. State*, 33 Tex. Crim. 501; *Boyle v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 495; *Fikes v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 248; *Strain v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 383; *Jackson v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 287; *Wilson v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 279. See also *Robinson v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 678; *Couch v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 942; *Hunt v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 750; *Blackshear v. State*, (Tex. Crim. 1895) 33 S. W. Rep. 222; *Clark v. State*, (Tex. Crim. 1895) 32 S. W. Rep. 901; *Pace v. State*, (Tex. Crim. 1895) 32 S. W. Rep. 697; *Heath v. State*, (Tex. Crim. 1895) 31 S. W. Rep. 659; *Loven v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 358; *Baizey v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 358; *Allison v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 1081; *De Auda v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 73; *Turner v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 62; *Harkey v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 423; *Calhoun v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 126; *Rhoads v. State*, (Tex. Crim. 1894) 28 S. W. Rep. 467. *Compare Hardy v. U. S.*, (C. C. A.) 71 Fed. Rep. 158, where it was held that if a magistrate has jurisdiction to inquire into an offense similar to the one charged, a bail bond taken by him conditioned for appearance in a trial court will not be void, even though the information charges no offense and the description of the offense in the recognizance follows the information.

Amendment. — The recognizance cannot be amended on appeal so as to cure a defect in that it did not charge an offense against the law. *Youngman v. State*, 38 Tex. Crim. 459.

A Joint Recognizance by Several Defendants, of such a nature that a breach by one would be a breach by all, is insufficient to support an appeal. *Standifer v. State*, (Tex. Crim. 1902) 66 S. W.

Rep. 550; *McHam v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 911; *Stanly v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 345.

A Variance between the recognizance and judgment as to the crime charged is fatal. *Schoonmaker v. State*, 37 Tex. Crim. 424. But see *Morrison v. State*, 37 Tex. Crim. 601, wherein it was held that where one is convicted of a less offense than the one charged in the indictment, his recognizance on appeal reciting that he was charged with the less offense and convicted thereof is sufficient.

Where there Are Two Counts in the Charge, a recognizance on appeal from conviction upon one count reciting that the accused was charged with the offense charged in the other count will be insufficient. *Smith v. State*, (Tex. Crim. 1896) 33 S. W. Rep. 1079.

The File Number of the Case need not be stated where the recitals are sufficient to identify the recognizance with the case. *Thielen v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 533.

Time for Giving Recognizance. — A recognizance on appeal must be entered into at the term at which the conviction is had. *Mundelino v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 235; *Donnelly v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 228; *Kounce v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 966.

New Bond on Appeal. — If the recognizance filed at the time of taking an appeal is defective, a dismissal cannot be prevented by filing a valid recognizance. *Peck v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 229. *Contra, Hudson v. Parker*, 156 U. S. 277.

234. 2. Power Only to Take Bail. — A count which is expressly authorized to take a bail bond has implied jurisdiction to forfeit and enforce it. *State v. Caldwell*, 124 Mo. 509.

In *Koger v. Madison*, 108 Ga. 543, it was held that where a municipal court is expressly authorized merely to take bail, and there is an adequate remedy for the enforcement of bail bonds taken by such court by civil action, the municipal court has no authority to forfeit the bond. *Distinguishing State v. Caldwell*, 124 Mo. 509.

Where there Is a Change of Venue the court to which the case is transferred has authority to forfeit a recognizance taken by the court from which the

235. See note 1.

b. GROUNDS. — See note 3.

236. See notes 1, 2.

cause was transferred. *Havis v. State*, 62 Ark. 500.

Forfeiture Allowable Only in Pending Cases. — Where an indictment is filed away subject to another indictment to be thereafter found, but no other indictment is found, no forfeiture of the recognizance given to answer the indictment which is filed away can be had at any succeeding term of the court, the filing away of the indictment and failure to find another being equivalent to a dismissal of the indictment. *Hall v. Com.*, (Ky. 1895) 30 S. W. Rep. 877.

235. 1. Must Be Filed. — *Where there Was a Change of Venue* after bail was granted, but before the bond was filed, the action of the sheriff in sending the bond direct to the clerk of the court of the new venue, instead of filing it with the clerk of the court in which the prosecution originated, was held, in *Havis v. State*, 62 Ark. 500, to be a mere irregularity which would not justify a reversal of a judgment upon the bond.

3. After Cause Continued. — *Continuance of the Recognizance Without Respite* operates as an expiration thereof, and excuses further appearance. *State v. Roop*, 1 Marv. (Del.) 535.

A Continuance Before the Hour for Appearance excuses appearance at such hour. *People v. Morstadt*, 101 Cal. 379.

Continuance with the Consent of the Accused continues the recognizance. *Kuhle v. People*, 65 Ill. App. 378.

Succeeding Term. — *Compare State v. Moore*, 57 Mo. App. 662 [citing *State v. Mackey*, 55 Mo. 51]; *Hesselgrave v. State*, (Neb. 1902) 89 N. W. Rep. 295; *State v. Murdock*, 59 Neb. 521.

In Misdemeanor Cases. — A recognizance given for appearance in a misdemeanor case cannot be forfeited at a time when the person of the accused is not required, over the objection of his attorneys who appear and demand trial. *Kenworthy v. El Dorado*, 7 Kan. App. 643.

Dismissal Before the Hour for Appearance discharges the sureties, and the failure of the accused to appear will render them liable. *People v. Morstadt*, 101 Cal. 379.

Failure to Remain All Day at a Justice's Office which is closed is not a breach of a recognizance to appear before such justice on that day, where the attorney of the accused was present all day, and the accused himself was close at hand, ready to appear whenever called, and the office was not opened during the day. *Neal v. State*, 61 Ark. 283.

Waiver of Appearance. — In a prosecution for a felony the attorney of the accused cannot waive an appearance so as to prevent forfeiture of the bail bond. *State v. McMichael*, 50 La. Ann. 428.

236. 1. Compare *Braxton v. Candler*, 112 Ga. 459; *Hudson v. State*, 91 Ga. 553.

2. State v. Gardner, 29 Oregon 254.

Next Term. — *Lane v. State*, 6 Kan. App. 106; *Hesselgrave v. State*, (Neb. 1902) 89 N. W. Rep. 295; *State v. Murdock*, 59 Neb. 521. *Compare State v. Horton*, 123 N. Car. 695, wherein it was held that a recognizance conditioned for the appearance of the accused at the next term, and that he will not depart without leave, binds him to appear at a subsequent special term intervening between the two regular terms, and to which his case is continued.

Abide Order of Court. — See *State v. Breen*, 6 S. Dak. 537. *Compare Hesselgrave v. State*, (Neb. 1902) 89 N. W. Rep. 295; *State v. Murdock*, 59 Neb. 521.

Nonappearance After Trial and Verdict of guilty is ground for forfeiting a recognizance conditioned to abide the order of the court. *Neininger v. State*, 50 Ohio St. 394.

Appearance until Discharged. — A condition in a recognizance requiring appearance until discharged requires appearance from day to day and from term to term until discharged. *People v. Hanaw*, 106 Mich. 421.

A Condition Not to Depart Without Leave may be broken as follows:

By Failure to Remain until Discharged. — *State v. Ruthing*, 49 La. Ann. 909.

By Failure to Appear at Term to Which Case Is Conditioned. — *State v. Horton*, 123 N. Car. 695; *State v. Jenkins*, 121 N. Car. 637. *Contra*, *Hes-*

237. c. PROCEEDINGS — Calling Accused and Entering Default. — See notes 1, 2.

238. d. ENFORCEMENT — Judgment of Forfeiture. — See note 3.

selgrave v. State, (Neb. 1902) 89 N. W. Rep. 295.

By Failure to Appear and Answer Defective Indictment. — *State v. Livingston*, 117 Mo. 627; *State v. Hoeffner*, 68 Mo. App. 164, citing *State v. Livingston*, 58 Mo. App. 449.

By Failure to Appear to Answer a New Indictment found in lieu of a defective one. *State v. Austin*, 141 Mo. 481 [citing *State v. Livingston*, 117 Mo. 627]; *Silvers v. State*, 59 N. J. L. 428.

A Recognizance to Answer a Particular Indictment may be forfeited for failure to appear to answer a new indictment found in lieu of the original one. *State v. Brooks*, 48 La. Ann. 855. Compare *Hyde v. Cross*, 25 Oregon 543.

237. 1. Accused Must Be Called. — *Langridge v. Judge*, 46 La. Ann. 29; *State v. Jenkins*, 121 N. Car. 637; *State v. Lambert*, 44 W. Va. 308. *Contra*, *State v. Holdorf*, 61 Mo. App. 515. See also *State v. Murphy*, 23 Nev. 390, decided under Gen. Stat. Nev., § 4403 (Comp. Laws Nev., § 4488).

Record of Calling. — The record entry of forfeiture need not show that the defendant or his bondsman was called. *State v. Holdorf*, 61 Mo. App. 515; *State v. Murphy*, 23 Nev. 390.

The calling of the accused will be presumed from a record entry of forfeiture. *Com. v. Fogelman*, 3 Pa. Super. Ct. 566.

Only Accused. — *State v. Lambert*, 44 W. Va. 308, citing 3 ENCYC. OF PL. AND PR. 437, note 1.

Nature of Proceedings. — *Proceedings to Declare a Default* are criminal. *State v. O'Rourke*, 49 La. Ann. 1567; *State v. Alexander*, 46 La. Ann. 550.

A Scire Facias Proceeding upon a forfeited criminal recognizance is a continuation of the original forfeiture proceeding, and hence is criminal in its nature. *State v. Hoeffner*, 137 Mo. 612; *State v. Clifford*, 124 Mo. 492; *State v. Murmann*, 124 Mo. 502; *State v. Caldwell*, 124 Mo. 509; *State v. Hoeffner*, 124 Mo. 488. *Contra*, *Vaughan v. Candler*, 113 Ga. 9. See also *Morse v. State*, 39 Tex. Crim. 566.

An Action upon a Forfeited Recognizance is not an action for a penalty, but an action upon a written instrument. *State v. Murphy*, 23 Nev. 390.

2. Record of Default. — The record

must show that the accused did not appear at the time and place required by his recognizance. *State v. Murphy*, 23 Nev. 390. Compare *Hesselgrave v. State*, (Neb. 1902) 89 N. W. Rep. 295, decided under Crim. Code Neb., § 388.

Excuse for Default. — Neither the record of the court nor the minutes of the trial judge need recite that the failure of the accused to appear was "without sufficient cause or excuse," although the statute authorizing forfeiture provides that it may be made when the accused fails to appear "without sufficient cause or excuse." *State v. Austin*, 141 Mo. 481, 69 Mo. App. 377; *State v. Whitecotton*, 63 Mo. App. 8.

The Record of Forfeiture Is Conclusive if it shows that the defendant was called and did not appear. *Com. v. Burkholder*, 3 Pa. Dist. 563.

The Record May Be Amended so as to show that the forfeiture was properly made, if such is the case. *State v. Jenkins*, 121 N. Car. 637.

Notice of Forfeiture Not Essential. — No notice of forfeiture of a recognizance need be given to the principal therein. See Code Crim. Pro. Tex., art. 478; *Sims v. State*, 41 Tex. Crim. 440.

238. 3. Failure to Enter the Judgment upon the Minutes is not fatal to its validity. It may be entered directly upon the records without any previous record on the minutes. *State v. Whitecotton*, 63 Mo. App. 8.

Sufficiency of Judgment. — The judgment must show where the accused was required to appear. *Moseley v. State*, 37 Tex. Crim. 18.

The Record May Be Amended so as to show that a judgment *nisi* was rendered. *State v. Jenkins*, 121 N. Car. 637.

Distinction Between Recognizances and Bail Bonds. — A bail bond is a different thing from a recognizance within the meaning of the statutes authorizing a judgment *nisi* upon a recognizance without the intervention of a separate suit. *Fahey v. People*, 8 Colo. App. 553. See also *Everly v. State*, 10 Ind. App. 15, wherein it was held that the liability of the principal and surety on a bail accrues immediately upon the failure of the accused to comply with the conditions thereof, and that no judgment of forfeiture is necessary.

239. *Subsequent Proceedings.* — See note 1.

Remedy. — See note 2.

240. See notes 1, 2.

239. 1. *Braxton v. Candler*, 112 Ga. 459; *Meekins v. Sullivan County*, 154 Mo. 136; *State v. Dwyer*, 70 Vt. 96. Compare *Fahey v. People*, 8 Colo. App. 553, decided under a special statute.

2. *Solre Facias* — *Georgia*. — *Candler v. Kirksey*, 113 Ga. 309; *Vaughan v. Candler*, 113 Ga. 9; *Freeman v. State*, 112 Ga. 648.

Illinois. — *McNamara v. People*, 183 Ill. 164; *Kuhle v. People*, 65 Ill. App. 378; *People v. Cleaver*, 74 Ill. App. 210.

Massachusetts. — *Norcross v. Crabtree*, 161 Mass. 55.

Mississippi. — *Smith v. State*, 76 Miss. 728.

Missouri. — *State v. Hoeffner*, 124 Mo. 488; *State v. Livingston*, 117 Mo. 627; *State v. Whitecotton*, 63 Mo. App. 8.

North Carolina. — *State v. Horton*, 123 N. Car. 695; *State v. Jenkins*, 121 N. Car. 637.

Pennsylvania. — *Com. v. Hart*, 17 Pa. Co. Ct. 148.

Texas. — *Thompson v. State*, 34 Tex. Crim. 135; *Avant v. State*, 33 Tex. Crim. 312; *Markham v. State*, 33 Tex. Crim. 91; *Lewis v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 570.

Vermont. — *State v. Dwyer*, 70 Vt. 96.

West Virginia. — *State v. Lambert*, 44 W. Va. 308.

Record Conclusivo. — *Com. v. Fogelman*, 3 Pa. Super. Ct. 566.

240. 1. Debt is the proper form of action upon a recognizance which is not filed and made of record in the Supreme Court. *State v. Wheeler*, 67 N. H. 511.

2. *Civil Action under Code* — *Arkansas*. — *Harris v. State*, 60 Ark. 209, 212.

California. — *People v. McReynolds*, 102 Cal. 308.

Connecticut. — *State v. Connolly*, 72 Conn. 607.

Indiana. — *State v. Osborn*, 155 Ind. 385.

Kansas. — *Hardesty v. State*, 5 Kan. App. 780.

Kentucky. — *Combs v. Com.*, 103 Ky. 385.

Montana. — *State v. Wrote*, 19 Mont. 209.

Nevada. — *State v. Murphy*, 23 Nev. 390.

Ohio. — *Kinney v. State*, 7 Ohio Cir. Dec. 97.

Oklahoma. — *McColgan v. Territory*, 5 Okla. 567.

Oregon. — *Metschan v. Grant County*, 36 Oregon 117.

South Dakota. — *State v. Newson*, 8 S. Dak. 327.

Requisites of Complaint — *Release of Principal*. — Compare *Dilley v. State*, 2 Idaho 1012; *Com. v. Perkins*, (Ky. 1895) 32 S. W. Rep. 134.

Default of Principal. — *State v. Wrote*, 19 Mont. 209.

Charge Made. — The complaint need not set out the acts constituting the crime charged. *State v. Wrote*, 19 Mont. 209.

Allegation of Forfeiture. — An averment that the principal was called and failed to appear is equivalent to an averment that his default for not appearing was entered of record. *State v. Wrote*, 19 Mont. 209.

The complaint need not allege that the bond was "duly" forfeited, where the allegations of fact contained show that the forfeiture was properly made. See *Kinney v. State*, 7 Ohio Cir. Dec. 97.

Identity of Crimes Charged in Information and in Recognizance. — A complaint charging that a certain crime of the same name as that charged in the recognizance was committed sufficiently identifies the two charges. *State v. Wrote*, 19 Mont. 209.

Averment of Filing. — A complaint upon a recognizance which avers that the recognizance was filed is sufficient to show, as against a demurrer, that the recognizance was filed and became a part of the record in the cause in which it was given. *State v. Murphy*, 23 Nev. 390. See also *State v. Wrote*, 19 Mont. 209, wherein it was held that no averment of filing was necessary.

In *Arkansas* the proceeding is as follows: Indorsement of forfeiture upon the bond; filing the bond so indorsed with the clerk of the Circuit Court; issuance of summons by such clerk; answer by the bail showing cause, if any, why the final judgment should be entered upon the forfeiture, with right of appeal to either party. *Havis v. State*, 62 Ark. 500; *Neal v. State*, 61 Ark. 283.

242. *c.* REMISSION AND DISCHARGE — Power to Remit. — See note 1.

Motion and Grounds. — See notes 2, 3, 4, 5, 6.

In **Indian Territory** the bond and the order of forfeiture are treated as a complaint, the practice being the same as in Arkansas. *Zufall v. U. S.*, 1 Indian Ter. 638, wherein it was held that a bond showing (1) the obligation of the principal and sureties; (2) its conditions; (3) the signature of the parties; (4) acknowledgment; and an order of forfeiture thereof showing that the principal was called and failed to answer and made default, was a sufficient declaration. But although this was held to be sufficient, the court suggested that it would be better to use a regular form for the entry of the default, and prescribed a form, with the suggestion that it be used in all cases on forfeited bail bonds thereafter arising.

In **Kentucky** the statutory remedy is a civil action, but no pleadings are required on the part of the state. Being a civil action, an appeal therein depends upon the amount in controversy. *Speckert v. Com.*, (Ky. 1901) 63 S. W. Rep. 752.

In **Massachusetts**. — See *Com. v. Abbott*, 168 Mass. 471.

Parties. — The state or the territory is the proper party plaintiff in an action upon a forfeited bail bond. *McColgan v. Territory*, 5 Okla. 567; *State v. Newson*, 8 S. Dak. 327.

242. 1. **Colorado.** — See Gen. Stat. Colo. (1883), § 969; Mills's Annot. Stat. Colo. (1891), § 1476; *Huston v. People*, 12 Colo. App. 271.

Illinois. — See Starr & Curt. Annot. Stat. Ill. (1896), c. 38, par. 491; *People v. Flynn*, 53 Ill. App. 493.

Massachusetts. — See Rev. Laws Mass., c. 169, § 9; *Norcross v. Crabtree*, 161 Mass. 55.

Missouri. — See Rev. Stat. Mo. (1899), § 2554; *State v. Taylor*, 136 Mo. 462.

New York. — See Code Crim. Pro. N. Y., § 597; *People v. Young*, 92 Hun (N. Y.) 373.

Pennsylvania. — See Act Pa. Dec. 9, 1783 (Bright. Purd. Dig. Laws Pa. 1894, pp. 909, 910); *Com. v. Fogelman*, 3 Pa. Super. Ct. 566.

Chancery Bond. — In an action upon a bail bond the court has a discretionary power to chancery the bond; but

this discretion can be exercised only upon an admitted liability, and not in rendering a judgment in a suit wherein the right of the state to recover at all is put in issue and found by the court in favor of the state. *State v. Connolly*, 72 Conn. 607.

2. *State v. Row*, 89 Iowa 581; *Hardesty v. State*, 5 Kan. App. 780; *State v. Clifford*, 124 Mo. 492; *Com. v. Fogelman*, 3 Pa. Super. Ct. 566; *State v. Dwyer*, 70 Vt. 96. See also *People v. Flynn*, 53 Ill. App. 493. But see *Com. v. Brandt*, 17 Pa. Co. Ct. 138. Compare *Norcross v. Crabtree*, 161 Mass. 55, wherein it was held that a remission of a forfeiture may be obtained by a motion in scire facias proceedings upon the forfeiture.

Remission by Governor. — *Williams v. Shelbourne*, 102 Ky. 579.

Motion — How Supported. — The motion may be supported by affidavit. *People v. Flynn*, 53 Ill. App. 493; *People v. Hobbs*, 46 Ill. App. 206.

Counter Affidavits. — *People v. Flynn*, 53 Ill. App. 493.

Objections to the Motion as Coming Too Late should be urged as a defense to such motion, and not against the filing or hearing thereof. *State v. Hayes*, 104 La. 461.

Authority of Prosecuting Attorney. — A prosecuting attorney has no power to remit a forfeiture. *State v. Clifford*, 124 Mo. 492.

3. *State v. Row*, 89 Iowa 581.

4. *People v. Flynn*, 53 Ill. App. 493; *People v. Hobbs*, 46 Ill. App. 206; *Hardesty v. State*, 5 Kan. App. 780.

Recapture by the State and arrest on the same charge is good cause for remission of forfeiture. *State v. Taylor*, 136 Mo. 462. Compare *State v. Martin*, 50 La. Ann. 1157; *State v. Martin*, 49 La. Ann. 752; in each of which cases it was held that the arrest of the accused and taking him into custody during the term at which his bond was forfeited, and the execution of an additional bond to secure his further appearance, were not sufficient grounds for a remission.

5. See *People v. Samuels*, (C. Pl. Gen. T.) 5 Misc. (N. Y.) 585, wherein it was held that the subsequent indictment and discharge of the accused is

- 243.** See note 1.
Conditions of Remission. — See note 2.
244. **Effect of Remission.** — See note 1.
Review on Appeal. — See notes 2, 3.
Discharge. — See note 4.
Setting Aside. — See note 5.
245. **10. Surrender — How Made.** — See note 3.

sufficient ground for the remission of a forfeiture of a recognizance for appearance during the preliminary examination.

Complainant Satisfied. — See *Com. v. Saloton*, 17 Pa. Co. Ct. 152.

242. 6. See *Com. v. Matyiewicz*, 17 Pa. Co. Ct. 154.

Louisiana Statute. — Appearance, trial, and conviction constitute sufficient ground for remission in Louisiana by virtue of Act No. 17, 1900. *State v. Hayes*, 104 La. 461. See also *State v. Martin*, 50 La. Ann. 1157; *State v. Schexneider*, 45 La. Ann. 1445. But this statute does not exclude other grounds of remission. *State v. Hayes*, 104 La. 461.

243. 1. **The Death of the Principal After Forfeiture** is not ground for the remission of the forfeiture. *People v. Rich*, 36 N. Y. App. Div. 60.

Sickness in Family of Accused. — That the accused was called away to attend a sick wife, and hence did not appear, is not sufficient ground for remission. *Com. v. Hart*, 17 Pa. Co. Ct. 148.

2. *Hardesty v. State*, 5 Kan. App. 780; *Morgan v. Jones*, 117 Mich. 59; *Meekins v. Sullivan County*, 154 Mo. 136; *State v. Taylor*, 136 Mo. 462; *People v. Young*, 92 Hun (N. Y.) 373; *Com. v. Matyiewicz*, 17 Pa. Co. Ct. 154; *Com. v. Saloton*, 17 Pa. Co. Ct. 152; *Com. v. Bruener*, 17 Pa. Co. Ct. 151.

244. 1. *Meekins v. Sullivan County*, 154 Mo. 136; *Davidson v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 488.

Action to Recover Money Paid — Sufficiency of Petition. — Where a surety seeks to recover money paid upon a forfeited recognizance upon the ground that the forfeiture has been remitted on account of the surrender of the principal and the payment of costs, the petition must allege such surrender and payment. *Meekins v. Sullivan County*, 154 Mo. 136.

Effect of Failure to Plead Remission. — Where, in an action on a recognizance, the sureties fail to plead a remission

by the governor, they cannot thereafter recover the money paid in satisfaction of the judgment in such action. *Williams v. Shelbourne*, 102 Ky. 579.

2. *People v. Young*, 92 Hun (N. Y.) 373. See also *People v. Rich*, 36 N. Y. App. Div. 60.

3. *People v. Flynn*, 53 Ill. App. 493; *People v. Hobbs*, 46 Ill. App. 206; *Hall v. Com.*, (Ky. 1898) 45 S. W. Rep. 458; *People v. Young*, 92 Hun (N. Y.) 373. See also *People v. Rich*, 36 N. Y. App. Div. 60.

4. **Discharge — How Pleased.** — Matters in discharge may be pleaded:

By Motion to Set Aside Judgment Nisi. — *State v. Crosby*, 114 Ala. 11.

In Bar to an Action on the bond or recognizance. *State v. Kyle*, 99 Ala. 256; *People v. McReynolds*, 102 Cal. 308.

General Issue. — It seems that in an action on a recognizance matters in discharge may be proved under the general issue. *State v. Kyle*, 99 Ala. 256.

5. Supporting the text: *State v. Fuller*, 128 Ala. 45. See also *Reed v. Police Ct.*, 172 Mass. 427; *People v. Russell*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 765, *affirmed* 67 N. Y. App. Div. 620; *Coleman v. State*, 32 Tex. Crim. 595.

Certiorari. — Where the proceeding in which the bail is taken is statutory, it seems that certiorari will lie to quash a forfeiture of the recognizance. *Reed v. Police Ct.*, 172 Mass. 427.

245. 3. **Necessity for Formal Commitment.** — An offer of the accused to submit himself to the sheriff to be taken into custody will operate as a surrender by the sureties, although the sheriff refuses to take the prisoner into custody because he has not received a formal commitment. *Jackson v. State*, 52 Kan. 249.

Where the Accused Is under Arrest for Another Crime his sureties may relieve themselves from liability by a formal offer to surrender. *Huston v. People*, 12 Colo. App. 271.

Readiness to Produce the Accused is insufficient. There must be an actual surrender. *State v. McMichael*, 50 La. Ann. 428.

Mere Presence of the Accused and his promise to perform the judgment which has been rendered against him will not operate as a surrender, where such a promise is not kept. *Com. v. Turpin*, 98 Ky. 9. See also *Gray v. Com.*, 100 Ky. 645, wherein it was held that where a change of venue granted by consent was, at the same term, set

aside for the want of a proper recognizance to appear at the new venue, the fact that the accused was present at the time of the making of the order changing the venue, and that he remained in court during that entire day, was not equivalent to a surrender, and that the recognizance might be forfeited for failure to appear after such order was set aside.

Statutory Methods of Surrender. — See Code Crim. Pro. Tex., art. 321; *Whitener v. State*, 38 Tex. Crim. 146.

BANKS AND BANKING.

251. 1. ACTIONS BY OR AGAINST BANKS — 1. Generally. — See note 1.

252. 2. Where Maintained. — See notes 2, 3.

3. By Whom Maintained. — See note 6.

253. See notes 1, 2.

251. 1. After Expiration of Charter. — A national bank after the expiration of the time limit of its charter continues to exist as a person in law, capable of suing and being sued, until its affairs and business are completely settled. *Farmers Nat. Bank v. Backus*, 74 Minn. 264.

Bank in Process of Liquidation. — In *Pritchard v. Barnes*, 101 Wis. 86, it was held that a bank corporation is not dissolved by going into liquidation, but still continues capable of suing and being sued. *Distinguishing Combes v. Keyes*, 89 Wis. 297.

In *Argues v. Union Sav. Bank*, 133 Cal. 139, it was held under a statute of *California* that an ordinary action for the collection of a debt cannot be maintained against an insolvent bank in process of liquidation.

See also WINDING UP CORPORATIONS.

252. 2. Action of Deceit. — An action by a shareholder of a national bank against its directors for violating the provisions of the National Banking Act can only be brought as an action at common law in the nature of an action of deceit. *Gerner v. Thompson*, 74 Fed. Rep. 125. See also *Utey v. Hill*, 155 Mo. 232.

Enforcement of Liability for Receiving Deposits after Insolvency. — A statute which imposes individual liability upon the officers of a bank for receiving deposits after the bank has become insolvent is penal, and a depositor's action on it is at law rather than in equity. *Eads v. Orcutt*, 79 Mo. App. 511. See also *Minton v. Stahlman*, 96 Tenn. 98.

3. A Suit to Enforce the Individual Liability of Stockholders of a national bank to creditors must be brought, under the Act of Congress June 30, 1876, in a

court of equity. *Williamson v. American Bank*, (C. C. A.) 115 Fed. Rep. 793.

Mismanagement by Directors of National Bank. — In *National Bank of Commerce v. Wade*, 84 Fed. Rep. 10, it was held that a suit in equity will lie under Rev. Stat. U. S., § 5239, by a national bank against its former directors for mismanagement of its affairs in loaning sums largely in excess of ten per cent. of its entire capital in violation of Rev. Stat. U. S., § 5200, and in making other loans without any security, because there is no adequate remedy at law.

6. Where the complaint alleged that the plaintiff was a corporation duly organized and with its main office and place of business at the city of W., it was held that the action could be maintained though its proper name was "Citizens' National Bank of W." *Citizens' Nat. Bank v. Great Western Elevator Co.*, 13 S. Dak. 1.

253. 1. The Cashier of a National Bank has presumptive authority to maintain an action for the collection of its papers. *Battersbee v. Calkins*, 128 Mich. 569.

2. The Assignee of an insolvent bank may sue the directors for mismanagement of its affairs. *Union Nat. Bank v. Hill*, 148 Mo. 380.

The Directors of an insolvent bank cannot institute proceedings for voluntary dissolution, after the superintendent has taken possession of its assets with an intention to have the attorney-general bring an action for its dissolution. *Matter of Murray Hill Bank*, 153 N. Y. 199.

One of Two Joint Makers of Note — Usury. — When two persons executed a note to a bank and the note was paid by one of them, it was held that

253. 4. Proper Parties. — See note 3.

254. See note 2.

5. Requisites of Complaint, Declaration, or Bill. — See note 3.

the other could not maintain an action to recover double the interest paid thereon under Rev. Stat. U. S., § 5198. *Lealos v. Union Nat. Bank*, 9 N. Dak. 60.

Executrix. — Nor can an executrix maintain an action for usury paid by her prior to her qualification as such on a note executed by the deceased. *Lealos v. Union Nat. Bank*, 9 N. Dak. 60.

A City may maintain an action to recover money deposited in a bank by its treasurer in his own name. *Farmers, etc., Banking Co. v. Red Cloud*, 62 Neb. 442.

253. 3. See in support of the text the following cases. *Rice v. Howard*, (Cal. 1902) 69 Pac. Rep. 77; *Gregory v. Merchants Nat. Bank*, 171 Mass. 67; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *McKeown v. Savings Bank*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 824; *Kavanagh v. Vermont Sav. Bank*, 68 Vt. 494. See also STOCK AND STOCKHOLDERS.

Joinder of Parties. — In an action against the directors of an insolvent bank for the mismanagement of its affairs when the complaint alleges that the defendants acting together committed the acts complained of, the defendants may be joined without an averment of a common design. *Solomon v. Bates*, 118 N. Car. 311.

In an action by a bank to determine in one suit conflicting claims to the proceeds of securities held by it, if the complaint omits to allege that a certain claimant asserts rights in a portion of the proceeds, such claimant may be joined in the action. *National Union Bank v. Kleinwort*, 15 N. Y. App. Div. 478.

Intervenors. — Where in accordance with the terms of an order creditors of a bank file their claims as intervenors, they become parties. *Palmer v. Zumbrota Bank*, 65 Minn. 90. See also INTERVENTIONS.

254. 2. Action Against Stockholders. — In an action against stockholders of an insolvent bank to recover the amount for which each, as a stockholder of the corporation, is liable to the creditors thereof, the bank and the stockholders may be joined as

defendants. *German Nat. Bank v. Farmers, etc., Bank*, 54 Neb. 593. See also *Williamson v. American Bank*, (C. C. A.) 115 Fed. Rep. 793.

In such an action it is not necessary to join as defendants those stockholders who had transferred their stock, though the transfers were not strictly in accordance with the articles of association. *Wadsworth v. Hocking*, 61 Ill. App. 156.

Nebraska Constitution. — Under Const. Neb., art. Miscellaneous Corporations, § 7, which provides that "every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder," such liability must be enforced by or on behalf of all the creditors. *Hastings v. Barnd*, 55 Neb. 93; *Farmers' L. & T. Co. v. Funk*, 49 Neb. 353.

3. Organization of Corporation. — An allegation that the plaintiff is a national banking corporation incorporated under and by virtue of the national banking laws is substantially an allegation that it has been duly organized. *Gill v. First Nat. Bank*, (Tex. Civ. App. 1898) 47 S. W. Rep. 751. See also *Denver First Nat. Bank v. Schmidt*, 6 Colo. App. 216.

Amendment. — In *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255, it was held that in an action by a national bank, after naming the plaintiff in the declaration and alleging it to be a corporation, the plaintiff should not be allowed to amend by adding the words "a national bank duly chartered and organized under the laws of the United States of America, in the city of Charleston, county of K. and state of West Virginia," where the existence of the corporation was not denied under oath.

Private Act of Organization Made Public by Amendment. — In an action by or against a banking corporation, in which it is designated by its corporate name, it is not necessary to allege the creation or existence of the corporation under a public act, where the act under

255. See note 2.**Nonpayment of Check.** — See note 3.**Recovery of Deposits.** — See note 4.

which it was incorporated has been made public by amendment. *Parker v. Carolina Sav. Bank*, 53 S. Car. 583.

255. 2. *Morris v. Eufaula Nat. Bank*, 106 Ala. 384; *Argues v. Union Sav. Bank*, 133 Cal. 139; *Hobbs v. Chemical Nat. Bank*, 97 Ga. 524; *Wichita Nat. Bank v. Weeks*, 5 Kan. App. 694; *Pieratt v. Young*, (Ky. 1899) 49 S. W. Rep. 964; *Gores v. Elliott*, 108 Wis. 465.

For Good Complaints see *American Sav., etc., Assoc. v. Farmers', etc., State Bank*, 65 Minn. 139; *Tecumseh Nat. Bank v. Best*, 50 Neb. 518; *Tate v. Bates*, 118 N. Car. 287; *Citizens' Nat. Bank v. Great Western Elevator Co.*, 13 S. Dak. 1; *Howard v. Seattle Nat. Bank*, 10 Wash. 280.

Misjoinder. — In *Foster v. Abingdon Bank*, 88 Fed. Rep. 604, it was held not to be a misjoinder to charge the president of a bank with making false and fraudulent representations inducing deposits, and the directors, of whom the president was one, with negligence and failure to discharge their duties. See also *Tate v. Bates*, 118 N. Car. 287; *Solomon v. Bates*, 118 N. Car. 311.

3. *Eichner v. Bowery Bank*, 24 N. Y. App. Div. 63, reversing 20 Misc. (N. Y.) 90.

Action by Depositor — Special Damages. — Under a declaration which avers that the plaintiff was engaged in the mercantile business and was injured by the wrongful act of his banker in failing and refusing to pay checks drawn upon an ample deposit, there may be recovered substantial damages without averment or proof of special damages. And in such an action it is not essential for the plaintiff to aver that the defendant did not have a lien upon the deposit for indebtedness due to himself, as such fact is a matter of defense. *James v. Continental Nat. Bank*, 105 Tenn. 1.

4. A petition which alleges that a certificate of deposit was duly issued and that the plaintiff was the owner, and that it was duly presented for payment and payment refused, states a cause of action. *Seven Valleys Bank v. Wise*, 61 Neb. 880.

Prayer for Discovery. — In an action
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to recover a deposit, a prayer for a discovery will not invalidate the petition where there is also a prayer for general relief. *Coleman v. Waxahachie First Nat. Bank*, 17 Tex. Civ. App. 132.

Requisite Particularity. — Where a petition for the recovery of a deposit alleges want of knowledge of the facts by the plaintiff and that all the matters were in the possession of the defendants, it sufficiently excuses the failure of the plaintiff to state with certainty the date of each deposit and the amount of the same. And under such circumstances it is not necessary to show that the plaintiff drew a check for the amounts and that payment thereof was refused. *Coleman v. Waxahachie First Nat. Bank*, 17 Tex. Civ. App. 132.

Averment of Single Cause of Action. — In an action to recover money paid out on a forged check, an allegation that the plaintiff drew the check to the order of the payee, and that after the issuing and payment of the check the plaintiff learned that the payee was a fictitious person, is good on motion to require the plaintiff to elect, since there are no two matters between which an election can be made. *Building, etc., Co. v. Bank*, 3 Ohio Dec. 689.

Alleging Fraud of Directors. — In an action against the directors of an insolvent bank for loss of deposits occasioned by their mismanagement, in charging deceit it is sufficient to allege that the bank being insolvent, the defendants caused false and fraudulent statements of its condition to be published whereby the plaintiff was deceived and made a deposit for which he sues. *Solomon v. Bates*, 118 N. Car. 311.

Alleging Receipt of Deposit by Directors. — In an action against the directors of a bank for receiving a deposit during insolvency, whereby the plaintiff lost the amount of the deposit, it is not necessary to allege that the defendants personally received the deposit or connived at the receipt of it, but it is sufficient to allege that the teller received the deposit acting on the authority of the directors. *Baxter v. Coughlin*, 70 Minn. 1.

Insufficient Allegations as to Fraud and Mismanagement. — In an action based

256. Failure to Collect Note. — See note 1.Duplicity. — See note 3. See also **DUPLICITY**.

on M. & V. Code Tenn., § 2507 (Annot. Code Tenn. 1896, § 3242), which makes directors liable in cases where they have been guilty of intentional fraud and wilful mismanagement, it is not sufficient to allege that the defendants, "having due notice and knowledge of such facts and circumstances as, by ordinary diligence and business skill, would have shown them its true financial condition, which was that of insolvency," did continue to receive deposits, etc. *Minton v. Stahlman*, 96 Tenn. 98.

Averment of Bank's Insolvency. — When it is alleged that the plaintiff deposited money with the bank, and that the bank afterwards suspended and was "wholly insolvent," the complaint is sufficient without alleging that the bank has no assets or that no part of the debt can be recovered from it. *Solomon v. Bates*, 118 N. Car. 311.

Fraud and Mistake. — A petition stating that the plaintiff deposited in the defendant bank a promissory note, but that such note was not credited in its proper place, and that afterwards a sum equal to the face of the note was deposited in the bank to plaintiff's credit, but that he did not know of such deposit and was informed by the president of the bank that no such payment had been made, and that in his final settlement with the bank he was not credited with one of the sums, charges both fraud and mistake. *Cole v. Charles City Nat. Bank*, 114 Iowa 632.

Objection Waived by Failure to Demur. — In *Cole v. Charles City Nat. Bank*, 114 Iowa 632, it was held that as no demurrer was filed, an objection that no demand was made nor check or receipt tendered was waived.

Pleading and Proof — Variance. — In an action on a certificate of deposit it has been held to be no material variance between an allegation of a partnership between the defendant and S. which continued to the death of S. and proof of prior dissolution by consent. *Cornwall v. McKinney*, 12 S. Dak. 118.

Amendment. — In an action *ex contractu* against the successors of a bank to recover on a deposit made with the bank prior to its liquidation, an amendment to the complaint setting up fraud constitutes a cause of action against

them. *Buerstetta v. Tecumseh Nat. Bank*, 57 Neb. 504.

Joinder of Causes of Action. — In an action against the directors of a bank for the loss of a deposit occasioned by their mismanagement, it is held that a count charging that they failed to do their duty as required by law may be united with counts charging them with fraud and deceit. *Solomon v. Bates*, 118 N. Car. 311.

256. 1. Failure to Collect Check. — In an action against a bank for failing to collect a check, the complaint must allege that the plaintiff suffered damage from such neglect. *Morris v. Eufaula Nat. Bank*, 106 Ala. 383.

Failure to Collect Certificate of Deposit. — In an action against a bank for neglecting to collect a certificate of deposit by failing to present it at the proper time and by surrendering it to the payor without collecting the amount due thereon, where the complaint does not allege that the defendants could have collected the amount of the certificate after receiving it for collection, or that the surrender of the certificate prevented such collection, or that the payor thereafter refused to surrender it, and does not show that the alleged negligence has caused the plaintiff to lose his debt, it is held to be defective. *Farmers' Bank, etc., Co. v. Newland*, 97 Ky. 464.

Loss of Transfers of Land Certificates. — In an action for the loss of transfers of land certificates sent the defendant for collection, when it appeared from the complaint that the transfers were held by the plaintiff as collateral security for a debt due from one C. and that the defendants were instructed to deliver them to C. upon the payment by him of a certain sum for each transfer, an allegation that defendant failed to use due diligence in safely keeping such transfers sufficiently charges the defendant with a breach of the duty incurred by the receipt of a special deposit. *Birmingham First Nat. Bank v. Newport First Nat. Bank*, 116 Ala. 520.

3. A complaint in an action for the loss of a deposit may allege that the bank received a deposit as bailee and also that it received it during and with knowledge of insolvency. *Higgins v. Hayden*, 53 Neb. 61.

256. [Answer. — In the note hereto will be found rulings as to the requisites and sufficiency of answers in actions against banks. See note 3a.]

II. OFFENSES AGAINST BANKS — 1. False Entries. — See note 4.

257. See notes 1, 2.

256. 3a. Recovery of Deposit. — In an action by a city to recover money deposited in a bank by the city's former treasurer, an answer admitting that credit has been given for the amount claimed as money received by it, but alleging that no money had been deposited, only warrants that were worthless, and making no offer to return the warrants or to account for them in any way, is demurrable. *Tacoma v. German-American Safe Deposit, etc., Bank*, 15 Wash. 294.

Suit on Note. — In *Smith v. Marietta First Nat. Bank*, 115 Ga. 608, it was held that in a suit on a promissory note against the maker and indorser, an answer by the latter that the bank had allowed the maker to sell stock in the bank upon which the bank had a lien "under the laws governing national banks," without requiring the payment of the note, and that the increase in the risk of the surety released him, does not state a good defense.

Loss of Transfers of Land Certificates. — In an action against a bank as bailee for loss of transfers of land certificates sent the bank for collection, an answer which does not negative the entire cause of action but only that part which claims damages occasioned by the necessity of suits to establish titles to land, is bad on demurrer. *Birmingham First Nat. Bank v. Newport First Nat. Bank*, 116 Ala. 520.

Where Bank Is Garnished. — In *Ragsdale v. Groos*, (Tex. Civ. App. 1899) 51 S. W. Rep. 256, a bank was garnished in order to reach funds of one S., and it was alleged in the answer that the bank was not indebted to S. but to Mrs. S. It was held that such answer was not demurrable, since it did not appear from it that Mrs. S. was the wife of S., and consequently it was not shown that the property was community property.

Failure to Collect Draft. — An answer in an action against a bank for the nonperformance of its duty in the collection of a draft, setting up the custom followed by it in the collection of other drafts sent it by the plaintiff against

the drawer, is defective, in the absence of an averment that plaintiff constituted the defendant its continuing agent. *Citizens Nat. Bank v. Greensburg Third Nat. Bank*, 19 Ind. App. 69.

4. Checks Drawn by Persons Having No Funds. — An indictment under Rev. Stat. U. S., § 5209, for making false entries in the books of a bank because the receiving teller received and credited checks drawn on the bank by parties who had no funds therein, should set forth a description of the checks, with an averment of the reasons why they were false or valueless. *Dow v. U. S.*, (C. C. A.) 82 Fed. Rep. 904.

Separate Counts. — An indictment containing several counts against an officer of a national bank, under Rev. Stat. U. S., § 5209, charging several distinct offenses by making false entries at different times in the books of the bank, is sufficient under Rev. Stat. U. S., § 1024. *U. S. v. Berry*, 96 Fed. Rep. 842. See also *Peters v. U. S.*, (C. C. A.) 94 Fed. Rep. 127; *U. S. v. Peters*, 87 Fed. Rep. 984.

257. 1. Allegations Concerning Report. — In *Dorsey v. U. S.*, (C. C. A.) 101 Fed. Rep. 746, a reference to the report by its date and a specification of the particular false statement was held to be sufficient.

In *Cochran v. U. S.*, 157 U. S. 286, it was held that the report need not be described with technical accuracy; and that it is not necessary to allege that it was verified by the president or cashier, or attested by the signatures of the directors.

Exhibiting False Book. — An indictment under Penal Code N. Y., § 592, which makes it a crime for an officer of a corporation knowingly to exhibit a false book to any public officer authorized by law to investigate its affairs, "with intent to deceive such officer in respect thereto," is not bad for merely omitting the words "in respect thereto." *People v. Helmer*, 154 N. Y. 596.

Averment that Entry was "Caused" — Necessity to Request a Bill of Particulars. — In *McKnight v. U. S.*, (C. C. A.) 97

258. 2. Embezzlement, Abstraction, Wilful Misapplication. — See notes 1, 2, 3. See also EMBEZZLEMENT.

Fed. Rep. 208, the indictment charged that a false entry of a deposit was caused by the defendant without any money having in fact been deposited, as he well knew; that with this knowledge, and with intent to deceive and defraud, he caused the entry to be put upon the books. It was objected that the indictment was not sufficiently exact to charge the defendant with having "caused" the entry to be made without setting forth the particular mode and manner by which this entry was "caused." It was held, however, that in the absence of the application for a bill of particulars the indictment was sufficient.

Variance. — An information charging that the defendant made, or caused to be made, a false entry in the account of an individual with the bank on its books is not sustained by proof that such entry was in an account of such bank with such individual as township treasurer; and the variance is rendered none the less fatal by the fact that in such account there was included private money of the individual referred to as treasurer. *Williams v. State*, 51 Neb. 630.

257. 2. Indictment for Aiding and Abetting — Intent. — In an indictment charging one with aiding and abetting a cashier of a bank in making a false entry under Rev. Stat. U. S., § 5209, it is necessary after alleging that the cashier made the false entry with an intent to injure, defraud, and deceive, to allege that the one who aided and abetted the act did so with intent to injure, defraud, and deceive. *U. S. v. Berry*, 85 Fed. Rep. 208.

Charge that Cashier Procured Making of False Entries. — An indictment against a cashier of a bank, which charges that he caused, directed, and procured false entries to be made by clerks under his control, charges him as principal. *Peters v. U. S.*, (C. C. A.) 94 Fed. Rep. 127.

259. 1. Embezzlement. — A count drawn under Rev. Stat. U. S., § 5209, for aiding and abetting the misapplication of the funds of a bank, which distinctly charges the principal with embezzlement whereby the accused obtained moneys and funds of the bank and converted the same to his own use, with ample allegations of

fraudulent intent and purpose, is good on a motion in arrest under Rev. Stat. U. S., § 1024, which provides that where an indictment is so attacked matters of form are immaterial. *U. S. v. McClure*, 107 Fed. Rep. 268. See also *Breese v. U. S.*, (C. C. A.) 106 Fed. Rep. 680; *State v. Beach*, 147 Ind. 74, holding that where an indictment, under Burns's Annot. Stat. Ind. (1894), § 2031, charges embezzlement in the language of the statute, or language equivalent thereto, it is sufficient.

Conversion to His Own Use. — A count against an officer of a national bank charging the use of certain funds of the bank under his care and control to bribe city aldermen for wrongful purposes of his own, with an intent to defraud the bank, sufficiently shows that he converted the funds to his own use. *McKnight v. U. S.*, (C. C. A.) 97 Fed. Rep. 208.

In *Louisiana* an indictment charging a bank president with embezzlement, under Voorhies's Rev. Laws La. (1882), § 907, making it a crime for any president or other officer or person of any bank chartered by the state wilfully to embezzle or convert to his own use any money belonging to the bank, or deposited therein, need not allege that the property embezzled came into his hands in the course of employment or by virtue of his office. *State v. Nicholls*, 50 La. Ann. 699, *distinguishing Moore v. U. S.*, 160 U. S. 270.

Pleading and Proof. — There is no fatal variance between an allegation that a private banker embezzled money received by him as a special deposit, and proof that he was a member and manager of the firm that received such deposit. But an indictment that charges the defendant with having embezzled money received by him is not sustained by evidence that his firm received a check, forwarded it for collection, was credited therefor as a general depositor, and checked out the credit in the usual course of business, but that no part of the money was ever received by him or his firm. *Carr v. State*, 104 Ala. 43.

2. President and Agent. — An indictment that charges that a person misapplied the funds as president, director, and agent is not bad for duplicity.

259. 1. Other Offenses. — See note 1.

Jewett v. U. S., (C. C. A.) 100 Fed. Rep. 832, *affirming* 84 Fed. Rep. 142.

258. 3. Rieger v. U. S., (C. C. A.) 107 Fed. Rep. 916.

Necessity to Allege that Defendant "Wilfully Misapplied." — In *Batchelor v. U. S.*, 156 U. S. 426, an indictment under Rev. Stat. U. S., § 5209, for the wilful misapplication of funds of the bank, was held to be defective in that it alleged that the defendant "wilfully misapplied" the funds of the bank, but did not state acts that amounted to a wilful misapplication of the funds.

Discounting Note Known to Be Worthless. — An allegation that defendant misapplied "certain moneys, funds, and credits," with a subsequent statement that he committed the offense by discounting a note which he knew to be worthless, is not bad for want of certainty. *Rieger v. U. S.*, (C. C. A.) 107 Fed. Rep. 916.

Averment that Banking Was Done by Owner of Funds. — An indictment charging that the defendant as agent of a national banking association misapplied the funds thereof, need not allege that the association carried or was carrying on a banking business. *Jewett v. U. S.*, (C. C. A.) 100 Fed. Rep. 832.

Description of Note to Which Embezzled Funds Were Applied. — An indictment against an officer for misapplication of the funds of a bank by discounting for his own benefit a note that was known at the time to be utterly worthless need not set out the note *in hac verba*. *Rieger v. U. S.*, (C. C. A.) 107 Fed. Rep. 916.

259. 1. Illegal Certification of Check. — *Potter v. U. S.*, 155 U. S. 438, wherein the indictment was held to be sufficient.

Receiving Deposit During Insolvency. — In *State v. Winstandley*, 154 Ind. 443, it was held that an indictment drawn under Burns's Annot. Stat. Ind. (1894), § 2031, against the president and cashier, for receiving a deposit during the insolvency of the bank, with knowledge of such insolvency, must aver that the property came into the defendants' possession and was held by them as such officers. *Citing* 7 ENCYC. OF PL. AND PR. 422. See also *State v. Winstandley*, 155 Ind. 290.

An information under Gen. Stat. Kan., c. 100, § 104, for the receipt of a deposit during insolvency need not

state that loss accrued. *State v. Myers*, 54 Kan. 206.

In *Meadowcroft v. People*, 163 Ill. 56, it was held that such an indictment need not specifically allege that the deposit was received with an intent to defraud, nor that the defendants received it as bankers and as a general bank deposit, and that where the indictment was against persons doing a banking business under a firm name, it need not charge that the firm was insolvent.

An indictment that states that the deposit was received from a person named sufficiently shows who was injured and the ownership of the deposit. *State v. Elfert*, 102 Iowa 188.

Necessary to Allege Bank's Insolvency. — In *State v. Bairdwell*, 72 Miss. 535, it was held that an indictment under Annot. Code Miss., § 1089, for receiving a deposit during insolvency, though following the precise language of the statute is insufficient if it does not allege that the bank was actually insolvent.

Value of Deposit. — In *Brown v. People*, 173 Ill. 34, it was held that the indictment must state the value of the deposit received.

"Checks and Drafts." — It was held that where the indictment charged that checks were received, such charge was good on motion to quash, though the statute (Laws Kan. 1891, c. 43, § 16) under which the indictment was drawn does not use the word "check." *State v. Warner*, 60 Kan. 94.

Duplicity. — An information under Mills's Annot. Stat. Colo. (1891), § 222, that charges that a bank president received and assented to the reception of a deposit with knowledge of the bank's insolvency, is not bad for duplicity, *McClure v. People*, 27 Colo. 358; nor is an indictment charging that a bank president accepted deposits and connived at their reception, *State v. Easton*, 113 Iowa 516.

In *State v. Warner*, 60 Kan. 94, it was held that charges of separate receipts from different persons may be joined.

Under Missouri Statutes. — Under Rev. Stat. Mo., § 3581, providing that it shall be a crime for any cashier of a bank to assent to the creation of debts by such banking institution after he shall have had knowledge of its insol-

260. III. JURISDICTION OF NATIONAL BANK CASES — 1. State Courts. — See notes 1, 2.

261. Embellishment. — See note 1.

Attachment and Injunctions. — See notes 4, 5.

262. 2. Federal Courts. — See notes 1, 2.

veney, where the indictment charges that the cashier of a bank did assent to the creation of a debt, to wit, a certificate of deposit, it was held that it charged as assenting to a debt contemplated by the statute. *State v. Sattley*, 131 Mo. 464.

Under Texas Statute. — An indictment under Acts 25th Leg. Tex., p. 130, § 1, providing that if any owner of any private bank shall receive a deposit during its insolvency he shall be punished, should allege that the bank was a private bank and give the name of the owner thereof. *Roby v. State*, 41 Tex. Crim. 152.

Pleading and Proof. — In a prosecution for the receipt of deposits during insolvency, under Stat. Wis., § 4541, where the information alleges that the money was received for safekeeping, and the proof shows a general deposit, it was held to be a fatal variance. *Koetting v. State*, 88 Wis. 502.

An indictment charging that the defendant received a deposit is not sustained by proof that he assented to the reception thereof. *State v. Wells*, 134 Mo. 238.

Making False Statement of Condition — Venue. — Where a false statement of the condition of a state bank is made in one county and is then transmitted to the state bank commission in another, the jurisdiction of the offense is in either county. *State v. Mason*, 61 Kan. 102.

260. 1. Venue of Action. — *Groos v. Brewster*, (Tex. Civ. App. 1900) 55 S. W. Rep. 590, wherein it was held that an action against a national bank and another party defendant was improperly brought in the county in which the bank was located rather than the county in which the other party defendant resided, because no liability on the part of the bank was shown.

2. Mismanagement of Bank's Affairs by Directors. — A state court has jurisdiction of an action to enforce the liability of directors of a national bank for mismanagement of its affairs. *Zinn v. Baxter*, 65 Ohio St. 341.

Action to Compel Directors to Declare Dividend. — A state court has jurisdiction

of an action to compel the directors of a national bank to declare a dividend. *Hiscock v. Lacy*, (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 578.

State Supreme Court. — A state Supreme Court has not original jurisdiction of an action to determine the *bona fides* of the conveyances of the property of the former proprietor of a state bank. *State v. State Bank*, 40 Neb. 192.

261. 1. But in *State v. Bardwell*, 72 Miss. 535, it was held that a state court has jurisdiction of a prosecution against a national bank officer for receiving a deposit during and with knowledge of the bank's insolvency, under a statute (Annot. Code Miss., § 1089) providing for that purpose, there being no federal statute that declares such an act to be an offense.

4. Rev. Stat. U. S., § 5242; *Van Reed v. People's Nat. Bank*, 67 N. Y. App. Div. 75. See also *Dennis v. Seattle First Nat. Bank*, 127 Cal. 453, wherein it was held that no attachment can issue at any time from a state court against a national bank. And in *Willard Mfg. Co. v. Merchants' Nat. Bank*, 130 N. Car. 609, it was held that no attachment can be brought against a national bank in a state court.

Suit in Equity and Attachment Distinguished. — In *Searles v. Smith Grain Co.*, 80 Miss. 688, it was held that a suit in equity in attachment against a bank and another for a breach of contract and for a return of money by the bank, is not an attachment within Rev. Stat. U. S., § 5242.

5. United States Statutes. — In *Freeman Mfg. Co. v. National Bank of Republic*, 160 Mass. 398, it was held that Rev. Stat. U. S., § 5242, providing that a state court has no power to issue a preliminary injunction against a national bank, is not repealed by the Acts July 12, 1882, § 4. March 3, 1887, § 4. and August 13, 1888, § 4.

262. 1. By the Act of Congress, July 12, 1882 (22 U. S. Stat. at L. 163, § 4), national banks were deprived of the right to sue in the federal courts, hence, if the declaration fails to show

diverse citizenship and the record nowhere supplies the omission, a national bank situated in another state cannot sue in the federal court. *Thomas v. Nat. Bank*, (C. C. A.) 106 Fed. Rep. 438.

262. 2. In *National Bank of Commerce v. Wade*, 84 Fed. Rep. 10, it was held that a suit by a national bank against its officers for loaning money in excess of ten per cent. of its entire capital, in violation of Rev. Stat. U. S., § 5200, and for making other loans without personal security, in which a recovery was sought under Rev. Stat. U. S., § 5239, is one arising under the laws of the United States, and involves a construction thereof, and that therefore a federal court has jurisdiction in such a case.

Where Comptroller Has Made Assessment on Stock. — Upon the refusal of an executrix to recognize an assessment of the comptroller on bank stock of the deceased, it is within the jurisdiction of a federal court to fix the amount due on such stock, even though a probate court is administering the estate. *Zimmerman v. Carpenter*, 84 Fed. Rep. 747.

Where Money Is Deposited in a Bank by the Order of the United States Circuit Court, no other court has jurisdiction of any question pertaining to the disposition of the money which is held by that court, and claims against the bank for such money are to be made in that court and should be heard and determined there. *Gregory v. Merchants Nat. Bank*, 171 Mass. 67.

BASTARDY.

267. I. NATURE OF PROCEEDINGS. — See note 1.

268. See notes 1, 2.

269. II. INSTITUTION OF PROCEEDINGS — 1. Who May Prosecute — a. MOTHER. — See note 1.

270. Residence. — See note 1.

271. Infancy. — See note 2.

b. TOWN AUTHORITIES. — See note 3.

267. 1. Arkansas. — State *v.* Blackburn, 61 Ark. 407.

Illinois. — Gehm *v.* People, 87 Ill. App. 158; Rose *v.* People, 81 Ill. App. 128.

Indiana. — Dehler *v.* State, 22 Ind. App. 383; State *v.* Carlisle, 21 Ind. App. 438.

Massachusetts. — Conefy *v.* Holland, 175 Mass. 469.

Michigan. — People *v.* Cole, 113 Mich. 83.

Nebraska. — *In re* Walker, 61 Neb. 803; Stoppert *v.* Nierle, 45 Neb. 105; Munro *v.* Callahan, 41 Neb. 849; Priel *v.* Adams, (Neb. 1902) 91 N. W. Rep. 536.

New York. — People *v.* McFarline, 50 N. Y. App. Div. 95; Simis *v.* Alwang, 48 N. Y. App. Div. 529.

Oklahoma. — Matter of Comstock, 10 Okla. 299; Bell *v.* Territory, 8 Okla. 75.

268. 1. Vail *v.* State, 1 Penn. (Del.) 8; Com. *v.* Bostwick, 17 Pa. Co. Ct. 9.

In North Carolina the proceeding is now held to be criminal in nature. State *v.* White, 125 N. Car. 674; State *v.* Bruce, 122 N. Car. 1040; State *v.* Ballard, 122 N. Car. 1024; State *v.* Nelson, 119 N. Car. 797; State *v.* Ostwalt, 118 N. Car. 1208; State *v.* Wynne, 116 N. Car. 981. But see *dissenting* opinion of Clark, J., in State *v.* Ballard, 122 N. Car. 1024, *citing* 3 ENCYC. OF PL. AND PR. 267, to the effect that by the weight of authority elsewhere bastardy is recognized as a civil proceeding.

2. Alabama. — Lusk *v.* State, 129 Ala. 1; Bell *v.* State, 124 Ala. 94; Williams *v.* State, 117 Ala. 199; Miller *v.* State, 110 Ala. 69; *Ex p.* Charleston, 107 Ala. 688.

Florida. — See Bond *v.* State, 34 Fla. 45.

Illinois. — Waterloo *v.* People, 170 Ill. 488.

Kansas. — State *v.* Baker, (Kan. 1902) 69 Pac. Rep. 170.

South Dakota. — State *v.* Scott, 7 S. Dak. 619 [*citing* 3 ENCYC. OF PL. AND PR. 268]; State *v.* Knowles, 10 S. Dak. 471; State *v.* Hughes, 8 S. Dak. 338; State *v.* Bunker, 7 S. Dak. 639.

Wisconsin. — Barry *v.* Niessen, (Wis. 1902) 90 N. W. Rep. 166.

269. 1. Laney *v.* State, 109 Ala. 34; Johnson *v.* State, 55 Neb. 781.

Effect of Marriage Subsequent to Delivery While Single. — Parker *v.* Notcomb, (Neb. 1902) 91 N. W. Rep. 395.

270. 1. Illinois. — La Plant *v.* People, 60 Ill. App. 340.

Massachusetts — Bona Fide Residence. — The mother must be a resident of the state at the time she institutes the proceedings, and it is immaterial how long she has lived within the state or when or where the child was begotten or born, provided the facts show that her intention is to make such residence *bona fide* and permanent. Davis *v.* Carpenter, 172 Mass. 167.

Nebraska. — Clark *v.* Carey, 41 Neb. 780.

271. 2. Alabama. — Miller *v.* State, 110 Ala. 69, *distinguishing* Hanna *v.* State, 60 Ala. 100.

Indiana. — Dehler *v.* State, 22 Ind. App. 383.

Massachusetts. — Conefy *v.* Holland, 175 Mass. 469.

3. New York — Prosecution Must Be by Public Authorities. — The mother cannot institute a bastardy proceeding against the father nor the father

- 272.** 2. When Proceedings May Be Commenced. — See note 3.
 3. Place of Institution. — See notes 5, 6.
273. See note 1.
 4. Who May Entertain. — See note 2.
274. See note 1.
 5. Requisites of Complaint. — See notes 2, 3.
275. See notes 1, 2.

against the mother, and in case such a proceeding is instituted against either by any one other than the officials authorized by the statutes, the magistrates acquire no jurisdiction. *People v. Shulman*, 8 N. Y. App. Div. 514, and cases cited.

One Overseer of the Poor of the town may, without consulting with the other overseer, if there be two, institute bastardy proceedings. *People v. Ogden*, 8 N. Y. App. Div. 464, *overruling* by implication *Burke v. Burpo*, 75 Hun (N. Y.) 568.

272. 3. In North Carolina the proceedings may be instituted at any time within three years next after the birth of the child. *State v. Perry*, 122 N. Car. 1043; *State v. Hedgepeth*, 122 N. Car. 1039.

5. In Maryland the complaint may be laid before a justice in any county, but a copy of the papers must be transmitted to and the case prosecuted before a justice of the county where the defendant resides; and where the original papers are transmitted instead of the copies, as required by statute, the receiving magistrate acquires no jurisdiction. *State v. Chaney*, 93 Md. 71.

6. Alabama. — *Laney v. State*, 109 Ala. 34.

273. 1. *Ruff v. Kebler*, 62 N. J. L. 186.

Nebraska. — The prosecution may be had in the county of the complainant's actual residence and in which the child is liable to become a public charge, notwithstanding the complainant may have a legal settlement in another county or state. *Clark v. Carey*, 41 Neb. 780.

In New York City the commissioner of charities is required to commence bastardy proceedings when a woman actually within the city is delivered of a bastard or is pregnant of a child likely to become a charge upon the city, even though her legal residence be elsewhere; and her removal after the institution of the proceedings in

the Court of Special Sessions to another county within the city does not divest the court of jurisdiction. *Keller v. Mertens*, 37 N. Y. App. Div. 497.

And, where the proceedings are not instituted until after delivery, it must appear that the child was born in the county or the city of New York. *Keller v. Cleary*, 62 N. Y. App. Div. 609, 70 N. Y. Supp. 899.

Pennsylvania — *Place of Birth of Child.* — In Pennsylvania, where the bastardy statutes are penal and the prosecution is by indictment, it seems that the proceedings should be instituted in the county where the child is born. *Com. v. Davidheiser*, 20 Pa. Co. Ct. 200.

And when the child, though begotten within the state, is born in a foreign jurisdiction, there can be no conviction for bastardy. *Com. v. Bostwick*, 17 Pa. Co. Ct. 9.

2. *Laney v. State*, 109 Ala. 34.

How Jurisdiction Acquired. — A justice of the peace obtains jurisdiction over a defendant under the bastardy act by the filing of the statutory complaint, the issuance of a warrant, and the execution thereof. *In re Walker*, 61 Neb. 803.

274. 1. See *Camp v. Carroll*, 73 Conn. 247. See also *infra*, XI. 1. a. *What Courts Have Jurisdiction*, note 4.

Notaries Public in Alabama have jurisdiction to entertain complaints in bastardy under the state constitution. *Bell v. State*, 124 Ala. 94; *Douglass v. State*, 117 Ala. 185.

Nebraska — *County Judge.* — *Stoppert v. Nierle*, 45 Neb. 105.

2. In Alabama the complaint may be oral or written. *Laney v. State*, 109 Ala. 34.

3. **Who May Administer Oath.** — *Mooney v. People*, 96 Ill. App. 622.

275. 1. **Sufficient Allegation of Singleness** — *Allegation of Singleness Prior to Delivery.* — *Thomas v. State*, 37 Fla. 378. *Allegation of Singleness at Time of Delivery.* — A complaint under the

276. Time and Place of Begetting Child. — See note 2.

277. Accusation of Defendant. — See note 3.

6. Parties to Prosecution. — See note 7.

278. See note 1.

III. EXAMINATION OF COMPLAINANT BY MAGISTRATE. —

See note 3.

IV. WARRANT FOR ARREST. — See note 4.

280. See note 1.

281. VI. DETERMINATION OF MAGISTRATE. — See note 2.

282. VII. SECURITY FOR APPEARANCE — 1. When Required. —

See note 1.

Bastardy Act, made after delivery, should show that the complainant was an unmarried woman at the time of the birth of the child, and such an allegation made merely by way of recital at the beginning of the complaint is insufficient. Nor is the defect cured by an allegation that the child was born a bastard, as a bastard may be born during wedlock. *Eshelman v. People*, 52 Ill. App. 621.

275. 2. *Laney v. State*, 109 Ala. 34.

Statement of Legal Conclusion. — The averment, "which said child when born will in law be deemed and held to be a bastard," does not state merely a conclusion of law when it is supported by the statement that complainant is a single woman. *Thomas v. State*, 37 Fla. 378.

Birth of Child After Filing of Complaint.

— A complaint that the relator "is now pregnant with child, which, if born alive, will be illegitimate," is sufficient without amendment to permit evidence of the subsequent birth of the child alive. *State v. Harris*, 112 Iowa 589.

276. 2. **Failure to State Time and Place.** — The fact that time and place are not given does not make the complaint subject to the objection that it does not state facts sufficient to constitute a cause of action. *State v. Brathovde*, 81 Minn. 501.

277. 3. See *Palmer v. McDonald*, 92 Me. 125; *State v. Tipton*, 15 Mont. 74.

7. *State v. Bunker*, 7 S. Dak. 639.

278. 1. **Mother Not Party to Action.** — Although the action must be prosecuted in the name of the state on the relation of the prosecuting witness, yet the latter is not a party to the proceeding. *Dehler v. State*, 22 Ind. App. 383. See also *Com. v. Allen*, 2 Pa. Super. Ct. 175.

3. See *Simis v. Alwang*, 61 N. Y. App. Div. 426, holding that the magistrate is not required to take the depositions of the complainant and witnesses in writing.

A Statutory Requirement that the Examination Be Signed by the complainant is directory merely, and the absence of the signature is not a fatal defect. *Miller v. Busick*, 56 Ohio St. 437.

4. *Laney v. State*, 109 Ala. 34.

280. 1. In New York the warrant must be returned before the magistrate who issues it, and such magistrate has sole jurisdiction to grant an adjournment and require a bond as a condition thereof. *People v. Higgins*, 151 N. Y. 570.

281. 2. *Laney v. State*, 109 Ala. 34.

In Nebraska there is no provision for the determination by the magistrate of the guilt or innocence of the accused. Unless the latter shall give bond for the support of the child the magistrate can only take security for his appearance at the next term of the District Court. *Johnson v. State*, 55 Neb. 781.

Sufficiency of Adjudication. — An indorsement by the magistrate upon the warrant of the words "after hearing evidence and argument, defendant required to give bond in conformity with statute," is a sufficient adjudication, and one of which the accused is bound to take notice. *Parsons v. State*, 97 Ga. 73.

282. 1. *Exp. Charleston*, 107 Ala. 688.

Failure to Give Appearance Bond. — In Alabama a defendant who has been committed to jail in default of giving bond for his appearance before the proper tribunal is entitled to a writ of habeas corpus to review the proceedings before the justice. *Exp. Charleston*, 107 Ala. 688.

- 283.** 2. Form and Sufficiency. — See note 1.
 Conditions. — See note 2.
 3. New Security — When Required. — See note 3.
284. 4. Satisfaction and Discharge. — See note 3.
285. 6. Remedies for Breach of Conditions. — See notes 2, 3.
287. VIII. AMENDMENT OF INITIATORY PROCEEDINGS. — See notes 1, 2, 3.

IX. ABATEMENT. — See note 4.

288. See note 2.

289. X. JUSTICE'S RETURN TO TRIAL COURT — 2. Requisites and Sufficiency. — See note 3.

291. XI. ADJUDICATION — 1. Jurisdiction to Hear and Determine — *a.* WHAT COURTS HAVE JURISDICTION. — See notes 2, 3, 4.

283. 1. Sufficiency of Bond — *Alabama.* — Walker *v.* State, 108 Ala. 56, distinguishing Hanna *v.* State, 60 Ala. 100.

2. Effect of Conditions to Abide Judgment of Trial Court. — A recognizance given in bastardy proceedings, the condition of which is that the defendant shall appear before and abide the judgment of the trial court, is not a bond of indemnity for the payment of the judgment which may be ultimately recovered in the action, the amount of liability for the nonappearance of the defendant being merely the penal sum named in the bond with interest from the date of forfeiture. Myers *v.* Baughman, 61 Neb. 818.

3. State *v.* Murdock, 59 Neb. 521.

284. 3. Fitzpatrick *v.* Nordstrom, 176 Mass. 231; Standing *v.* Moore, (County Ct.) 16 Misc. (N. Y.) 106.

285. 2. In Whose Name Action Should Be Prosecuted — *Nebraska* — *In Name of State.* — An action based upon a forfeited recognizance conditioned for the appearance of a defendant in bastardy proceedings must be brought in the name of the state, the obligee named therein. Myers *v.* Baughman, 61 Neb. 818.

3. Defenses — *Postponement of Hearing Without Consent of Surety.* — State *v.* Murdock, 59 Neb. 521; People *v.* Higgins, 151 N. Y. 570. *Contra*, Pollman *v.* James, 5 Ohio Cir. Dec. 275.

Irregularity of Bond — Lack of Jurisdiction. — In an action upon an adjournment bond in bastardy proceedings, a surety is not only entitled to insist that he shall not be held liable except according to the very terms of his obligation, but he may also defend upon the

ground that the instrument was not given according to the requirements of the statute, and that the officer who took it was without jurisdiction. People *v.* Higgins, 151 N. Y. 570.

287. 1. Oath to Amended Complaint. — Where an application to amend is accompanied by an affidavit showing the facts sought to be introduced by way of amendment, the complaint as amended need not be sworn to by complainant. Eshelman *v.* People, 52 Ill. App. 621.

2. The Complaint May Be Amended to show the singleness of the complainant. Walker *v.* State, 108 Ala. 56; Harrison *v.* People, 81 Ill. App. 93.

And as to the residence of complainant. Walker *v.* State, 108 Ala. 56.

And as to the time and place of the act causing pregnancy. People *v.* Jamieson, 124 Mich. 164; People *v.* Cole, 113 Mich. 83; State *v.* Brathovde, 81 Minn. 501.

3. Amendment of Warrant. — The warrant may be amended by changing the date of the birth of the child to conform to the affidavit of the complainant. Com. *v.* Cantrell, (Ky. 1868) 45 S. W. Rep. 72.

4. Law *v.* Cline, 9 Ohio Cir. Dec. 106.
288. 2. State *v.* Harris, 112 Iowa 589.

289. 3. Illinois. — Baird *v.* People, 66 Ill. App. 671.

291. 2. In New Jersey, under the 1889 Supplement to the Bastardy Act, Gen. Stat. N. J., p. 148, § 41, one justice of the peace is authorized to hear and determine cases of bastardy. But such proceedings are to be taken only under the provisions of the Bastardy Act, and cannot be disposed of in the

293. *b.* REQUISITES TO CONFER. — See notes 1, 2.

294. *c.* EXTENT OF JURISDICTION — APPEARANCE AND SERVICE. — See notes 1, 2.

295. *d.* WHEN CAUSE MAY BE HEARD. — See note 2.

296. 2. Proceedings in Trial Court — *a.* SUPPLEMENTAL COMPLAINT. — See note 1.

297. See note 2.

court of small causes held by justices of the peace. *Lynch v. Pott*, 58 N. J. L. 253.

291. 3. New York — *Association of Judges of Rochester Municipal Court*. — *People v. Higgins*, 151 N. Y. 570, reversing, on another point, 77 Hun (N. Y.) 103.

4. Alabama. — City courts are invested with all the jurisdiction of circuit courts, and can hear and determine bastardy proceedings arising within their territorial jurisdiction. *Williams v. State*, 113 Ala. 58.

Arkansas. — The constitution gives the county courts exclusive original jurisdiction in all matters relating to bastardy. *Dobson v. State*, 69 Ark. 376; *State v. Blackburn*, 61 Ark. 407.

Nebraska. — A justice of the peace has no jurisdiction to try and determine the guilt or innocence of a party charged with being the father of a bastard child; such a proceeding can be tried on its merits in the District Court only. *Munro v. Callahan*, 41 Neb. 849.

New York City. — By the charter of the city of New York (Laws N. Y. 1897, § 1406, par. 3) the courts of special sessions are given exclusive jurisdiction in the first instance of all proceedings respecting bastards within the city. *Keller v. Cleary*, 62 N. Y. App. Div. 609, 70 N. Y. Supp. 899; *Keller v. Mertens*, 37 N. Y. App. Div. 407.

North Carolina — *Concurrent Jurisdiction of Justice of the Peace and Superior Court*. — A justice of the peace has, for the period of one year after the begetting of a bastard child, exclusive original jurisdiction to hear and determine bastardy proceedings commenced by the voluntary affidavit of the mother or by the county commissioners, but thereafter the concurrent jurisdiction of the Superior Court attaches and the prosecution may be commenced by indictment therein. *State v. Wynne*, 116 N. Car. 981. See also *State v. White*, 125 N. Car. 674; *State v. Nelson*, 119 N. Car. 797; *State v. Ostwalt*, 118 N.

Car. 1208; *State v. Mize*, 117 N. Car. 780.

Oklahoma. — *Probate Courts* have original jurisdiction in bastardy proceedings. *Matter of Comstock*, 10 Okla. 299.

South Dakota — *Circuit Court*. — It seems that the Circuit Court has sole jurisdiction to entertain bastardy proceedings, the Act of 1893, providing that such proceedings should be initiated in a justice's court and further prosecuted in the County Court, having apparently been repealed by a subsequent act relating to the jurisdiction of county courts. *State v. Sexton*, 11 S. Dak. 105; *State v. Knowles*, 10 S. Dak. 471.

293. 1. Waiver of Examination Before Justice by Defendant. — *Laney v. State*, 109 Ala. 34.

Jurisdiction Not Affected by Errors in Preliminary Examination. — Errors committed by a justice of the peace or a county judge in excluding testimony during the examination of the complainant in a bastardy case will not affect the jurisdiction of the District Court. *Stoppert v. Nierle*, 45 Neb. 105.

And where there has been a preliminary hearing before a justice, and the defendant appears and gives bond in the Circuit Court, the latter has jurisdiction though the record does not show that the justice rendered a judgment in the proceedings. *Armstrong v. State*, 24 Ind. App. 289.

2. *In re Walker*, 61 Neb. 803.

294. 1. *In re Walker*, 61 Neb. 803;

Pollman v. James, 5 Ohio Cir. Dec. 275.

2. *Henwood v. State*, 11 Ind. App. 636.

295. 2. Illinois. — *Rose v. People*, 81 Ill. App. 128.

296. 1. *State v. Brill*, 6 Ohio Dec. 14.

297. 2. To Conform to Proof. — A complaint alleging that the prosecutrix was "pregnant with or delivered of a bastard child" may be amended by striking out the words "or delivered of." *Miller v. State*, 110 Ala. 69.

297. *b.* CONTINUANCES. — See note 3.

c. PLEADINGS. — See note 4.

298. See note 1.

d. DEFENSES — (1) *Compromise and Settlement.* — See note 2.

300. See note 1.

297. 3. *Coney v. Holland*, 175 Mass. 469.

Affidavit of Merits. — An affidavit for a continuance which does not deny the truth of the charge against the defendant nor disclose a defense in bar of the action is insufficient. *Fish v. People*, 86 Ill. App. 408.

4. *Laney v. State*, 109 Ala. 34.

Sufficiency of Issue — *Illinois.* — *Mooney v. People*, 96 Ill. App. 622.

298. 1. *Indiana.* — *Dehler v. State*, 22 Ind. App. 383.

South Dakota. — Failure to require the defendant to plead to the complaint or charge does not constitute reversible error. *State v. Bunker*, 7 S. Dak. 639.

Defendant Required to Join in Issue. — The cause having reached the Circuit Court and the defendant being personally present, there is no error in requiring him to join in the issue directed by the statute to be formed, even though the warrant of arrest has been stricken from the files. *Douglass v. State*, 117 Ala. 185.

Where Defendant Refuses to Plead the court may enter a plea of not guilty. *Mooney v. People*, 96 Ill. App. 622.

2. *Waterloo v. People*, 170 Ill. 488; *Porter v. Caylor*, 146 Ind. 448; *Billingsley v. Clelland*, 41 W. Va. 234. And see *Ingwaldson v. Skrivseth*, 7 N. Dak. 388.

When Complainant May Be Compelled to Accept Offer of Compromise. — Where defendant, before trial, offers in settlement a sum equal to the full amount which could be awarded the complainant after trial, and upon the refusal of the complainant to accept the same pays the money into court, the court will dismiss the proceedings and direct the complainant to accept the amount so offered. *People v. Wheeler*, 60 Ill. App. 351.

Marriage of Complainant and Defendant. — The marriage of the complainant and the defendant after the commencement of bastardy proceedings is not a bar to their further prosecution. *Law v. Cline*, 9 Ohio Cir. Dec. 106.

Compromise of Judgment. — The com-

plainant has no authority to compromise a judgment rendered in bastardy proceedings. *State v. McBride*, (Neb. 1902) 90 N. W. Rep. 209.

And see *Jones v. People*, 77 Ill. App. 660, holding that the mother may not satisfy a judgment obtained in bastardy proceedings for a sum less than the four hundred dollars fixed by statute without the written consent of the county judge.

300. 1. **Necessity to Comply with Statute.** — A settlement between the parents of an illegitimate child, in order to be operative as a stay or termination of such proceedings, must be of such nature, and made and attested in such manner, as the statute prescribes, as the District Court can take judicial cognizance of none other. *Peters v. Killian*, (Neb. 1901) 87 N. W. Rep. 1049. See also *Com. v. Scott*, 7 Pa. Super. Ct. 590; *Com. v. Weaver*, 9 Pa. Dist. 427, holding that the validity of a settlement between the defendant and the prosecutrix, a minor, can be inquired into by the court and the sentence adjusted accordingly.

Dismissal by Minor without Consent of County Attorney. — The prosecutrix in a bastardy proceeding, although a minor, may dismiss the proceeding without the consent of the county attorney or other person if she shall enter of record an admission that provision for the maintenance of the child has been made to her satisfaction; and such admission and dismissal, if obtained without deception or fraud, is binding upon both the prosecutrix and the state and is a bar to further prosecution. *State v. Baker*, (Kan. 1902) 69 Pac. Rep. 170.

Settlement and Compromise as a Defense. — Where the defendant moves to dismiss the proceedings on the ground of a settlement made with the prosecutrix, and the latter resists such motion, it is the proper practice for the court to require the defendant to go to trial and establish the release as a defense in the action. *People v. Kuechler*, 87 Ill. App. 487.

300. (2) *Former Adjudication.* — See note 2.

301. See note 1.

302. *c.* **HEARING.** — See notes 1, 2.

303. **Instructions.** — See note 2.

300. 2. *State v. Ostwalt*, 118 N. Car. 1208.

301. 1. **Disagreement of Two Justices.** — A disagreement of the two justices as to the paternity of the child is not an acquittal of the defendant or a bar to subsequent proceedings upon the same charge. *People v. Crowley*, 25 N. Y. App. Div. 175, *affirming* Kirkpatrick *v.* Crowley. (County Ct.) 20 Misc. (N. Y.) 160.

Conclusiveness of Justice's Adjudication. — The discharge by a justice of the peace of a defendant in bastardy proceedings is not a bar to another examination or hearing before another justice on the same charge nor to a trial on the merits after such second examination. *Waterloo v. People*, 170 Ill. 488, *affirming* 67 Ill. App. 320; *Munro v. Callahan*, 41 Neb. 849. *Contra*, *State v. Carlisle*, 21 Ind. App. 438.

And when a defendant, through mistake or inadvertence, is bound over by a justice of the peace to the Circuit Court, which has no jurisdiction in the matter, such action amounts in effect to a legal discharge by the justice, and is not a bar to a subsequent proceeding. *Mooney v. People*, 96 Ill. App. 622.

In *Massachusetts* a discharge by a police court after a hearing on a complaint for bastardy is not a bar to a subsequent complaint for the same offense. *Barnes v. Ryan*, 174 Mass. 117.

Discharge on Settlement with Prosecutrix. — Where the defendant in a bastardy proceeding, after being arrested and brought before a justice of the peace, effects a settlement with the prosecutrix, and the justice thereupon destroys the papers and discharges the defendant, but renders no judgment in the proceeding, there is no "former trial and conviction," barring a subsequent prosecution on the same charge. *State v. Robertson*, 122 N. Car. 1045.

Dismissal Obtained by Fraud. — It is not sufficient to allege, in a reply to an answer pleading former adjudication in bastardy, that the prosecutrix, a minor, was induced to consent to a dismissal by fraudulent representa-

tions. Her consent being merely preliminary to a finding by the justice that a satisfactory settlement has been made, it must be alleged that the finding and entry of the justice were secured by fraud. Further, the reply should allege that the amount paid to prosecutrix in settlement has been refunded or offered to be refunded. *State v. Carlisle*, 21 Ind. App. 438.

Dismissal for Want of Jurisdiction. — *Lynn v. State*, 84 Md. 67.

302. 1. **Failure of Defendant to Testify.** — A proceeding in bastardy, though penal in its character and *quasi* criminal, does not come within the provisions of the statute which declares that the failure of defendant to testify in a criminal prosecution shall not be the subject of comment by counsel. *Miller v. State*, 110 Ala. 69.

Waiver of Legal Rights by Defendant. — The defendant may waive his legal right to introduce evidence and to cross-examine witnesses. *Mooney v. People*, 96 Ill. App. 622.

Custody of Child. — The trial court cannot, in a bastardy proceeding, try the issue whether the father or the mother of the child is the more suitable person to be intrusted with its custody. *Peters v. Killian*, (Neb. 1901) 87 N. W. Rep. 1049.

2. *Alabama.* — *Laney v. State*, 109 Ala. 34.

Trial in Absence of Defendant. — Where the defendant fails to appear in the District Court, after being duly bound thereto by a justice of the peace, and enters no plea, a trial may be had without a jury. *In re Walker*, 61 Neb. 803.

Waiver of Jury. — After issue is joined in the trial court and the time for entering the case in the jury docket has expired and when the parties with their witnesses are present for the purpose of a trial by the court, it is too late to withdraw the waiver of a jury trial. *Camp v. Carroll*, 73 Conn. 247.

Disagreement of Jury. — In case of the disagreement of the jury a new proceeding should not be instituted, but the justice should issue a *venire de novo*. *Lynch v. Pott*, 58 N. J. L. 253.

303. 2. *Miller v. State*, 110 Ala. 69; *Hobson v. People*, 72 Ill. App. 436.

303. Dilatory Objections. — See note 3.

304. See note 2.

f. VERDICT. — See note 3.

305. 3. Judgment—*a.* JURISDICTION TO RENDER—(1) *Generally*. — See notes 2, 3.

307. *b.* FORM AND SUFFICIENCY. — See note 4.

308. See note 2.

Confining Prosecution to Complaint. — A charge to the jury which would allow the conviction of the defendant for some other act of intercourse than the one charged in the complaint is erroneous. *People v. Schilling*, 110 Mich. 412.

Confining Prosecution to Evidence. — Where a date has been fixed with great positiveness by the complainant as the one on which she had intercourse with the accused, it is error for the trial court to modify certain requests to charge, submitted by defendant, by interpolating the words "on or about" immediately preceding such date. *State v. Ryan*, 78 Minn. 218.

Inference from Compromise. — *Gehm v. People*, 87 Ill. App. 158.

And see *People v. Hawks*, 107 Mich. 249, holding that it is error to charge the jury that an attempt by the brother of the defendant to compromise the suit without the latter's knowledge or consent is evidence that the defendant is the father of the child.

303. 3. *Bell v. State*, 124 Ala. 94; *Williams v. State*, 113 Ala. 58; *Laney v. State*, 109 Ala. 34; *Walker v. State*, 108 Ala. 56.

Irregularities in Lower Court. — *Conefy v. Holland*, 175 Mass. 469.

Defendant Does not Waive a Valid Objection to the Complaint because it is taken for the first time in the District Court where the trial proceeds upon the same complaint as was filed before the justice. *State v. Brathovde*, 81 Minn. 501.

304. 2. **Objections to the Complaint** cannot be made, upon any ground, after verdict. *Mooney v. People*, 96 Ill. App. 622.

3. Sufficiency of Verdict. — A verdict, which simply directs the payment yearly by the defendant of a certain sum for twelve years for the support of the child, is substantially a finding that the defendant is guilty, and is sufficient to support a judgment against him in accordance therewith. *Taber v. Com.*, (Ky. 1899) 54 S. W. Rep. 7.

305. 2. **Attorney's Fees.** — The order of maintenance should not include an allowance for the services rendered by an attorney for the prosecutrix. *Harshman v. Ingwerson*, 52 Neb. 116.

Burial Expenses may not be allowed by the court in ascertaining "the expense of lying-in, and of nursing the child," under Gen. Stat. Conn., § 1208. *Harty v. Malloy*, 67 Conn. 339.

3. *Jean v. State*, 25 Ind. App. 339; *Dehler v. State*, 22 Ind. App. 383; *Wurdeman v. Schultz*, 54 Neb. 404; *Clark v. Carey*, 41 Neb. 780.

What Is a Sufficient Amount. — A judgment of thirteen hundred dollars, payable in instalments, for the past support of a child four years of age and for its future maintenance, is not so excessive as to show an abuse of discretion in the trial court. *Ely v. Ott*, 7 Ohio Cir. Dec. 677.

307. 4. *Parsons v. State*, 97 Ga. 73.

Surplusage. — The inadvertent addition to the judgment of a requirement not provided for by the statute, but which imposes no additional burden on the defendant, does not render the judgment void, the Appellate Court having power to remand the record to the court below for the pronouncing of a proper judgment. *Lynn v. State*, 84 Md. 67.

308. 2. *People v. Wing*, 115 Mich. 698, wherein it was held that an order providing for the payment of a fixed sum "until the further order of this court," and that the defendant should be committed to jail until he gave a bond therefor "and until the further order of this court," is erroneous, as such an order should be definite and fix a limit to the liability, and should not be left open for subsequent applications to the court. *Citing* 3 ENCYC. OF PL. AND PR. 308, and *distinguishing* *Cross v. People*, 10 Mich. 24. See also *People v. Jamieson*, 124 Mich. 164.

Failure of Judgment to Limit Liability. — The defendant is not bound to obey the directions in a final order in bastardy where such order exacts of

309. See note 1.

c. AMENDMENTS. — See note 2.

310. *d.* ENFORCEMENT. — See notes 1, 2.

him a bond more binding and comprehensive in its terms than is provided for by law, and therefore where, by statute, the defendant may be required to give security for the maintenance and education of the child until it arrives at the age of fourteen years, failure to comply with a requirement in an order that such security be given without limit as to time is not indictable. *Johnson v. State*, 102 Ga. 613.

309. 1. Payment to Other than Mother.— Where the judgment of the court directs that the payments be made to some person other than the mother of the child, it need not contain an allegation that the mother is not a proper person to receive the money. *State v. Christian*, 18 Ind. App. 11.

Sufficiency of Award by Arbitrators.— A decision by arbitrators that defendant pay the complainant "three thousand dollars damages and support" properly awards the damages to the mother, who is charged with the support of the bastard child, but is void for uncertainty so far as it refers to support. *Poggenburg v. Conniff*, (Ky. 1902) 67 S. W. Rep. 845.

2. Omission of Date of Birth.— A judgment in bastardy which omits, as a purely clerical error, the date of birth of the child, will be amended by order of the court. *Woodard v. People*, 56 Ill. App. 45.

Amendment by Order of Appellate Court.— The Appellate Court may remand a cause to the trial court for the entry of a proper judgment. *Lynn v. State*, 84 Md. 67; *People v. Wing*, 115 Mich. 698.

310. 1. Barry v. Niessen, (Wis. 1902) 90 N. W. Rep. 166.

2. Bell v. State, 124 Ala. 77.

Georgia.— The failure on the part of the defendant to obey a final order in bastardy is indictable as a misdemeanor, but the order must strictly conform to the statute in its terms. *Sullivan v. State*, 114 Ga. 520; *Johnson v. State*, 102 Ga. 613.

Ohio.— Under *Bates's Annot. Stat. Ohio* (1897), § 5626, providing that in case defendant shall "neglect or refuse to give such security, and pay the costs of prosecution, he shall be committed to the jail of the county," the authority of the court to commit is not

confined to the time or the term of court at which the order of maintenance is made, but may be exercised at a subsequent term, the purpose of the statute evidently being to give the defendant an opportunity to furnish the required security. *Alling v. State*, 10 Ohio Cir. Dec. 260.

Oklahoma.— The statutes give no authority to imprison for failure to secure a bastardy judgment by executing a bond, and a defendant committed to jail until he gives such bond will be discharged on habeas corpus. *Matter of Comstock*, 10 Okla. 299.

Length of Imprisonment.— In *Florida* the maximum period during which a defendant may be committed to prison for failure to comply with the final judgment in bastardy proceedings has been fixed by statute as one year. *Bond v. State*, 34 Fla. 47.

In *Maryland*, upon the failure to give security before the justice, the putative father may be committed for twelve months, but may be released at any time by giving the required bond. If an appeal is taken to the Circuit Court, the term of imprisonment for failure to give the required security is not less than six nor more than twelve months. *Lynn v. State*, 84 Md. 67.

In *North Carolina* a justice of the peace, in committing a defendant in bastardy proceedings to prison for default in payment of the fine, allowance, and costs, must impose such term of imprisonment as is equivalent, as nearly as possible, to discharging the amount due. *State v. Nelson*, 119 N. Car. 797.

Discharge for Insolvency.— Under the *Illinois Bastardy Act*, § 9, the defendant shall be discharged for insolvency or inability to give bond, provided such discharge shall not be made within six months after the commitment, and the County Court has jurisdiction to so discharge the defendant after the final adjournment of the term at which he was convicted and committed. *People v. McIntyre*, 81 Ill. App. 519.

In *North Carolina* a defendant in bastardy proceedings who has been committed to prison for failure to pay the fine, costs, and allowance ordered

311. 4. Costs. — See notes 1, 3.

312. XII. SECURITY FOR MAINTENANCE — 1. When Required. — See note 3.

3. Discharge. — See note 6.

313. 4. Remedies Against Security. — See notes 4, 5.

315. XIV. REVIEW — 2. Parties to Proceedings to Review. — See note 5.

by the court may secure his discharge by taking an oath of insolvency in accordance with the statute. *State v. White*, 125 N. Car. 674; *State v. Parsons*, 115 N. Car. 730.

Place of Imprisonment on Failure to Give Bond. — A defendant in bastardy who fails to give security as required by the judgment of the court is not a "debtor" within the provision of the statute forbidding debtors to be confined in the same room with persons committed for crimes, and will not therefore be discharged because he is so confined. *Pease v. People*, 66 Ill. App. 584.

Error in Commitment. — The order of filiation and not the warrant of commitment is the authority for the imprisonment, and therefore, where the former is valid, an error in the latter in designating the court which has power to review the proceedings does not affect any substantial right of the defendant nor justify his discharge on habeas corpus; particularly as such error may be cured by filing with the sheriff a corrected warrant. *People v. McFarlane*, 50 N. Y. App. Div. 95.

311. 1. Bell v. State, 124 Ala. 77. **Costs on Appeal.** — Bullitt's Civ. Code Ky. (1895), § 727, providing for the allowance of costs in case appellant recovers a judgment on appeal more favorable to him than the original judgment, does not apply to bastardy proceedings. Such proceedings are regulated by Stat. Ky. (1894), § 178, which provides that "If the jury shall find against the person accused, he shall be adjudged to pay costs." *Wiggins v. Com.*, (Ky. 1902) 63 S. W. Rep. 31.

3. Acquittal on Appeal. — In *Arkansas* costs will not be taxed against the county where the defendant is acquitted on appeal. *State v. Blackburn*, 61 Ark. 407.

313. 3. An Undertaking for both Maintenance and Appearance in the Appellate Court cannot be required where the statute is in the alternative. *Stand-*

ring v. Moore, (County Ct.) 16 Misc. (N. Y.) 106.

New Security — When May Be Required. — The court has no power to order the defendant, in case he and his sureties become insolvent, to execute new security for maintenance or, in default thereof, to be committed to jail for his failure to comply with the original judgment. *Barbour County Ct. v. O'Neal*, 42 W. Va. 295.

6. See New York v. Buechel, 71 N. Y. App. Div. 507.

313. 4. An Assignment by the Superintendents of the Poor of Their Interest in the Bond to the mother will entitle her to bring an action thereon in her own name, and that too in spite of the fact that the bond in question is not the maintenance bond provided for by the statute, but is a supersedeas bond executed by defendant and his sureties for the purpose of having a review of the case in the Supreme Court upon writ of error. *Hollenbeck v. Breakey*, 127 Mich. 555.

5. Defenses — Release by Mother. — The defendant in an action upon a bastardy undertaking cannot plead in defense a release by the mother of any further obligation on the part of the father, as the mother is not a party to the bond and cannot in any way affect it either in its operation, force, or continuance. *New York v. Celia*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 138.

Material Variation from Statutory Form. — Where the statute provides that an undertaking must be given for the payment of the sum directed by the magistrates, "or which may be ordered by the Court of Sessions of the county," an undertaking which omits the latter provision is void, because it deprives the defendant of any possibility of having the amount directed to be paid by him reduced on appeal to the Court of Sessions and thereby enlarges his obligation. *Lester v. Worden*, 3 N. Y. App. Div. 216.

315. 5. State v. Chaney, 93 Md. 71. In *New York*, as neither the father nor the mother can institute bastardy pro-

- 316. 3. What Is Appealable.** — See notes 2, 3.
4. Appellate Jurisdiction. — See note 4.
318. 5. Perfection of Appeal. — See notes 2, 3, 4.

ceedings, neither one can appeal from any order or adjudication against the other made in a proceeding brought by the proper officials. *People v. Shulman*, 8 N. Y. App. Div. 514.

Appeal by Complainant from Determination of Magistrate. — The Bastardy Act of *Illinois* does not provide for an appeal by the prosecuting witness from the decision of a justice of the peace discharging a defendant. *Waterloo v. People*, 170 Ill. 488; *People v. Weiss*, 67 Ill. App. 320.

In *Massachusetts* a discharge by the justice is conclusive and the complainant cannot appeal to the Superior Court. *Jennings v. Browne*, 167 Mass. 543.

In *North Carolina* the proceeding being a criminal one and a justice of the peace having authority to hear and determine the case, his adjudication in favor of the defendant is final and conclusive, and no appeal therefrom lies to the state or to the prosecutrix. *State v. Bruce*, 122 N. Car. 1040; *State v. Ballard*, 122 N. Car. 1024; *State v. Ostwalt*, 118 N. Car. 1208.

316. 2. Application for Discharge from Imprisonment. — An order denying the defendant's application for his discharge from custody under a judgment in bastardy is a final one, affecting a substantial right, upon a summary application in an action after judgment, and therefore is appealable. *State v. District Ct.*, 79 Minn. 27.

New York. — *When Entire Order May Be Reviewed.* — Code Crim. Pro. N. Y., § 861, providing that where the defendant in bastardy proceedings has given an undertaking to obey an order of filiation and indemnify the public he cannot appeal from any other part of the order than that which fixes the amount of allowance to be paid, does not refer to an undertaking given for the appearance of the defendant at the next Court of Sessions, and where such latter undertaking only has been given the Appellate Court may review the entire order made by the magistrates. *People v. Schildwachter*, 87 Hun (N. Y.) 363.

3. Ruff v. Kebler, 62 N. J. L. 186.

4. Illinois. — An appeal from a judgment of conviction in bastardy is taken directly from the County Court to the

Appellate Court. *Lewis v. People*, 69 Ill. App. 244; *Thacker v. People*, 69 Ill. App. 325; *Pemberton v. People*, 63 Ill. App. 218.

New York. — The defendant in a bastardy proceeding may appeal to the appellate division from an order of filiation made by the County Court. *People v. Crowley*, 21 N. Y. App. Div. 189, and cases cited. But see *Simis v. Alwang*, 48 N. Y. App. Div. 529.

An appeal from an order of filiation in bastardy proceedings made by the Court of Special Sessions of New York city may be taken to the Appellate Division of the Supreme Court. *People v. McKay*, 72 N. Y. App. Div. 527; *Simis v. Alwang*, 61 N. Y. App. Div. 426; *Keller v. Cleary*, 56 N. Y. App. Div. 466. *Contra*, *Simis v. Alwang*, 48 N. Y. App. Div. 529.

Oklahoma. — In bastardy cases instituted in the Probate Court, if the party desires a trial *de novo* his appeal should be to the District Court, and should be taken in the manner and under the provisions prescribed in the chapter on probate procedure; but if questions of law only are to be presented on appeal, then the appeal should be to the Supreme Court, and must be taken in the manner provided for appeals in civil causes from the district courts to the Supreme Court. *Bell v. Territory* 8 Okla. 75.

318. 2. Florida. — A writ of error in a bastardy appeal must be sued out within six months of the date of the judgment, the proceeding not being a criminal one to which such limitation does not apply. *Bond v. State*, 34 Fla. 47.

3. Keller v. Cleary, 56 N. Y. App. Div. 466.

Assignment of Errors. — In *Alabama* an assignment of errors on appeal in bastardy proceedings may not be dispensed with as in criminal cases generally. *Williams v. State*, 117 Ala. 199.

4. Appearance Bond Pending Appeal. — There is no provision in the *Alabama* statutes allowing a bond to be given for the discharge of the defendant from imprisonment pending an appeal in bastardy proceedings. *Bell v. State*, 124 Ala. 77.

Condition of Appeal Bond. — In *Minne-*

319. 6. Proceedings on Appeal. — See note 1.

7. Hearing and Determination. — See note 4.

320. See note 1.

XV. CRIMINAL PROCEEDINGS — REQUISITES OF INDICTMENT. — See note 2.

321. See note 2.

[XVI. PROCEEDINGS TO LEGITIMATE. — Generally, bastards are legitimated by the subsequent marriage of the parents or by a public acknowledgment by the father. See note 2a.

sola the statutes relating to supersedeas bonds on appeals in civil actions do not apply to appeals from judgments in bastardy proceedings. A bond given upon such an appeal should be conditioned on the payment of all costs and charges awarded against defendant on appeal, and in case of dismissal or of affirmance, on defendant's abiding by and performing the judgment, or surrendering himself a prisoner, in execution thereof. *State v. Allrick*, 63 Minn. 328.

New York — Forfeiture of Undertaking — Who May Prosecute. — The undertaking required upon an appeal in bastardy is conditioned not only for the appearance of the defendant at the County Court, but also for the obedience by him of the final order of such court, and therefore the undertaking will be forfeited if the defendant fails to give the bond of indemnity required by the County Court upon the affirmance of the order of filiation. Either the authorities to whom the undertaking is given or the district attorney, upon the order of the court, may prosecute the undertaking. *Constable v. Kennedy*, 21 N. Y. App. Div. 97.

319. 1. Charities, etc., Com'rs *v.* McCloskey, 15 N. Y. App. Div. 41.

Evidence Given on Former Trial. — An appeal from the decision of the magistrates to the Court of General Sessions involves a new trial, and it is only upon showing that the mother is dead or insane that her former evidence is admissible upon such trial. *People v. Schildwachter*, 87 Hun (N. Y.) 363.

Motion in Appellate Court to Dismiss for Want of Prosecution. — Under Bullitt's Civ. Code Ky. (1895), § 730, providing that, if an appellant move to dismiss or fail to prosecute his appeal, the appellee may either proceed to trial on the appeal or have the original judgment confirmed, it is error for the Appellate Court to confirm the original judgment upon the motion of the appellee where

appellant merely moves to dismiss the bastardy warrant for want of prosecution, the appellant being entitled to a trial *de novo* in the Appellate Court. *Wiggins v. Com.*, 102 Ky. 40.

4. Proof that Mother Is Single Woman.

— The objection that there was no proof that the mother was unmarried will be too late when raised for the first time in the Appellate Court. *Terry v. People*, 81 Ill. App. 27.

320. 1. **Objections to Papers Not Before Appellate Court.** — The Appellate Court cannot pass upon the decision of the court below, in refusing a motion to quash the original papers in a bastardy proceeding, where such papers are not contained in the abstract on appeal and are therefore not before the court. *Baird v. People*, 66 Ill. App. 671.

Irregularities Not Affecting Merits or Jurisdiction. — Where the Circuit Court has tried a bastardy proceeding on its merits, the judgment will not be disturbed for irregularities in the mode of bringing the case to the Circuit Court not affecting the merits or the court's jurisdiction of the subject-matter of the action. *Armstrong v. State*, 24 Ind. App. 289.

Jurisdiction of Lower Court. — Where the question of the jurisdiction of the lower court over the person of the defendant in a bastardy proceeding is one of fact the appellate tribunal will not pass upon the question. *Henwood v. State*, 11 Ind. App. 636.

And where no lack of jurisdiction in the lower court appears from the record such jurisdiction is presumed. *Ruff v. Kebler*, 62 N. J. L. 186; *People v. Lyon*, 83 Hun (N. Y.) 303.

2. *Hudson v. State*, 104 Ga. 723.

321. 2. **In Pennsylvania** an indictment may be found without a previous prosecution before a magistrate. *Com. v. Miles*, 21 Pa. Co. Ct. 553.

2a. See the title *Bastardy*, 3 Am. and Eng. Encyc. of Law (2d ed.) 871.

But in some jurisdictions special proceedings to legitimate are authorized by statute. See note 26.]

321. 26. Jurisdiction of Proceedings.— **Georgia.**— It has been held that in proceedings to legitimate a child, under the provisions of 2 Code Ga., § 2494, instituted by the father, the mother has a legal right to file objections thereto. *Henderson v. Shiffett*, 105 Ga. 303.
Under M. & V. Code Tenn., §§ 4381, 4385-4391 (Annot. Code Tenn. 1896, §§ 5402, 5406-5412), the circuit and county courts have jurisdiction of proceedings to legitimate children. *Murphy v. Portrum*, 95 Tenn. 605.

BIGAMY.

322. I. JURISDICTION. — See note 1.

323. Subsequent Cohabitation. — See note 3.

324. II. INDICTMENT — 1. Generally — Following Statute. — See note 2.

Negating Exceptions. — See note 3.

325. Marriages. — See note 1.

2. Allegations as to First Marriage. — See note 2.

322. 1. Brown v. State, (Tex. Crim. 1894) 27 S. W. Rep. 137.

323. 3. The Offense of Continued Cohabitation must be laid with particulars of time and place. The times and places of the two marriages, however, are not material. *Cathron v. State*, 40 Fla. 468.

Failure to Allege a Second Marriage is fatal. *Watson's Petition*, 19 R. I. 342, decided under Pub. Stat. R. I. (1882), c. 244, § 1 (Gen. Laws R. I. 1896, c. 281, § 1).

324. 2. If the information conforms to the statutory requirements it is sufficient. *State v. Sherwood*, 68 Vt. 414.

Words in Statute Descriptive of Offense. — *McAfee v. State*, 38 Tex. Crim. 124.

Forms Held Good. — *Johnson v. State*, 60 Ark. 308; *Hiler v. People*, 156 Ill. 511; *Rogers v. Com.*, (Ky. 1902) 68 S. W. Rep. 14; *State v. Jenkins*, 139 Mo. 535; *Hills v. State*, 61 Neb. 589; *State v. Gallagher*, 20 R. I. 266; *Esser v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 776; *State v. Sherwood*, 68 Vt. 414.

Forms Held Bad. — *Niece v. Territory*, 9 Okla. 535; *Vinsant v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 550; *McAfee v. State*, 38 Tex. Crim. 124.

An Indictment in Substantial Compliance with the Statute and charging the offense in words of import equivalent to those used in the statute will not be disturbed. *State v. Hayes*, 105 La. 352; *Esser v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 776.

3. *State v. Jenkins*, 139 Mo. 535; *State v. Gallagher*, 20 R. I. 266.

325. 1. Lawful Wife Living. — In *Oklahoma*, if the indictment is drawn under Stat. Okla., § 2181, there must

be an allegation that the defendant had a former spouse still living at the date of the second marriage. If, however, the indictment is framed under § 4551, an allegation of this character is unnecessary. *Niece v. Territory*, 9 Okla. 535.

An allegation in the indictment that "the said M., said former wife, being then alive, and the said H. well knowing that said M., his former wife, was then alive, and the said H. never having been legally divorced from the said M.," has been held to be a sufficiently direct averment that the first wife is alive. *Hiler v. People*, 156 Ill. 511.

Subsisting Marriage. — An allegation in the indictment that the defendant has never secured any divorce from the first spouse is unnecessary. *Rogers v. Com.*, (Ky. 1902) 68 S. W. Rep. 14; *State v. Melton*, 120 N. Car. 591.

2. Name of First Husband or Wife. — The name of the first spouse need not be mentioned in the indictment. *Johnson v. State*, 60 Ark. 308; *State v. Melton*, 120 N. Car. 591.

By Whom Celebrated. — *McAfee v. State*, 38 Tex. Crim. 125.

First Marriage Lawful. — The indictment need not allege the lawfulness of the first marriage, as the averment of a marriage implies that it was lawful. *Hills v. State*, 61 Neb. 589.

Name of First Husband or Wife. — In *Texas* it is imperative that the name of the first spouse should be alleged in the indictment. *Vinsant v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 550; *McAfee v. State*, 38 Tex. Crim. 124, overruling *Watson v. State*, 13 Tex. App. 76.

325. Time and Place of First Marriage. — See note 4.

326. See note 1.

3. Allegations as to Second Marriage. — See notes 2, 3.

327. Setting Out Marriage. — See note 2.

328. IV. INSTRUCTIONS. — See notes 1, 2.

325. 4. But see *McAfee v. State*, Okla., § 4551, must deny that the alleged bigamous spouse was the spouse of the defendant at the time of the second marriage. *Niece v. Territory*, 9 Okla. 535.

326. 1. *Keneval v. State*, 107 Tenn. 581 [*citing* 3 ENCYC. OF PL. AND PR. 325, 326]; *Cathron v. State*, 40 Fla. 468.

It is of the essence of the indictment that there should be an allegation of a prior marriage. *McAfee v. State*, 38 Tex. Crim. 124.

2. *Cathron v. State*, 40 Fla. 468.

3. Second Spouse Not First Spouse. — An indictment drawn under Stat. **327.** 2. *Keneval v. State*, 107 Tenn. 581, *citing* 3 ENCYC. OF PL. AND PR. 327.

328. 1. *People v. Corbett*, 49 N. Y. App. Div. 514; *Keneval v. State*, 107 Tenn. 581.

2. *Eldridge v. State*, 126 Ala. 63; *People v. Hartman*, 130 Cal. 487.

BILLS IN EQUITY.

340. III. SEVERAL PARTS OF BILL — 3. Introduction. — See *infra*, IV. 4. *Designation of Parties*.

341. 4. Stating Part. — See note 6.

344. 7. Jurisdiction Clause. — See note 3.

345. 8. Interrogating Part — In General. — See note 1.
Special Interrogatories. — See notes 2, 3.

346. See note 1.

9. Prayer for Relief — *a*. IN GENERAL. — See note 4.
See also PRAYERS FOR RELIEF.

347. *b*. FOR SPECIAL RELIEF ALONE. — See note 2.

c. FOR GENERAL RELIEF ALONE. — See note 3.

348. *d*. FOR SPECIAL AND GENERAL RELIEF — Any Appropriate Relief. — See note 3.

341. 6. An Allegation by Way of Recital instead of direct averment is good against a general demurrer when from the language used the fact appears by necessary implication. *Investor Pub. Co. v. Dobinson*, 72 Fed. Rep. 603.

344. 3. In Maine, under Rule 4, Chancery Rules of the Supreme Judicial Court, the use of the jurisdictional clause is not necessary. *Goodwin v. Smith*, 89 Me. 506.

In Pennsylvania the jurisdictional clause is not necessary. *Borie v. Satterthwaite*, 180 Pa. St. 542.

345. 1. United States Courts. — See also National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 83 Fed. Rep. 26.

2. Gormully, etc., Mfg. Co. v. Bretz, 64 Fed. Rep. 612.

Stay Pending Answer to Interrogatory. — Where interrogatories are filed which are pertinent to the averments of the plea, the defendant is bound to answer them, and all other questions should be reserved pending his compliance with this requirement. *Playford v. Lockard*, 65 Fed. Rep. 870.

3. Gormully, etc., Mfg. Co. v. Bretz, 64 Fed. Rep. 612, holding that the interrogatories must relate to matters material to the purposes of the suit, and cannot be used to disclose matters with respect to which the plaintiff has no right to discovery.

346. 1. *Downey v. Lancy*, 178 Mass. 465.

4. See *Loggie v. Chandler*, 95 Me. 220.

347. 2. *Rice v. Eiseman*, 122 Ala. 343, *per* Haralson, J.; *Harms v. Jacobs*, 158 Ill. 505; *Loggie v. Chandler*, 95 Me. 220; *Goff v. Price*, 42 W. Va. 384; *Vance Shoe Co. v. Haught*, 41 W. Va. 275. Compare *Fitzpatrick v. Engard*, 4 Pa. Dist. 383.

In Massachusetts. — Under Acts Mass. (1883), c. 223, § 10 (Rev. Laws Mass. 1902, c. 159, § 12), the bill need not contain any prayer for general relief, and the court will construe the bill as though such prayer were included. *Allen v. French*, 180 Mass. 487.

3. *Vance Shoe Co. v. Haught*, 41 W. Va. 275, *per* Brannon, J.

Exceptions — *An Injunction*. — *Vance Shoe Co. v. Haught*, 41 W. Va. 275, *per* Brannon, J. See also INJUNCTIONS.

348. 3. *Missouri*, etc., Trust Co. v. Richardson, 57 Neb. 617, *citing* 3 ENCYC. OF PL. AND PR. 348. See also the following cases:

Alabama. — *Rice v. Eiseman*, 122 Ala. 343; *Mutual Bldg., etc., Assoc. v. Wyeth*, 105 Ala. 639.

Florida. — *Lee v. Patten*, 34 Fla. 149.

Illinois. — *French v. Commercial Nat. Bank*, 79 Ill. App. 110.

New Jersey. — *Junior Order Bldg., etc., Assoc. v. Sharpe*, (N. J. 1902) 52

350. Different Relief. — See notes 1, 3.

352. 10. Prayer for Process. — See note 2.

353. IV. GENERAL PRINCIPLES OF PLEADING—1. Statement of Essential Facts — *a.* IN GENERAL. — See note 5.

Atl. Rep. 832; *Chambers v. Kunzman*, 59 N. J. Eq. 433.

Tennessee. — *Tennessee Ice Co. v. Raine*, 107 Tenn. 151.

Vermont. — *Coffin v. Cole*, 67 Vt. 226.

See also *Kempner v. Ivory*, (Tex. Civ. App. 1895) 29 S. W. Rep. 538.

Relief Must Be Secundum Allegata. — *Fuller v. John S. Davis' Sons Co.*, 184 Ill. 505

No Resort to Legal Relief. — Compare *Waite v. O'Neil*, 72 Fed. Rep. 348.

Personal Judgment. — In *Rees v. Shepherdson*, 95 Iowa 431, it was held that a personal judgment will not be rendered under a prayer for "such other and further relief as equity may require."

350. 1. *Penn v. Fogler*, 182 Ill. 76; *Tennessee Ice Co. v. Raine*, 107 Tenn. 151; *Crawford v. Stevens*, (Tex. Civ. App. 1895) 31 S. W. Rep. 79, *per Williams, J.*; *Vance Shoe Co. v. Haught*, 41 W. Va. 275, *per Brannon, J.* See also *Coleman v. Ryan*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 715; *Kempner v. Ivory*, (Tex. Civ. App. 1895) 29 S. W. Rep. 538.

Consistency with Special Prayer. — *Lockhart v. Leeds*, 10 N. Mex. 568 [citing 3 ENCYC. OF PL. AND PR. 350]; *Ellis v. Hill*, 162 Ill. 557; *Baker v. Updike*, 155 Ill. 54; *Crawford v. Stevens*, (Tex. Civ. App. 1895) 31 S. W. Rep. 79.

3. *Lockhart v. Leeds*, 10 N. Mex. 568, citing 3 ENCYC. OF PL. AND PR. 350.

352. 2. *J. K. Orr Shoe Co. v. Kimbrough*, 99 Ga. 143.

In the Federal Courts. — Where the defendants are named in the caption and body of a bill it is not ground for demurrer that the prayer for process is omitted. *Jennea v. Landes*, 84 Fed. Rep. 73.

353. 6. *Florida.* — *West v. Reynolds*, 35 Fla. 317.

Maine. — *Cobb v. Baker*, 95 Me. 89.

Maryland. — *Baltimore v. Coates*, 85 Md. 531.

New Jersey. — *Ter Kijle v. Reddick*, (N. J. 1898) 39 Atl. Rep. 1062.

West Virginia. — *Hood v. Morgan*, 47 W. Va. 817.

United States. — *Fougeres v. Jones*, 66 Fed. Rep. 316. See also *Hubbard v. Urton*, 67 Fed. Rep. 419.

In *Maine.* — Rule 4. Chancery Rules of the Supreme Judicial Court, requires that bills shall be "drawn succinctly and in paragraphs numbered *seriatim*." *Cobb v. Baker*, 95 Me. 89.

Must Show Equitable Jurisdiction. — *Willis v. Willis*, 42 W. Va. 522.

Must Support Decree pro Confesso. — *Mengel v. Lehigh Coal, etc., Co.*, 24 Pa. Co. Ct. 152.

Relief on the Whole Bill. — The fact that a plaintiff prays for relief to which he is not entitled will not prevent a decree for other relief asked for consistent with the case. *Wight v. Roethlisberger*, 116 Mich. 241.

If the bill presents a case for equitable relief the court will construe its allegations so as to sustain the bill if possible. *Condon v. Knoxville, etc., R. Co.*, (Tenn. Ch. 1895) 35 S. W. Rep. 781.

Amount in Controversy. — The bill should allege that the amount in controversy is sufficient to give jurisdiction. *Home Ins. Co. v. Nobles*, 63 Fed. Rep. 641.

Description of Property. — A bill to set aside a sale of real estate must contain a description of the property. *Stille v. Hess*, 112 Mich. 678.

Agent's Authority. — A bill is not demurrable for failing to state the authority of the agent through whom the contract sued upon was made, it not appearing on the face of the bill that the agent did not have such authority. *Riley v. Hodgkins*, 57 N. J. Eq. 278.

Allegations as to Inability to Perform Conditions Precedent. — Where a plaintiff in equity asks to be excused for the nonperformance of a duty or condition precedent to maintaining his suit, it is not sufficient merely to state that he was unable to perform it or to ascertain what it was, but he must set forth fully the facts and circumstances. *Loggie v. Chandler*, 95 Me. 220.

Facts Appearing by Implication. — An allegation of an essential fact by way of recital instead of direct averment is good against a general demurrer when from the language used the fact ap-

355. *b. MATTERS OF EVIDENCE — In General.* — See note 4.

356. See notes 1, 2.

c. MATTERS JUDICIALLY KNOWN — Foreign Laws. — See note 6.

357. *d. CONCLUSIONS OF LAW.* — See note 1. See also LEGAL CONCLUSIONS.

e. DECREE MUST BE SECUNDUM ALLEGATA — (1) General Rule. — See note 2.

358. See note 1.

(2) *Admissions in Answer.* — See note 2.

359. 2. Plaintiff's Title and Interest. — See note 1.

360. See note 1.

361. 3. Defendant's Title and Interest. — See note 1.

4. Designation of Parties — In General. — See note 2.

pears by necessary implication. *Investor Pub. Co. v. Dobinson*, 72 Fed. Rep. 603.

355. 4. *Penn v. Fogler*, 182 Ill. 76.

356. 1. *Penn v. Fogler*, 182 Ill. 76.

3. *Facts Preferred to Conclusions.* — The bill must allege facts and not matters of conclusion or opinion. *Barre v. Central Bldg., etc., Assoc.*, 130 Ala. 294; *Smith v. Gauby*, (Fla. 1901) 30 So. Rep. 683; *Fuller v. John S. Davis' Sons Co.*, 184 Ill. 505; *Toles v. Johnson*, 72 Ill. App. 182; *Einstein v. Schnebly*, 89 Fed. Rep. 540. See also LEGAL CONCLUSIONS.

6. *Jennes v. Landes*, 84 Fed. Rep. 73.

357. 1. *Cobb v. Baker*, 95 Me. 89.

Harmless Error. — The fact that a bill erroneously calls a restrictive clause in a conveyance a condition instead of a negative covenant is immaterial. *Star Brewery Co v. Primas*, 163 Ill. 652.

When Terms of Agreement Ambiguous. — Where the terms of the agreement upon which a suit is based are ambiguous, the plaintiff may set them forth in full and also the construction placed by him upon them. *Einstein v. Schnebly*, 89 Fed. Rep. 540.

2. *Equitable Mortg. Co. v. Finley*, 133 Ala. 575, citing with approval 3 ENCYC. OF PL. AND PR. 357. See also the following cases:

Alabama. — *Freeman v. Pullen*, 130 Ala. 653; *Montgomery First Nat. Bank v. Acme White Lead, etc., Co.*, 123 Ala. 344, per *Tyson, J.*

Illinois. — *Fuller v. John S. Davis' Sons Co.*, 184 Ill. 505; *Jeffery v. Robbins*, 167 Ill. 375; *Harms v. Jacobs*, 158 Ill. 505; *Baker v. Updike*, 155 Ill. 54; *Odell v. Bell*, 67 Ill. App. 106.

Oregon. — *Coughanour v. Hutchinson*, 41 Oregon 419.

Tennessee. — *Fite v. Wiel*, (Tenn. Ch. 1898) 46 S. W. Rep. 330.

Texas. — *Crawford v. Stevens*, (Tex. Civ. App. 1895) 31 S. W. Rep. 79.

West Virginia. — *Fadely v. Tomlinson*, 41 W. Va. 606; *Evans v. Kelley*, 49 W. Va. 181; *Hood v. Morgan*, 47 W. Va. 817.

Facts Must Appear in Bill. — *McLean v. Thomas*, 159 Ill. 227; *Harms v. Jacobs*, 158 Ill. 505.

Material Variance Fatal to Decree. — *Willis v. Willis*, 42 W. Va. 522.

358. 1. *Coughanour v. Hutchinson*, 41 Oregon 419.

Immaterial Variance. — *Loewenstein v. Rapp*, 67 Ill. App. 678.

2. *Equitable Mortg. Co. v. Finley*, 133 Ala. 575, citing with approval 3 ENCYC. OF PL. AND PR. 358.

Conflicting Authorities — Michigan. — "Where the case is submitted on bill and answer and no exceptions are filed to the latter, relief must be based on the admissions in the answer." *Per Long, J.*, in *Fields v. Colby*, 102 Mich. 449.

359. 1. *Florida.* — *West v. Reynolds*, 35 Fla. 317.

Maryland. — *Baltimore v. Coates*, 85 Md. 531; *Ulman v. Charles St. Ave. Co.*, 83 Md. 130.

Michigan. — *Stille v. Hess*, 112 Mich. 678.

Pennsylvania. — *Cope v. Hastings*, 183 Pa. St. 300.

360. 1. *Cope v. Hastings*, 183 Pa. St. 300.

361. 1. *Smith v. Gauby*, (Fla. 1901) 30 So. Rep. 683.

2. *The Residence of the Plaintiff* must be stated. *Liddell v. Carson*, 122 Ala. 518.

Age of Plaintiff. — It is the better

361. Defendant. — See note 4.

362. 5. Stating Written Instruments — Exhibits. — See notes 2, 4. See also EXHIBITS.

363. See notes 1, 2.

7. Positiveness — Information and Belief. — See notes 5, 7.

364. 8. Bills with Double Aspect, and Inconsistency — Double Aspect. — See note 1.

365. See note 1.

366. Inconsistency. — See note 2.

368. 10. Offers in Bill — In General. — See note 1.

practice to state the age of the plaintiff, but the failure to do so is not ground for demurrer unless infancy appears upon the face of the bill. *Liddell v. Carson*, 122 Ala. 518.

361. 4. *Ex p. Richards*, 117 Fed. Rep. 658, holding that no defendant can be made a defendant to a bill except by name.

362. 2. Under the Maryland Statute (Pub. Gen. Laws Md., art. 5, § 120), when any exhibit is referred to in a bill as a part thereof, process will not issue on the bill until the filing of the exhibit. *Chappell v. Clark*, 92 Md. 98.

4. *Loewenstein v. Rapp*, 67 Ill. App. 678.

Deeds in Hæc Verba. — *Loewenstein v. Rapp*, 67 Ill. App. 678.

363. 1. *Hill v. Meinhard*, 39 Fla. 111; *Kester v. Lyon*, 40 W. Va. 161.

Repugnancy Between the Bill and an Exhibit annexed as a part thereof will be fatal on demurrer to the bill. *Barratt v. Central Bldg., etc., Assoc.*, 130 Ala. 294; *Lockhead v. Berkeley Springs Waterworks, etc., Co.*, 40 W. Va. 553.

2. *Baltimore v. Coates*, 85 Md. 531, holding that where a bill prays that certain prior proceedings be regarded as a part thereof, the record of the proceedings referred to must be filed with the bill.

5. *Coryell v. Klehm*, 157 Ill. 462, in which case the facts necessary to make a positive statement were not within the plaintiff's knowledge.

7. *Murphy v. Murphy*, 189 Ill. 360, citing with approval 3 ENCYC. OF PL. AND PR. 363.

364. 1. *Virginia-Carolina Chemical Co. v. Home Ins. Co.*, (C. C. A.) 113 Fed. Rep. 1; *Ritchie v. Sayers*, 100 Fed. Rep. 520 [each citing 3 ENCYC. OF PL. AND PR. 364]; *Florida Southern R. Co. v. Hill*, 40 Fla. 1; *Tennessee Ice Co. v. Raine*, 107 Tenn. 151; *McGraw*

v. Woods, 96 Fed. Rep. 56; *Hubbard v. Urton*, 67 Fed. Rep. 419. See also *Allen v. Caylor*, 120 Ala. 251.

Rescission or Specific Performance and Lien. — A bill praying to set aside a deed for fraud, and for the alternative relief that in case the deed is found to be valid the plaintiff may recover the contract price and have a vendor's lien, is neither contradictory nor inconsistent. *Hogueland v. Arts*, 113 Iowa 634.

Specific Performance or Damages. — A bill praying for specific performance may be amended so as to ask in the alternative for damages in case the prayer for specific performance be denied. *Fitzpatrick v. Engard*, 4 Pa. Dist. 383.

A Bill to Redeem or Declare a Tax Deed Void may be maintained in the alternative. *Downey v. Lancy*, 178 Mass. 465.

Inconsistent Relief. — A bill praying to set aside a conveyance as fraudulent or, if found to be valid, to have it declared a general assignment for the benefit of creditors, is inconsistent and cannot be maintained. *Brooks v. Lowenstein*, 124 Ala. 158.

365. 1. *Davis v. Berry*, 106 Fed. Rep. 761.

Alternative Statement of Facts. — A plaintiff may present in his bill in the alternative two different views of the same collation of facts, each leading to the same relief. *Snyder v. Grandstaff*, 96 Va. 473.

366. 2. *Brown v. Bedford City Land, etc., Co.*, 91 Va. 31.

368. 1. *Buena Vista Fruit, etc., Co. v. Tuohy*, 107 Cal. 243; *Christian v. Vance*, 41 W. Va. 754. Compare *Winterson v. Hitchings*, (C. Pl. Spec. T.) 9 Misc. (N. Y.) 322.

Form of Offer. — The offer should be direct and positive, and not merely that the party is willing to pay or perform. *Loggie v. Chandler*, 95 Me. 220.

370. V. SIGNATURE OF COUNSEL — 1. As General Requisite.
— See note 1.

371. 3. Effect of Omission — Plaintiff's Remedy. — See note 4.
Defendant's Remedy. — See note 6.

373. VIII. FILING BILL. — See note 4.

[IX. PRINTING BILL. — In *Pennsylvania*, under Equity Rule 3, § 14, all bills must be printed except where counsel shall certify that his client by reason of poverty is unable to do so, or, in case of bills for injunction, that there has not been sufficient time, and this requirement is not satisfied by typewritten bills. See note 4a.]

370. 1. Dever v. Willis, 42 W. Va.
365.

371. 4. See Dever v. Willis, 42 W.
Va. 365.

6. Dever v. Willis, 42 W. Va. 365.

373. 4. Meridian Nat. Bank v.
Hoyt, etc., Co., 74 Miss. 221.

Under the Statute of Alabama (Civ. Code Ala., § 3420) providing that "the filing of the bill is the commencement of the suit, if prosecuted," the suit is pending from the filing of the bill although the subpoena is not issued

until later. *Greenwood v. Warren*, 120 Ala. 71.

Sufficiency of Filing. — Where a bill is indorsed "filed" by the clerk, and a corresponding entry made upon the court calendar, but the bill is left in the custody of the plaintiff's counsel and no process issued, it is not so filed as to constitute the beginning of an action. *Meridian Nat. Bank v. Hoyt, etc., Co.*, 74 Miss. 221.

4a. Sunday v. Hagenbuch, 5 Pa.
Dist. 542.

BILLS OF EXCEPTIONS.

378. I. DEFINITION. — See note 1.

II. STATUTORY ORIGIN — IN WHAT CASES ALLOWED —

1. Generally. — See note 3.

379. 2. Extent of Statute. — See note 2.

381. 7. In Chancery — Generally. — See note 1.

382. 9. Scope of Bill in Actions at Law — *b*. IN CASES TRIED WITHOUT JURY. — See note 7.

386. IV. NUMBER OF BILLS REQUIRED — Where Several Bills Required. — See note 1.

378. 1. *Rogers v. Richards*, 8 N. Mex. 663 [citing 3 ENCYC. OF PL. AND PR. 378]; *Towle v. Weise*, 64 Kan. 760, wherein it was held that a bill of exceptions purporting to include all the pleadings and proceedings, including every motion, notice, order, stipulation, ruling, decision, and exception, as well as the evidence, was sufficient.

The Object of a Bill of Exceptions is to make that a part of the record which was not theretofore such. Of necessity there must be incorporated therein statements regarding the truth of which the memory of the court and those engaged in the case must be depended upon. *O'Haire v. Burns*, 25 Colo. 158.

To Preserve Incidents Arising During the Trial — In *Allen v. Lewis*, 38 Fla. 115, the court said: "Bills of exceptions were demandable, however, at common law for certain purposes. Any ruling of the trial court involving points of law growing out of the evidence, such as its admission or rejection, the giving or refusing instructions thereon, and many other incidents arising during the trial and deemed harmful to the objecting party could be reviewed on bills of exceptions. Such bills did not undertake to give the entire evidence in the case, but only so much of it, or such of its bearing, as was necessary to show the propriety or impropriety of the ruling thereon in point of law."

Distinction Between Exceptions and Bill of Exceptions. — In *State v. Rigall*, 160 Mo. 659, it was declared that the bill of exceptions is the repository of exceptions to the ruling of the court.

Distinction Between "Term" and "Final" Bills of Exceptions. — In *Missouri* the record must disclose that the appellant objected to the action of the court when it was taken or saved exceptions thereto by a term bill of exceptions. If this is not done it cannot be saved in the final bill of exceptions, which is signed at a term subsequent to that at which the ruling complained of occurred. *U. S. Casualty Co. v. Kacer*, 169 Mo. 301.

3. See *Akron Bank v. Dole*, 24 Colo. 94.

379. 2. In *Nebraska* the statute relating to bills of exceptions being remedial in its nature will be liberally construed. *Williams v. Miles*, 62 Neb. 566.

For Use on Writ of Error — *Colorado*. — In *Akron Bank v. Dole*, 24 Colo. 94, a writ of error was sued out from the Supreme Court to review a judgment of the Court of Appeals, and it was held that no bill of exceptions was necessary.

381. 1. *United States*. — *Southern Bldg., etc., Assoc. v. Carey*, 117 Fed. Rep. 325; *Continental Trust Co. v. Toledo, etc., R. Co.*, 99 Fed. Rep. 177, in each of which cases the court cited 3 ENCYC. OF PL. AND PR. 381.

382. 7. In *Mandamus Proceedings* a bill of exceptions under the statute of *Arkansas* is necessary to be filed under the same circumstances and for the same purpose as it is in ordinary actions. *School Dist. No. 14 v. School Dist. No. 4*, 64 Ark. 483.

386. 1. In *Missouri*. — *Atchison v. Chicago, etc., R. Co.*, 94 Mo. App. 572.

Necessity for Separate Bills Although Cases Were Tried Together. — In *Wells*

386. Cross-bill. — See note 3.

387. V. WHERE BILL REQUIRED — EXCLUSIVENESS OF REMEDY — 1. General Rule. — See notes 1, 2.

389. 2. Stipulations. — See note 3.

390. 3. Evidence. — See note 1.

v. Coker Banking Co., 113 Ga. 857, it was held that the mere fact that several separate and distinct cases "arising under the same contract," and being between the same parties, were, "by agreement, * * * tried together" before the judge "presiding as judge and jury," did not have the effect of consolidating the cases into one, so as to authorize the losing party, by a single bill of exceptions, to bring to the Supreme Court for review the judgments severally rendered in such cases in the court below. *Citing Erwin v. Ennis*, 104 Ga. 861.

386. 3. Nature and Office of Cross-bill. — In *Georgia* the cross-bill of exceptions is a remedy provided for the successful party in the trial court to have reviewed rulings made against him during the trial, in the event his adversary is successful in obtaining a judgment in the Supreme Court, which in its effect leaves the case to be tried again in the trial court. The cross-bill of exceptions must contain, or specify, so much of the evidence as is material to a clear understanding of the errors therein complained of. Other evidence than what is necessary for this purpose has no proper place in the cross-bill of exceptions, and if contained therein must be entirely disregarded. It is the right, even if it is not the duty, of the judge to refuse to sign a cross-bill of exceptions until all of such matter, entirely unnecessary and utterly irrelevant so far as anything in the cross-bill is concerned, has been stricken therefrom. *Planters, etc., Mut. F. Assoc. v. De Loach*, 113 Ga. 802. See also *Little v. Sparks*, 112 Ga. 220. See also *Martin v. Harwell*, 115 Ga. 156; *Monroe v. Lippman*, 115 Ga. 164.

387. 1. *Brooks v. Raiden*, 113 Ga. 86; *Yandell v. Madison County*, 79 Miss. 212; *Denise v. Omaha*, 49 Neb. 750.

No Substitute. — *Groves v. Groves*, 9 Wyo. 173.

Dismissal for Failure to File Bill of Exceptions. — The failure of the appellant to file a bill of exceptions is not a ground for dismissing the appeal, as he is entitled to have the court examine

the record proper. *Daum v. Conley*, 27 Colo. 56.

In Chancery Cause. — In *Nebraska*, where a bill of exceptions is not preserved on an appeal in equity, the only question presented by the record is whether the decree is supported by the pleadings. *Pettibone v. Fitzgerald*, 62 Neb. 869.

2. Stenographer's Certificate. — The certificate of the court stenographer is unavailable to make evidence a part of the record on appeal. *Conklin v. Cullen*, 25 Mont. 214.

Reference to the Statement of Facts cannot be made in order to aid an insufficient bill of exceptions. *McKinney v. State*, 41 Tex. Crim. 434.

389. 3. *Illinois.* — *Chicago v. South Park Com'rs*, 169 Ill. 387.

Montana. — *Conklin v. Cullen*, 25 Mont. 214.

In *Nebraska* it has been held that the parties may make a stipulation as to the correctness of the bill when it is presented to the clerk to be signed. *Philadelphia F. Assoc. v. Ruby*, 49 Neb. 584.

Admissions of Parties. — See *School Dist. No. 14 v. School Dist. No. 4*, 64 Ark. 483.

Ineffectual Stipulation as to Documents. — A stipulation of counsel that "inasmuch as the foregoing documents," meaning an ordinance, copy of commissioners' reports, etc., "appear in the record, they may be referred to in argument of counsel as if they were copied," etc., will not operate to incorporate such documents in the bill of exceptions. *Chicago v. South Park Com'rs*, 169 Ill. 387.

Necessity for Bill of Exceptions to Bring Up Agreed Statement of Facts. —

An agreed statement of facts upon which the case was heard, unless it was made a part of the record by a bill of exceptions "or order of the court," cannot be considered on appeal. A reference to it in the judgment is not sufficient. *School Dist. No. 14 v. School Dist. No. 4*, 64 Ark. 483.

390. 1. *Colorado.* — *Pettit v. People*, 24 Colo. 517.

Georgia. — *Russell v. Mohr-Weil*

Lumber Co., 115 Ga. 35; Bond v. Winn, 113 Ga. 18; Clarke v. East Atlanta Land Co., 113 Ga. 21.

Indiana. — Gifford v. Hess, 15 Ind. App. 450.

Indian Territory. — Simon v. Aubrey, 3 Indian Ter. 680.

Massachusetts. — P. P. Emory Mfg. Co. v. Rood, 182 Mass. 166.

Missouri. — Mankameyer v. Egelhoff, 93 Mo. App. 183.

Nebraska. — Michigan University v. McGuckin, 62 Neb. 489; Reynolds v. McCandless, 50 Neb. 225; Roberts v. Hopper, 50 Neb. 681; Storz v. Finklestein, 48 Neb. 28; Winters v. Means, 48 Neb. 333; McKenna v. Dietrich, 48 Neb. 433; Lewis Invest. Co. v. Boyd, 48 Neb. 604.

New Jersey. — State v. Ackerman, 62 N. J. L. 456.

New Mexico. — Silva v. Territory, 9 N. Mex. 650.

Oklahoma. — Menten v. Shuttee, 11 Okla. 381.

Pennsylvania. — Forrest v. Buchanan, 203 Pa. St. 454.

Wyoming. — Groves v. Groves, 9 Wyo. 173.

On Motion for New Trial. — Evidence adduced on the hearing of a motion for a new trial, to be available on review, must be incorporated in a bill of exceptions. Holt v. State, 62 Neb. 134.

In Chancery Cause — Where Review of Findings Is Sought. — In Arkansas the rule stated in the text is likewise applicable to chancery causes. Unless oral evidence taken before the chancellor is brought up by a bill of exceptions, the Appellate Court will presume that the findings of fact made by him were based upon competent and sufficient evidence. Gaines v. Waters, 64 Ark. 609.

Excluded Evidence. — The exclusion as evidence of a paper or document not subsequently embodied in the bill of exceptions cannot be reviewed. Graham v. Frazier, 49 Neb. 90.

Failure to Show what Witness Would Have Answered. — In P. P. Emory Mfg. Co. v. Rood, 182 Mass. 166, the court refused to consider objections to the exclusion of questions asked of the defendant, because the bill of exceptions did not show what the answers to such questions would have been.

Review of Sufficiency of Evidence. — In Stuart v. Burcham, 50 Neb. 823, it was held that there can be no review of findings of fact in the absence of a bill

of exceptions. Citing State Ins. Co. v. Buckstaff Bros. Mfg. Co., 47 Neb. 1. See also Douglas v. Smith, 50 Neb. 899.

Where Review Is Sought of Order Denying Motion for New Trial. — Where error is alleged in denying a motion for a new trial and in arrest of judgment, such alleged error cannot be considered, on appeal, unless the evidence is brought up by bill of exceptions. Simon v. Aubrey, 3 Indian Ter. 680.

Longhand Extension of Evidence — Iowa Statute. — Under Code Iowa, § 3675, declaring that in all appealable actions the parties are entitled to have the whole proceedings reported, which report, when certified by the judge, shall constitute a bill of exceptions, does not change the requirement of § 3652 that in equitable actions the longhand extension of the evidence shall be filed and certified by the judge within six months. Spinney v. Halliday, 115 Iowa 420.

When Extrinsic Evidence Is Introduced at Hearing of Motion. — "When extrinsic evidence is introduced at the hearing of a motion to quash or to set aside process, and an appeal is taken to this court, the facts must of course be presented in some properly authenticated form so that we may know what proof was submitted to the court below. The best and most reliable method of thus presenting the evidence offered orally is by a bill of exceptions, and if that practice be always pursued it will oftentimes avoid technical difficulties which may stand in the way of the Appellate Court considering the evidence." Palmer v. Hughes, 84 Md. 652.

Evidentiary Bill. — In Florida it is provided by special rule 1, for preparation of bills of exceptions and transcripts of records, that "if any assignment of error presented to the judge is based upon the refusal of the court to grant a new trial, on the ground that the verdict is contrary to the evidence, or not supported thereby, or if the defendant in error shall demand in writing that all the testimony shall be reviewed for the purpose of showing that any error of law, either as to the admission or rejection of testimony, or as to a charge given or refused, is, in view of the whole testimony, a harmless error, then an entirely separate and distinct bill of exceptions of the evidence adduced at

392. 4. *Motions Generally.* — See note 2.

395. See notes 2, 9, 13.

396. 5. *Affidavits.* — See note 1.

the trial of the cause shall be made up and signed by the judge, to be known as the evidentiary bill of exceptions." This rule further provides that nothing shall be inserted in the evidentiary bill but the testimony, and that it shall contain all the evidence adduced at the trial, stated in a narrative form, omitting repetitions and questions, except when the judge shall otherwise direct as to questions. Evidence offered and rejected cannot go into such bill, though exceptions are predicated thereon, as the rule forbids anything but the evidence adduced at the trial to be inserted therein. If any assignment of error calls for a production of all the evidence adduced at the trial, an entirely separate and distinct bill of the evidence alone must be made and signed. *Allen v. Lewis*, 38 Fla. 115.

392. 2. *Rowland v. McGuire*, 67 Ark. 320, wherein the court cited 3 ENCYC. OF PL. AND PR. 392-396. See also the following cases:

Alabama. — *Randall v. Wadsworth*, 130 Ala. 633; *Cottingham v. Greely Barnham Grocery Co.*, 129 Ala. 200.

Illinois. — *Nester v. Carney Bros. Co.*, 98 Ill. App. 630.

Oklahoma. — *Menten v. Shuttee*, 11 Okla. 381.

Motion *Ne Recipiatur.* — In *Spencer v. Patten*, 84 Md. 414, in which case the question was raised as to whether a plea in abatement was filed in time or not, the court said: "The motion *ne recipiatur* is presumably made before a plea is filed and made part of the record. A better practice would therefore be to present the question by a bill of exceptions. There may be a rule of court in force which governed the court below, and if the plea is not received, and therefore not technically a part of the record, it may well be questioned whether this court is authorized by an appeal such as this to review the ruling of the court below unless presented by an exception. The general subject is fully discussed in 3 Encyc. of Pl. and Pr. 392, and following pages, and although the practice in this state may not be in accord with all the authorities cited by the author, the wisdom, if not necessity, of having a bill of exceptions in a question of this

kind is made apparent. Certain it is that we must presume the action of the court below on a motion of this character was right, unless there be something on the record to affirmatively establish the contrary."

395. 2. *To Set Aside Judgment.* — *Contra.* — In *Alabama* it has been held that in a criminal case a motion in arrest of judgment and the ruling of the court thereon must be shown by the record proper. *Taylor v. State*, 112 Ala. 69.

9. Affirmance Where Bill of Exceptions Is Not Preserved. — In *Dexter Bank v. Stoddard County Bank*, 169 Mo. 74, it was held that a motion to set aside an order appointing a receiver must be preserved in a bill of exceptions to entitle the movant to have the order reviewed in the Appellate Court. If the motion is not so preserved, and the only error is the trial court's refusal to sustain it, the judgment will be affirmed.

13. Other Instances. — *To Set Off Costs.* — In *Rowland v. McGuire*, 67 Ark. 320, wherein the motion was not considered because there was no bill of exceptions.

To Require Defendants to Pay Fee of Guardian ad Litem. — *Rowland v. McGuire*, 67 Ark. 320, wherein the motion was not considered because there was no bill of exceptions.

396. 1. *California.* — *People v. Louie Foo*, 112 Cal. 17.

Colorado. — *Daum v. Conley*, 27 Colo. 56.

Montana. — *Cornish v. Floyd-Jones*, 26 Mont. 153.

Nebraska. — *Hans v. State*, 50 Neb. 150; *Minick v. Minick*, 49 Neb. 89; *Rosecrans v. Asay*, 49 Neb. 512; *Norfolk Nat. Bank v. Job*, 48 Neb. 774.

New Mexico. — *U. S. v. Lesnet*, 9 N. Mex. 271.

South Dakota Statute. — Under Comp. Laws S. Dak., § 5217, providing that on appeals from orders the clerk shall transmit the orders and the original papers used on the hearing, it has been held that on an appeal from an order made upon affidavits the affidavits will be considered by the Appellate Court, although not incorporated in a bill of

399. 6. Rulings. — See note 2.

400. 7. Motion for New Trial. — See note *a*.

8. Motion to Dismiss. — See note 1.

To Dismiss Appeal. — See note 2.

9. Motions Affecting Pleadings. — See note 3.

exceptions. *Bedtkey v. Bedtkey*, 15 S. Dak. 310.

Continuance. — *Hans v. State*, 50 Neb. 150.

Affidavits Used on a Motion for a New Trial cannot be considered in appellate proceedings unless preserved by a bill of exceptions. *Rosecrans v. Asay*, 49 Neb. 512.

399. 2. *Florida*. — *Allen v. Lewis*, 38 Fla. 115.

Indiana. — *Bonham v. Citizens St. R. Co.*, 158 Ind. 106.

Montana. — *Rumney Land, etc., Co. v. Detroit, etc., Cattle Co.*, 19 Mont. 557.

Oklahoma. — *Menten v. Shuttee*, 11 Okla. 381.

Texas. — *Prewett v. State*, 41 Tex. Crim. 262; *Adcock v. State*, 41 Tex. Crim. 288.

Interlocutory Orders. — *Ewing v. Wofford*, 122 Ala. 439.

California — Order Dissolving Attachment. — Under rule 29 an order dissolving a writ of attachment must be presented by a bill of exceptions, and the practice prescribed by Code Civ. Pro. Cal., §§ 650, 651, must be followed. *Smith v. Jordan*, 122 Cal. 69.

Ruling on Motion in Arrest of Judgment. — In *Alabama* it has been held that in a criminal case a ruling on a motion in arrest of judgment must be shown by the record proper, and not by a bill of exceptions. *Taylor v. State*, 112 Ala. 69.

Ruling on Motion to Compel Election. — An exception to the action of the court in overruling defendant's motion to compel the state to elect on which act of embezzlement it will go to the jury, can be preserved only in the bill of exceptions. *State v. Rigall*, 169 Mo. 659.

On an Appeal from an Order Denying a Motion to Set Aside a Default unless it is otherwise provided by statute, the order and the evidence upon which such order was granted should be incorporated in a bill of exceptions. *Rumney Land, etc., Co. v. Detroit, etc., Cattle Co.*, 19 Mont. 557.

Order Made on Motion to Quash Garnishment. — The rulings of the court upon motions of various kinds, made

during the progress of the cause, and its orders striking out an amended answer, refusing to quash a garnishment, and recitals in the judgment that the court heard the admissions of the attorney for defendant as a reason for its judgment, can only be shown by a bill of exceptions, and when not so shown cannot be considered on appeal. *Jett v. Sittle*, 3 Indian Ter. 671.

Where Copies of Motion Appear in Transcript. — In *Ewing v. Wofford*, 122 Ala. 439, it was held that the motion docket of the Circuit Court is not a record of that court, and a ruling by said court upon a motion spread upon the motion docket cannot be reviewed on appeal, unless the motion is incorporated in the bill of exceptions, or the transcript shows that said motion was enrolled upon the records of the Circuit Court by an order thereof; and it is not sufficient for the presentation of the ruling upon said motion that copies of the motion appear in the transcript.

400. *a.* *Henry v. Couch*, 132 Ala. 570; *Smith v. Simpson*, 3 Indian Ter. 503; *Scaggs v. Western Home Town Mut. F. Ins. Co.*, 94 Mo. App. 88.

1. **A Motion to Direct a Verdict** should be brought up by a bill of exceptions. *Bonham v. Citizens St. R. Co.*, 158 Ind. 106.

2. **Motion in Arrest — Contra**. — See *Scaggs v. Western Home Town Mut. F. Ins. Co.*, 94 Mo. App. 88, holding that the bill of exceptions must show that exceptions were taken to the ruling of the court on a motion in arrest.

3. *Dothan Guano Co. v. Ward*, 132 Ala. 380; *Nashville, etc., R. Co. v. Smith*, 132 Ala. 434; *Randall v. Wadsworth*, 130 Ala. 633; *Cottingham v. Greely Barnham Grocery Co.*, 129 Ala. 200; *Holley v. Coffee*, 123 Ala. 406.

Motion to Quash Indictment. — *Loeb v. State*, 115 Ga. 241, holding that the refusal of the court to quash an indictment must be complained of in the bill of exceptions.

Motion to Strike General Issue. — In order to assign error upon the action of the court in striking a plea of the general issue, an exception to the court's ruling must be reserved by bill

401. See notes 1, 2.

402. See note 1.

10. Instructions. — See note 2.

403. 11. Other Instances. — See note 1.

of exceptions. *Nester v. Carney Bros.* Co., 98 Ill. App. 630.

401. 1. *Alabama Statute.* — Under Code Ala. 1896, § 614, which provides that when from any decision on the trial of a cause it may become necessary for the plaintiff to suffer a nonsuit, the facts, points, or decision may be reserved by bill of exceptions, it has been held that where the plaintiff suffers a nonsuit on account of the adverse ruling upon a matter of evidence to which an exception is reserved, the court on appeal is confined to a consideration of that matter as shown by the bill of exceptions, and cannot revise the rulings of the court below on the pleadings. *Chastain v. Porter*, 130 Ala. 470, following *Wyatt v. Evins*, 52 Ala. 285. See also *Randall v. Wadsworth*, 130 Ala. 633; *Cottingham v. Greely Barnham Grocery Co.*, 129 Ala. 200; *Holley v. Coffee*, 123 Ala. 406.

2. *Alabama.* — *Cottingham v. Greely Barnham Grocery Co.*, 129 Ala. 200.

402. 1. *Motion to Make More Definite and Certain.* — In *Fulton County v. Gibson*, 158 Ind. 471, it was held that a motion to make a complaint more specific is not a part of the record on appeal by order of court without a bill of exceptions, where it does not appear that the order of the court was made on the motion of either party, and the motion was not spread on the order book as a part of the court's order.

2. *Colorado.* — *Petit v. People*, 24 Colo. 517.

Illinois. — *Schafer v. Moe*, 72 Ill. App. 50.

Indiana. — *Bonham v. Citizens St. R. Co.*, 158 Ind. 106.

Indian Territory. — *Hockett v. Alston*, 3 Indian Ter. 432.

Kansas. — *State v. Blunk*, 4 Kan. App. 780.

Massachusetts. — *Corey v. Havener*, 182 Mass. 250.

Texas. — *Preston v. State*, 41 Tex. Crim. 300.

Effect of Failing to Set Forth Instructions. — Where the bill of exceptions does not set forth what instructions were given, it will be assumed that they were appropriate to the case as presented by the evidence and were

correct. *Corey v. Havener*, 182 Mass. 250.

Under Iowa Statute — Instructions Filed with Clerk. — Under Code Iowa, § 3707, providing that all instructions requested or given shall be filed by the clerk and be a part of the record, instructions which are handed to the judge, marked on the margin "Refused. Defendant excepts," — with the judge's signature, and are filed with the clerk of the District Court the day the verdict is returned, become a part of the record; and the contention that they cannot be considered by the Appellate Court because they are not embodied in the bill of exceptions is without merit. *Decatur v. Simpson*, 115 Iowa 348.

In *Montana*, by statute, the instructions are a part of the judgment roll, and need not be included in a bill of exceptions. *Sanderson v. Billings Water Power Co.*, 19 Mont. 236.

In *New Mexico* the instructions are made a part of the record by statute (Code Civ. Pro. 1897) and hence it is not necessary to incorporate them in a bill of exceptions. *Schofield v. Territory*, 9 N. Mex. 526.

In *Texas.* — *Compare Spears v. State*, 41 Tex. Crim. 527, decided under 25 Act Leg., p. 17, and holding that an exception and a bill of exceptions, or a notice for a new trial based on the instructions complained of, is necessary.

Requisite Number of Bills Where Instructions Are Refused Simultaneously.

— Where a number of prayers for instructions to the jury are submitted to the trial court at the same time, the ruling of the court upon them is a single act, and only one bill of exceptions should be taken. *McCosker v. Banks*, 84 Md. 292, in which case the court said: "The practice of embodying each prayer in a separate exception, though it prevailed half a century ago, has long since been abandoned as one that served no useful purpose."

403. 1. *Remarks of Judge.* — *Reamer v. Morrison Express Co.*, 93 Mo. App. 501.

The Conduct of the Court in controlling the procedure at the trial cannot be

404. VI. WHERE BILL IS NOT REQUIRED. — See note 1.

406. Where Matters Improperly Embraced. — See note 3.

2 Pleadings. — See note 4.

407. 3. Judgments — On Pleadings. — See note 2.

409. 5. Other Instances. — See note 7.

VII. WHAT BILL MUST SHOW — SUFFICIENCY — 1. In General — Error. — See note 9.

410. See note 2.

411. 2. Objections. — See notes 1, 2.

considered in the absence of a bill of exceptions. *Pettit v. People*, 24 Colo. 517.

Findings of Court. — A special finding of facts by the court is no part of the record, and can only be made so by bill of exceptions. *State v. Lusk*, 93 Mo. App. 680.

Refusal of Court to Settle Bill of Exceptions. — Even if an appeal lies from an order refusing to settle a bill of exceptions there must be a bill of exceptions showing error in such refusal. *Williamson v. Joyce*, 137 Cal. 151.

An Ordinance and a copy of a commissioner's report must be brought up by bill of exceptions. *Chicago v. South Park Com'rs*, 169 Ill. 387.

404. 1. Wilson v. State, 156 Ind. 635; *Harris v. State*, 155 Ind. 15; *Home Electric Light, etc., Co. v. Globe Tissue Paper Co.*, 146 Ind. 673, in each of which cases the court cited 3 ENCYC. OF PL. AND PR. 404. See also *Underwood v. David*, 9 Wyo. 178.

Copy of Instrument Sued Upon. — Whenever a defendant intends to raise a question upon an instrument sued upon, or upon a bill of particulars, filed with the declaration, he must preserve such question by a bill of exceptions. The copy of the instrument sued upon, or the bill of particulars, indorsed on the declaration, being no part thereof, is no part of the record, and a bill of exceptions is necessary to inform the Appellate Court what it is. *Boyles v. Chytraus*, 175 Ill. 370, citing 3 ENCYC. OF PL. AND PR. 404.

406. 3. Wilson v. State, 156 Ind. 635; *Harris v. State*, 155 Ind. 15; *Home Electric Light, etc., Co. v. Globe Tissue Paper Co.*, 146 Ind. 673, in each of which cases the court cited 3 ENCYC. OF PL. AND PR. 406.

4. Underwood v. David, 9 Wyo. 178. See also *Lewis Invest. Co. v. Boyd*, 48 Neb. 604.

In Montana it seems that the pleadings must be identified by the bill of

exceptions. *Cornish v. Floyd-Jones*, 26 Mont. 153.

Amendments Which Are Not Allowed must in *Georgia* be brought up by bill of exceptions, and it is error to attempt to bring them up as a part of the record. *Turner v. Camp*, 113 Ga. 339.

407. 2. Kahului R. Co. v. Hawaiian Commercial, etc., Co., 11 Hawaii 749, citing 3 ENCYC. OF PL. AND PR. 407.

Judgment on Demurrer. — *Mallinckrodt Chemical Works v. Nemnich*, 169 Mo. 388.

Judgment by Confession. — Where a judgment by confession is entered in term time, the warrant of attorney, the affidavit of execution, and note, upon which judgment is confessed, must be brought up by a bill of exceptions. *Boyles v. Chytraus*, 175 Ill. 370, citing 3 ENCYC. OF PL. AND PR. 407.

A Decree is a matter of record and does not need the authentication of the judge in a bill of exceptions in order to have it considered upon appeal. *White v. White*, 112 Cal. 577.

Where Judgment Is Shown in Recitals of Motion for New Trial. — When the recitals in the ground of a motion for a new trial sufficiently indicate the character of the judgment rendered to enable the appellate court to determine the assignments of error, it is not necessary that a copy of the judgment rendered should be specified in the bill of exceptions and transmitted in the record. *McCowan v. Brooks*, 113 Ga. 532.

409. 7. Oral Stipulations and Admissions will not be regarded on appeal unless they are made to appear in the record. *Rio Grande County v. Phye*, 27 Colo. 107.

9. Davis v. People, 24 Colo. 102.

410. 2. Gillespie v. McBryde, 13 Hawaii 432, citing 3 ENCYC. OF PL. AND PR. 409, 410.

411. 1. Alabama. — *Stallworth v. State*, 129 Ala. 118.

2. Georgia. — *Grogan v. Tate*, 113 Ga. 1057.

412. 3. Rulings. — See note 1.

4. Exceptions. — See note 2. See also EXCEPTIONS AND OBJECTIONS.

414. Exceptions Timely and Specific. — See note 2.

415. 5. Facts. — See note 1.

416. 6. Unnecessary Matters. — See note 2.

419. 7. Evidence — *a.* IN GENERAL. — See note 1.

420. b. ALL THE EVIDENCE. — See note 2.

412. 1. Missouri. — *State v. Rigall*, 169 Mo. 659.

Compare *Withers v. Kemper*, 25 Mont. 432, wherein it was held that it will be presumed that the lower court passed upon all the points raised by the bill of exceptions.

2. Alabama. — *Stallworth v. State*, 129 Ala. 118; *Western Union Tel. Co. v. White*, 129 Ala. 188.

Nevada. — *McGurn v. McInnis*, 24 Nev. 370.

414. 2. South Carolina. — *Thompson v. Security Trust etc., Ins. Co.*, 63 S. Car. 290.

415. 1. The Nevada Statutes provide that the point of the exception shall be particularly stated with so much of the evidence or other matter as may be necessary to explain it. *McGurn v. McInnis*, 24 Nev. 370.

416. 2. Alabama. — *Louisville, etc., R. Co. v. Hall*, 131 Ala. 161; *Woodward Iron Co. v. Herndon*, 130 Ala. 364.

Rules of Court. — In this particular the bill of exceptions must be framed in accordance with the rules of court, if any, otherwise it will be stricken. *Louisville, etc., R. Co. v. Hall*, 131 Ala. 161.

The Notice of Appeal is a matter of record and does not need the authentication of the judge in a bill of exceptions. *White v. White*, 112 Cal. 577.

Rulings Against Parties Who Did Not Appeal, and the grounds upon which such rulings were made and the exceptions thereto, should not be set forth. *Louisville, etc., R. Co. v. Hall*, 131 Ala. 161.

419. 1. Alabama. — *Bodine v. State*, 129 Ala. 106.

Arkansas. — *Gaines v. Waters*, 64 Ark. 609; *Overton v. Lohmann*, 67 Ark. 464.

Colorado. — *Pettit v. People*, 24 Colo. 517.

Pennsylvania. — *Forrest v. Buchanan*, 203 Pa. St. 454.

Virginia. — *Greever v. Graham Bank*, 99 Va. 547.

Wyoming. — *Groves v. Groves*, 9 Wyo. 173.

Evidence Introduced on Plea in Abatement. — In *Bodine v. State*, 129 Ala. 106, it was held that the evidence upon which a plea in abatement was heard should have been brought up in a bill of exceptions.

Oral Evidence in Chancery Case. — Where a suit in equity is heard in part upon evidence taken orally before the court, unless the appellant files a bill of exceptions showing such evidence it will be presumed that the findings of fact made by the chancellor were based upon competent and sufficient evidence. *Gaines v. Waters*, 64 Ark. 609.

Reference from One Bill of Exceptions to Another. — The general rule is that one bill of exceptions cannot be looked to in order to supply an omission of evidence in another unless the one refers to the other; but when one bill contains evidence clearly admissible, and as to which it is manifest that no subsequent evidence could have rendered it inadmissible, such evidence may be considered in determining the admissibility of other evidence the exclusion of which is presented by another bill of exceptions, and which purported to have been introduced in connection with the evidence presented by the former bill, provided, however, that the evidence presented by the former bill be fully identified by the second bill, and that the departure from the general rule will work no injustice to the opposing party. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239.

420. 2. Alabama. — *Louisville, etc., R. Co. v. Hall*, 131 Ala. 161. See also *Woodward Iron Co. v. Herndon*, 130 Ala. 364.

New Mexico. — *Denver, etc., R. Co. v. U. S.*, 9 N. Mex. 309.

Under Hawaii Statute. — In *Gillespie v. McBryde*, 13 Hawaii 432, the court said: "While it might be desirable to have all of the testimony before the

421. See note 1.

422. See note 1.

423. *Finding.* — See note 1. See also APPEALS.

court in many cases, it is not necessary that all the evidence should be brought up in every case. The statute requires that 'the cause, or so much thereof as may be necessary to a full understanding of the question,' shall be presented. One wishing to present to the appellate court for review the ruling of the Circuit Court on a question of evidence can clearly bring himself within this statute by embodying in his bill of exceptions a sufficient amount of the testimony to give the appellate court a clear idea of the relevancy and competency of the evidence offered, or the reverse, the grounds of the objection and the grounds of the ruling of the court if any are given."

Misconstruction of Rule by Presiding Judge. — A bill of exceptions which contains all of the testimony as given by questions and answers instead of a statement of the testimony such as is required by a rule of court will be stricken, even though it was improperly prepared in obedience to the presiding judge's requirements that it should be constructed in violation of the rule. *Louisville, etc., R. Co. v. Hall*, 131 Ala. 161.

Effect of Settlement. — The settlement of a bill of exceptions is equivalent to an affirmative statement that all the evidence necessary to a review of the cause is incorporated in the bill of exceptions, provided the contrary does not appear from the face of the bill itself. *Denver, etc., R. Co. v. U. S.*, 9 N. Mex. 309.

Where Verdict Was Directed for Failure to Introduce Certain Evidence. — In *Lamar v. Gardner*, 113 Ga. 781, it was held that a motion to dismiss a writ of error upon the ground that all of the evidence was not brought up will not be sustained where it appears that the judgment complained of in the bill of exceptions was the direction of a verdict based on the plaintiff's failure to introduce certain specified evidence.

Where No Evidence Was Adduced at Trial. — Where a case was tried on the allegations contained in the petition and answer, and no evidence was adduced at the trial, a motion to dismiss the writ of error because there was not incorporated in the bill of excep-

tions "a brief of the evidence," and no reason assigned for the omission, is manifestly without merit. *Holmes v. Sikes*, 113 Ga. 580.

Brief of Evidence. — In *Georgia* the Supreme Court will not review the evidence in a case in which it is apparent from the record that there has been no *bona fide* effort made to brief the evidence as required by law, and when the document purporting to be a brief of the evidence is no brief at all, but a needlessly voluminous paper, abounding in repetition and much totally useless and irrelevant matter. *Moore v. Medlock*, 113 Ga. 259; *McLeod v. Florida Cent. R. Co.*, 111 Ga. 859; *Buchanan v. McClain*, 110 Ga. 479; *Ansley v. Davidson*, 110 Ga. 279; *Price v. High*, 108 Ga. 145. See also *Culver v. Silver*, 113 Ga. 1142.

421. 1. *Matter of Burdick*, 112 Cal. 387; *Deering v. Hannah*, 93 Mo. App. 618; *Hans v. State*, 50 Neb. 150. See also *Roberts v. Hopper*, 50 Neb. 681; *Charter Oak Stove, etc., Co. v. Rice*, 108 La. 699.

Where Question Is Raised as to Applicability of Instructions. — Objections to the instructions on the ground that they are not pertinent and accurate can be determined only in the light of all the evidence bearing upon them, and unless all the evidence is brought up such objections will not be considered. *Short v. People*, 27 Colo. 175.

General Affirmative Charge. — In *Alabama* it has been held, under a rule of court requiring the evidence to be given in narrative form and that a statement of the testimony *in extenso* shall be given when the affirmative charge has been asked in good faith, that it is not proper to set forth in a bill of exceptions the questions and answers, but only to state testimony in full and in narrative form where that can be intelligently and intelligibly done. *Woodward Iron Co. v. Herndon*, 130 Ala. 364.

422. 1. *Alabama.* — *Northern Alabama R. Co. v. Brakefield*, 123 Ala. 605, in which case it was held that a bill of exceptions which shows only the mere "tendencies" of the evidence is insufficient.

423. 1. *Freman v. Marshall*, 137 Cal. 159; *Matter of Burdick*, 112 Cal. 387.

423. Taking Case from Jury. — See note 2.

c. CERTIFICATION AS TO ALL THE EVIDENCE — (1) *Generally.* — See note 4.

425. (2) Form of Certificate. — See note 1.

427. 8. Evidence Rejected Over Objection. — *a. GENERALLY.* — See note 2.

428. Proper Offer. — See note 2.

429. b. QUESTIONS. — See notes 1, 2.

9. Admission of Evidence Over Objection. — See note 3.

Surrounding Facts. — See note 4.

423. 2. Deering v. Hannah, 93 Mo. App. 618.

4. Colorado. — *Daum v. Conley*, 27 Colo. 56.

425. 1. Sufficient Certificate. — The recital in the bill of exceptions at the close of the testimony, as stated therein, that "this was substantially all the testimony; the court, on the testimony introduced, rendered judgment," etc., sufficiently shows that all the evidence introduced upon which the trial court acted was set out in the bill of exceptions. *Tallman v. Drake*, 116 Ala. 262. See also *Bishop v. Taylor*, 41 Fla. 77; *Baxter v. Coughlin*, 80 Minn. 322.

Insufficient Certificate. — A bill of exceptions reciting that plaintiffs "introduced evidence hereinafter specified, and closed," and containing no further statement with respect to this evidence, fails to show what was the testimony introduced in behalf of the plaintiffs. *Bond v. Winn*, 113 Ga. 18.

Certificate Construed. — Where the certificate of the trial judge to a bill of exceptions is to the effect that "the foregoing" is all the evidence introduced in the trial relating in any manner to the admissibility of the confessions testified to by witnesses, it will be construed as certifying only that the bill contains all the evidence that relates to the question whether or not the confessions were given under such conditions as the rules of evidence require to make them admissible, and not that it contains all the evidence corroborative of such confessions. *Short v. People*, 27 Colo. 175.

427. 2. Supreme Lodge, etc., v. Robbins, 70 Ark. 364; *Laffin v. Shackelford*, (C. C. A.) 98 Fed. Rep. 372, in each of which cases the court cited 3 ENCYC. OF PL. AND PR. 427. See also the following cases:

Alabama. — *Carwile v. Carwile*, 131 Ala. 603.

Texas. — *Duffy v. State*, 41 Tex.

Crim. 391; *Spears v. State*, 41 Tex. Crim. 527; *Nacogdoches First Nat. Bank v. Hicks*, 24 Tex. Civ. App. 269.

Virginia. — *Longley v. Com.*, 99 Va. 807; *Clark v. Sleet*, 99 Va. 381.

West Virginia. — *Sesler v. Rolfe Coal, etc., Co.*, 51 W. Va. 318.

428. 2. What Must Be Brought Up. — *Torey v. State*, 41 Tex. Crim. 543; *Longley v. Com.*, 99 Va. 807; *Clark v. Sleet*, 99 Va. 381.

The Purpose for Which the Evidence Was Offered must appear. *Cannon v. State*, 41 Tex. Crim. 467. See also *Clay v. State*, 41 Tex. Crim. 653.

Where Some of the Evidence Objected to Is Clearly Inadmissible the action of the trial court in excluding all of it will not be reviewed unless the bill of exceptions points out the portions of such evidence claimed to be admissible. *Ford v. State*, 41 Tex. Crim. 1.

Method of Showing Relevancy and Materiality of Excluded Testimony. — *The Usual Method* is by incorporating in the bill of exceptions the expected answer of the witness. *Longley v. Com.*, 99 Va. 807.

Where Testimony upon a Certain Issue Has Been Excluded on the Ground that the Issue Was Immaterial, the expected answers of witnesses upon such issue need not be incorporated in the bill of exceptions, where the character of the testimony sought to be introduced appears from the argument of the counsel offering it, as shown by the bill. *Clark v. Sleet*, 99 Va. 381.

429. 1. Alabama. — *Carwile v. Carwile*, 131 Ala. 603.

Texas. — *Fossett v. State*, 41 Tex. Crim. 400.

West Virginia. — *Sesler v. Rolfe Coal, etc., Co.*, 51 W. Va. 318.

2. Carwile v. Carwile, 131 Ala. 603.

3. Texas. — *Edens v. State*, 41 Tex. Crim. 522.

4. Texas. — *McKinney v. State*, 41

- 430.** 10. **Incorporation of Documentary Evidence by Reference** — *b.* UNDER MODERN PRACTICE. — See note 3.
432. *d.* IDENTIFICATION REQUIRED. — See note 1.
435. *e.* RECORD. — See note 1.
436. *f.* STENOGRAPHIC BILL — (1) *Generally.* — See note 2.
 (2) *Incorporation of Reporter's Notes.* — See note 3.
439. *g.* NARRATION OF EVIDENCE. — See note 2.
440. 11. **Charge** (see also *supra*, V. 10. *Instructions*) — *a.* INSTRUCTIONS GIVEN. — See note 2.

Tex. Crim. 434; *Spears v. State*, 41 Tex. Crim. 527.

Leading Questions. — Where the allowance of leading questions is complained of, the bill must show the connection in which such questions were asked, and that the circumstances surrounding the witness did not authorize such questions. *Hamilton v. State*, 41 Tex. Crim. 599.

430. 3. **Insufficient Reference.** — A bill of exceptions stating that the "testimony" filed therewith was offered in evidence, without any further reference or words of identification, is insufficient to make depositions attached to the bill a part thereof. *McKendree v. Shelton*, 51 W. Va. 516.

A general order that a paper, or document, or ruling of the court, designating the same by name, be made a part of the record, without a bill of exceptions, is not effective and does not make such paper, document, or ruling a part of the record. Such paper, document, or ruling must be copied at full length in the order of court which directs it to be made a part of the record. It cannot be made a part of such order and record by the words "here insert." *Fredericksburg v. Wilcoxon*, 158 Ind. 359, citing *Close v. Pittsburgh*, etc., R. Co., 150 Ind. 560.

Requirements of Statute and Rules of California. — Code Civ. Pro. Cal., § 951, provides that "the appellant must furnish the court with a copy * * * of papers used on the hearing in the court below." Rule 29 of the Supreme Court (formerly rule 32) provides that on appeal to the Supreme Court from the orders of the Superior Court "the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except when another mode of authentication is provided by law." In *San Diego Sav. Bank v. Goodsell*, 137 Cal. 420, a motion was made to vacate an order

of publication, and it was held that the papers in evidence used at the hearing of such motion should have been authenticated by incorporating them in the bill of exceptions, and that documents omitted from the bill of exceptions and merely referred to therein, could not be considered.

Ponderous Articles. — In *O'Neill v. Chicago*, etc., R. Co., 62 Neb. 358, it was said: "The evidence, which it is claimed is omitted, consists of ponderous articles which do not admit of physical attachment to the record proper. These articles are all referred to in the written portion of the bill of exceptions, and articles answering to such reference were filed with the record in the case, and produced at the hearing in this court, bearing the marks of identification of the official reporter of the trial court. Their identity is unchallenged, save in the course of the argument. Under such circumstances, the articles produced will be regarded as a part of the bill of exceptions. The bill of exceptions, therefore, is complete and will be considered as a part of the record in the case."

432. 1. *McKendree v. Shelton*, 51 W. Va. 516, quoting 3 ENCYC. OF PL. AND PR. 430. See also *Dannelley v. State*, 130 Ala. 132.

435. 1. **Necessity to Copy Ballots and Tally Sheets.** — In a proceeding to contest an election where the transcript contains no copies of ballots or tally sheets, a package sent with it and said to contain such papers will not be examined. *Black v. Pate*, 130 Ala. 514.

436. 2. *Nosler v. Coos Bay Nav. Co.*, 40 Oregon 305.

3. *Contra.* — *Nosler v. Coos Bay Nav. Co.*, 40 Oregon 305.

439. 2. *Woodward Iron Co. v. Herndon*, 130 Ala. 364.

440. 2. *Texas.* — *Ford v. State*, 41 Tex. Crim. 1.

Erroneous Charge to Regular Panel. — Where it is claimed that the jurors on

441. b. INSTRUCTIONS REFUSED. — See note 2.

VIII. SETTLEMENT OF BILL — 1. **By Whom Prepared.** — See note 4.

442. 2. By Whom Settled. — See notes 2, 3.

443. 4. Submission to Adverse Party. — See note 1.

a special venire were influenced by an erroneous charge to the regular panel, the bill of exceptions should be accompanied by proper affidavits showing that some of the jurors were unduly influenced by such charge. *Furlow v. State*, 41 Tex. Crim. 12. See also *Murphy v. State*, 41 Tex. Crim. 120.

Marginal Notations — Indiana Statute. — Where the instructions are brought into the record by marginal notations under Burns's Stat. Ind. 1901, § 544, without a bill of exceptions, an order-book entry, set out in the transcript, showing that both parties requested the court to instruct the jury in writing, and that the court thereupon instructed "the said jury, which said instructions of the court are in writing, and are filed herein, and are in these words, to wit," followed by the instructions, does not sufficiently show that all of the instructions given are in record. *Fulton County v. Gibson*, 158 Ind. 471, in which case the court cited *State v. Winsteadley*, 151 Ind. 495.

441. 2. Danneley v. State, 130 Ala. 132.

Instructions Not Shown Not to Have Been Given. — Where it does not appear from the bill of exceptions that the court on a prosecution for murder did not instruct the jury in definition of murder in the second degree, it will be assumed that such instructions were given. *Williams v. State*, 130 Ala. 107.

Insufficiency of Mere Description of Instructions. — A bill of exceptions which states that the defendant asked and the court refused to give instructions based on the defendant's plea of former jeopardy is insufficient. The court will not take any mere statement of what is instructions which falls short of giving their very language. *Danneley v. State*, 130 Ala. 132.

Envelope Containing Refused Instructions. — Where in aid of a bill of exceptions which does not set forth in full the instructions refused there is pinned thereto a sealed envelope containing what purports to be the instructions, the court will not look to the envelope or its contents for any

purpose, the envelope not being certified or referred to in the bill. *Danneley v. State*, 130 Ala. 132.

4. Gifford v. Hess, 15 Ind. App. 450; *Blomgren v. Holmquest*, 49 Neb. 49, holding that the failure of a defeated party through his own neglect to secure a true bill of exceptions presents no ground for reversal.

Specifying Portions of Record Which Are to Be Incorporated in Bill of Exceptions.

— It is the duty of the plaintiff in error or his attorney to specify to the clerk the portions of the record which he deems material and which he wishes to be incorporated in the bill of exceptions, and unless this course is pursued no part of the record should be set up by the clerk. *Pyne v. State*, 113 Ga. 725.

442. 2. Gifford v. Hess, 15 Ind. App. 450; *Herren v. Merrilees*, 7 Okla. 261.

After Judge's Term of Office Has Expired. — Neither under the provisions of Civ. Code Ga., § 5543, nor under any other previous statutes of that state is one who has been a trial judge authorized to certify, after the expiration of his term of office, a "fast" bill of exceptions. *Grace v. Gordon*, 113 Ga. 88.

Capacity in Which Judge Settles Bill of Exceptions. — The settling and allowing of a bill of exceptions is a judicial act, and can only be performed by a judge when sitting as a court. The judge cannot perform such an act as an individual, but only when he is acting as a court. *Nester v. Carney Bros. Co.*, 98 Ill. App. 630.

3. On Death of Judge — Alabama Statute. — Code Ala. 1896, § 622, allows the Supreme Court to establish a bill of exceptions where the judge dies or his term of office expires. *Coppin v. State*, 123 Ala. 58, in which case the judge's term of office expired before he had signed the bill of exceptions.

443. 1. Nebraska. — *Lancaster County Bank v. Gillilan*, 49 Neb. 165.

Dismissal of Appeal. — *Edmondson v. South Georgia R. Co.*, 115 Ga. 790. See also *Vickers v. Sanders*, 106 Ga. 265.

444. Failure to Serve — Waiver. — See note 1.

5. Notice of Settlement. — See note 2.

445. 6. Upon Whom Service Must Be Made — *a.* GENERALLY. — See note 1.

446. 7. Proof of Service. — See note 1.

Rule in Nebraska — Effect of Stipulations Consenting to Appeal. — In *Williams v. Miles*, 62 Neb. 566, a proposed bill of exceptions was submitted to opposing attorneys for examination and suggestions of amendment, and they after examination returned the bill with the following indorsement: "We consent this bill of exceptions be allowed and signed." Afterwards another stipulation was entered into that the clerk might settle and allow the bill of exceptions, and it was agreed in such stipulation that no amendments would be suggested by the parties seeking to have the proposed bill allowed. It was held that the two stipulations when construed together were equivalent to an agreement that the bill proposed was true and correct and that the clerk was authorized to allow the same under provisions of Code Civ. Pro. Neb., § 311.

What Constitutes Sufficient Submission. — A proposed bill of exceptions is not submitted to the adverse party or to his attorney by leaving it at the office of the attorney in his absence. *Lancaster County Bank v. Gillilan*, 49 Neb. 165.

Validity of Rule Requiring Service upon Adverse Party. — Rule 31 of the St. Louis City Circuit Court requiring bills of exceptions to be prepared and served on the adverse party within ten days after any ruling at special term which is excepted to, and prohibiting the signing of any bill by the judge unless served within such time, is an abridgment of the rights of litigants under Rev. Stat. Mo. 1889, § 2168, which provides that exceptions taken during a trial may be reduced to writing and filed during the term at which taken, and it is the duty of the trial judge to settle a bill, if properly prepared and presented, at any time during the term. *State v. Withrow*, 135 Mo. 376.

444. 1. Acknowledgment of Service. — In *Edmondson v. South Georgia R. Co.*, 115 Ga. 790, the bill was not served and filed in the office of the clerk within the proper time after having been certified by the judge. Counsel

for the defendant in error acknowledged service in these words: "I acknowledge service of a true copy of the foregoing bill of exceptions, and further service thereof is waived." The writ of error was dismissed.

Failure to Date Acknowledgment of Service. — Though an acknowledgment of service entered on a bill of exceptions be not dated, yet if it otherwise affirmatively appear from official entries thereon that it was actually served within the time prescribed by law, the writ of error will not be dismissed on the ground that the fact of service does not duly appear. *Southern R. Co. v. Barfield*, 115 Ga. 724.

2. *State v. Gawith*, 19 Mont. 48, in which case the court cited 3 ENCYC. OF PL. AND PR. 444-446.

Mandatory Statute. — A statute requiring notice is mandatory. *State v. Gawith*, 19 Mont. 48.

445. 1. Dismissal Where Bill Has Not Been Served. — In *Redman v. Hitchins*, 113 Ga. 380, the court said: "There was no appearance for the defendant in error. The bill of exceptions must be served upon the opposite party or his attorney, or service of the same must be acknowledged. There being neither service nor acknowledgment thereof in the present case, we are constrained to dismiss the writ of error."

446. 1. Evidence of Service. — *State v. Gawith*, 19 Mont. 48, from which case it would seem that it must appear from the recital and statements of record that notice was given of the presentation of the bill of exceptions.

Strict Application of Rule. — In *Palmer v. Hughes*, 84 Md. 652, the court said: "It is of great importance that the rule upon this subject be definite and fixed and that it be applied with strictness; for if it be relaxed it will inevitably beget contentions that will likely involve counsel, and sometimes the court, in conflicts of recollection as to the circumstances of the delay, as well as to the facts proper to be incorporated in the exception." *Quoting Westminster v. Shipley*, 68 Md. 610.

446. 8. Who Must Determine Contents — *a. GENERALLY.* — See note 2.

447. See note 1.

b. EXAMINATION BY TRIAL JUDGE. — See note 5.

448. c. PROPOSALS OF CORRECTIONS. — See note 3.

451. IX. AUTHENTICATION — 1. In General. — See note 1.

2. Signature. — See notes 2, 3.

452. 3. By Whom Signed — *a. TRIAL JUDGE.* — See note 2.

453. Statutory. — See notes 1, 2.

446. 2. State v. Cooper, 107 Tenn. 202 [citing 3 ENCYC. OF PL. AND PR. 446]; *Herren v. Merrilees*, 7 Okla. 261.

447. 1. Oklahoma. — *Herren v. Merrilees*, 7 Okla. 261.

5. Interlineations and Notes by Judge. — While the judge may supply omissions in a bill of exceptions by interlineations or notes, any interlineation or note which has the effect of showing that some of the averments in the bill of exceptions are not true will work a dismissal of the writ of error, when the bill of exceptions is certified to be true only "as amended." *Jarriel v. Jarriel*, 115 Ga. 23.

448. 3. State v. Cooper, 107 Tenn. 202, citing 3 ENCYC. OF PL. AND PR. 448.

Practice on Proposals — Unreasonable Delay in Making Correction. — While a party to whose attorney a bill of exceptions has, under the Civil Code Ga., § 5545, been returned for correction is entitled to reasonable time within which to meet and remove the judge's objections thereto, the latter has no authority to extend for an unreasonable period the right of such party to tender a correct bill of exceptions. This is a matter which is regulated by statute, and as to which the judge has no discretionary powers. Accordingly, if a bill of exceptions be so returned to counsel, and a true and correct bill of exceptions be not tendered until after the lapse of seven months, the delay not being occasioned by providential cause, the judge is without power to then certify, and the writ of error must be dismissed. *Sutton v. Valdosta Guano Co.*, 115 Ga. 794. See also *Parkman v. Dent*, 109 Ga. 289.

451. 1. Alabama. — *Sterrett v. Davie*, 129 Ala. 269; *Louisville, etc., R. Co. v. Malone*, 116 Ala. 604.

Form of Certificate. — In authenticating a bill of exceptions the clerk must certify that it is either the original or a copy. *Merrill v. Equitable Farm, etc., Imp. Co.*, 49 Neb. 198.

The bill must be certified as being part of the record below or as being the original bill. *Yankton, etc., R. Co. v. State*, 49 Neb. 272.

Certification Pursuant to Stipulation of Parties. — A clerk may sign a bill under a stipulation clearly showing that the particular bill to which the stipulation is attached is agreed upon by the parties as a correct bill. *Philadelphia F. Assoc. v. Ruby*, 49 Neb. 584.

2. State v. Briscoe, 135 Mo. 660.

Effect of Alteration after Signature. — In *Alabama* it is well settled that after the judge has signed the bill of exceptions and court has adjourned, or the time allowed for signing the bill has expired, it is beyond his power to alter, modify, or extend it. *Louisville, etc., R. Co. v. Malone*, 116 Ala. 604.

3. Missouri. — *State v. Briscoe*, 135 Mo. 660, in which case the bill of exceptions not having been signed the Supreme Court affirmed the judgment without looking into the evidence or any of the rulings made during the trial. See also *Scaggs v. Western Home Town Mut. F. Ins. Co.*, 94 Mo. App. 88.

452. 2. McFarlane v. Johnson, 64 Ark. 597 [wherein the court cited 3 ENCYC. OF PL. AND PR. 452]; *Gifford v. Hess*, 15 Ind. App. 450.

Necessity to Sign Bill in Open Court. — The signing of a bill of exceptions is the act of the judge, and not of the court, and it is not essential that it be done in open court. *Chicago v. South Park Com'rs*, 169 Ill. 387.

453. 1. Scott v. Overall, 50 Neb. 144, in which case the court cited 3 ENCYC. OF PL. AND PR. 453.

In Mississippi a Special Judge appointed by the governor to preside in a particular case, under Const. Miss. 1890, § 165, authorizing such appointments, where the regular judge is disqualified, is empowered to approve the stenographer's report of the evidence and to sign a bill of exceptions in the

454. *d.* SPECIAL JUDGE. — See note 3.

455. *c.* AFTER DEATH OR RESIGNATION OF TRIAL JUDGE — New Trial. — See note 1.

456. *f.* EX-JUDGE. — See note 1.

4. Where Signed. — See note 3.

457. **5.** How Shown. — See note 2.

6. Sealing — Common Law. — See note 4.

What Seal Required. — See note 5.

458. **7.** Certification — *a.* BY JUDGE — Statutory. — See note 2.

cause, although the statute (Code Miss. 1892, §§ 920, 921, and Laws 1896, p. 91) may seem to be inconsistent therewith. *Lopez v. Jackson*, 79 Miss. 460.

Signature by President of Board of Supervisors. — In *Mississippi* only the president of the board of supervisors can sign a bill of exceptions upon appeal from a judgment of said board to the Circuit Court, under Code Miss. 1892, § 79, so providing, and in case of his refusal he may be compelled to do so by mandamus. *Roach v. Tallahatchie County*, 78 Miss. 303.

453. **2.** *McFarlane v. Johnson*, 64 Ark. 597, wherein the court cited 3 ENCYC. OF PL. AND PR. 453.

454. **3.** Acting Judge. — A motion to strike a bill of exceptions from the files on the ground that the cause was heard by a judge acting temporarily and the bill of exceptions signed by him when not presiding as judge will be denied, where the affidavit in support of the motion fails to show that he was not then the acting judge, though not sitting in open court. *Chicago v. South Park Com'rs*, 169 Ill. 387.

455. **1.** Where There Is a Dispute as to What the Bill Should Contain, the successor of the judge cannot sign it. The proper practice in such case is to send the case back for a new trial. *Henrichsen v. Smith*, 29 Oregon 475.

456. **1.** *Montana*. — See also *Montana Ore Purchasing Co. v. Lindsay*, 25 Mont. 24.

3. Out of Circuit. — *Chicago v. South Park Com'rs*, 169 Ill. 387, citing 3 ENCYC. OF PL. AND PR. 456.

457. **2.** Where Authentication Has Been Lost. — A bill of exceptions may be considered upon satisfactory proof of its proper authentication, though the authentication has been lost. *Winters v. Means*, 50 Neb. 209, the report of which case does not disclose how the showing was made.

4. Omission of Seal by Inadvertence. — In *Williams v. People*, 25 Colo. 251,

the seal was omitted through inadvertence, and a motion to strike out the bill was denied and the plaintiff in error was given leave to withdraw the bill for the purpose of having the same sealed.

5. Packet Transferring Bill — Envelope Containing Instructions. — In *Dannelley v. State*, 130 Ala. 132, a bill of exceptions was accompanied by a sealed envelope which purported to contain instructions which were refused. The envelope was not authenticated or referred to in the bill, and the court refused to consider it.

458. **2.** Effect of Defective Certificate. — *Gwinn v. Almand*, 113 Ga. 1152, wherein the writ of error was dismissed; *Johnson v. Equitable Loan, etc., Co.*, 113 Ga. 1153.

Additional Certificate Regarded as Surplusage. — A bill of exceptions duly and regularly certified according to law will not be vitiated by an additional certificate following the one required by statute. In such a case the additional certificate may be ignored and treated as harmless surplusage. *Dyson v. Southern R. Co.*, 113 Ga. 327; *Planters', etc., Mut. F. Assoc. v. De Loach*, 113 Ga. 802.

Failure of Certificate to Embrace Proceedings in Impaneling Jury. — In *Coil v. State*, 62 Neb. 15, the certificate of the trial judge was as follows: "Now, I, the said judge, do hereby certify that this bill of exceptions contains all the testimony adduced or offered by the plaintiff and defendant on the trial of said cause, all of the objections to the admission of testimony, all the rulings of the court on such objections, and all of the exceptions taken to such rulings at the time," etc. It was held that such certificate did not embrace the proceedings had and taken in impaneling the jury, and that consequently alleged errors in such proceedings could not be considered.

Insufficiency of Qualified Certificate. — When a bill of exceptions recites that

459. *b.* BY CLERK. — See note 1.

Original and Copy. — See note 3.

X. TIME FOR SETTLEMENT AND SIGNATURE — 1. In General. — See note 4.

460. See note 1.

a demurrer to a petition was sustained and that the plaintiff excepted to this ruling, and the certificate of the judge, instead of verifying without qualification the bill of exceptions as written, embraces a statement to the effect that before the court passed upon the demurrer counsel for the plaintiff informed the court that they did "not care to submit any argument nor to resist the demurrer," and the judge signed the order of dismissal, "considering it a consent order," such bill of exceptions is not duly certified, and presents no question for determination by the Supreme Court. *Gwinn v. Almand*, 113 Ga. 1152; *Johnson v. Equitable Loan, etc., Co.*, 113 Ga. 1153. See also *Taylor v. Howard*, 112 Ga. 347; *McCullough Export Lumber, etc., Co. v. National Bank*, 111 Ga. 132; *Sanges v. State*, 110 Ga. 260; *Fort v. Sheffield*, 108 Ga. 781; *Woodruff v. Swann*, 105 Ga. 510; *Hawkins v. Americus*, 102 Ga. 786.

459. 1. *Pettit v. People*, 24 Colo. 517; *Spurck v. Dean*, 49 Neb. 66; *Derse v. Straus*, 49 Neb. 665. See also *Berry v. Chicago, etc., R. Co.*, 158 Ind. 668; *R. G. Marcy Mfg. Co. v. Flint, etc., Mfg. Co.*, 158 Ind. 173.

In *Nebraska* a bill of exceptions must be authenticated by the certificate of the clerk and identified as a bill of exceptions, otherwise it will not be considered. *Royse v. State Nat. Bank*, 50 Neb. 16; *Chicago Lumber Co. v. Benjamin*, 50 Neb. 143; *Reuther v. Zimbleman*, 50 Neb. 165; *Behrends v. Beyschlag*, 50 Neb. 304; *Berger v. Lincoln County*, 50 Neb. 687; *Town v. Missouri Pac. R. Co.*, 50 Neb. 768.

3. See *Dannelley v. State*, 130 Ala. 132.

4. *Alabama*. — *Richter v. Koopman*, 131 Ala. 399; *Tisdale v. Alabama, etc., Lumber Co.*, 131 Ala. 456; *Sterrett v. Davie*, 129 Ala. 269.

California. — *Smith v. Jordan*, 122 Cal. 69.

Georgia. — *American Freehold Land Mortg. Co. v. Walker*, 115 Ga. 737.

Illinois. — *Nester v. Carney Bros.* Co., 98 Ill. App. 630.

Montana. — *Burns v. Napton*, 26 Mont. 360.

Motion to Strike. — A bill of exceptions not signed within the time required by law will on motion be stricken. *Richter v. Koopman*, 131 Ala. 399.

Unnecessary or Unreasonable Delay. — There should be no unnecessary or unreasonable delay in settling a bill of exceptions because it consists largely of statements regarding the truth of which the memory of the court and those engaged in the case must be depended upon. *O'Haire v. Burns*, 25 Colo. 158.

Within Time Fixed by Order of Court. — In *Colorado* it is well settled that in order to constitute the bill of exceptions it must be signed and sealed by the trial judge in the time fixed by the order of the court. *Williams v. People*, 25 Colo. 251.

Presumption that Bill Was in Time. — The all-important jurisdictional fact that the bill of exceptions was in time is not a legitimate subject-matter of bare presumption, but must be made affirmatively to appear either from the bill of exceptions or the transcript of the record accompanying the same. *American Freehold Land Mortg. Co. v. Walker*, 115 Ga. 737; *Evans v. State*, 112 Ga. 763. See also *Bourquin v. Bourquin*, 110 Ga. 440; *Regopoulos v. State*, 115 Ga. 232; *Williams v. State*, 115 Ga. 588; *McDaniel v. Allison*, 115 Ga. 751.

460. 1. *Alabama*. — *Tisdale v. Alabama, etc., Lumber Co.*, 131 Ala. 456.

Ignorance of Time Within Which Bill Should Be Filed. — In *Ingrim v. Epperson*, 137 Cal. 370, it was held that ignorance of the time within which a statement or bill of exceptions must be prepared and served, cannot be the result of mistake or surprise or inadvertence, and that neglect to prepare and serve it within the time prescribed by the code is not excusable.

Remedy by Motion to Strike Out Assignments of Error. — Where a bill of exceptions is not signed within the time limited by statute the court will, on motion, strike out the assignments of error

461. 2. Construction of Statutes. — See notes 1, 2.

462. 3. Rule of Court. — See note 1.

4. After Appeal Taken. — See note 3.

465. 7. During Term. — See note 1.

467. 8. Extension by Motion. — See notes 2, 3.

based on rules which are shown to such bills of exceptions. *Alabama Midland R. Co. v. Brown*, 129 Ala. 282.

Computation of Time — Where the Last Day Is Sunday the bill may be presented and allowed on the succeeding Monday. *Enck v. Gerding*, 63 Ohio St. 175.

461. 1. *Alabama*. — *Tisdale v. Alabama*, etc., *Lumber Co.*, 131 Ala. 456; *Capital City Ins. Co. v. Cofield*, 131 Ala. 198; *Alabama Midland R. Co. v. Brown*, 129 Ala. 282; *Sterrett v. Davie*, 129 Ala. 269.

Arkansas. — *McFarlane v. Johnson*, 64 Ark. 597.

California. — *Smith v. Jordan*, 122 Cal. 69. See also *Ingrim v. Epperson*, 137 Cal. 370.

Georgia. — *Dyson v. Southern R. Co.*, 113 Ga. 327. See also *Sutton v. Valdosta Guano Co.*, 115 Ga. 794.

Kentucky. — *Turner v. Johnson*, 35 S. W. Rep. 923, 18 Ky. L. Rep. 202, (Ky. 1895) 31 S. W. Rep. 1028.

Nebraska. — *Horbach v. Omaha*, 49 Neb. 851.

Ohio. — *Riverside Rubber Co. v. Midland Mfg. Co.*, 63 Ohio St. 66.

Texas. — *Harper v. State*, 41 Tex. Crim. 353.

2. *Riverside Rubber Co. v. Midland Mfg. Co.*, 63 Ohio St. 66.

Rule in Criminal Cases. — In *New Mexico* it has been held that the rule of construction of statutes defining the time for the settlement of bills of exceptions is the same in criminal as in civil cases, and that a judge has no authority to extend the time. *Haynes v. U. S.*, 9 N. Mex. 519.

Effect of Amendment After Expiration of Time. — Where the bill of exceptions is not signed within the proper time an amendment made and signed long after the time allowed for filing the bill has expired cannot give validity to it. *McFarlane v. Johnson*, 64 Ark. 597.

Effect of Extension of Time — Further Extension. — In *Alabama* it has been held under a statute which allows the court to extend the time where the parties agree in writing for an extension, that where there is an order making an extension the bill of exceptions

must be filed within the time fixed by such order, and that the mere consent of the appellee for the signing of the bill thereafter is not sufficient to avoid the provisions of the statute. *Tisdale v. Alabama*, etc., *Lumber Co.*, 131 Ala. 456.

462. 1. *McElvain v. Bradshaw*, 30 Oregon 569, citing 3 ENCYC. OF PL. AND PR. 462.

3. *Capital City Ins. Co. v. Cofield*, 131 Ala. 198; *Louisville*, etc., *R. Co. v. Murphree*, 129 Ala. 432.

465. 1. *Colorado*. — *Robinson v. Denver*, etc., *R. Co.*, 24 Colo. 98, wherein the court cited *Ritchey v. People*, 23 Colo. 314.

Maryland. — *Palmer v. Hughes*, 84 Md. 652.

More than Thirty Days After Adjournment. — A direct assignment of error upon a ruling made during the trial of a civil case is presented too late for consideration by the Supreme Court when it first appears in a bill of exceptions tendered more than thirty days after the adjournment of the term at which such ruling was made; and unless it affirmatively appears that a bill of exceptions embracing such an assignment of error was, with respect thereto, tendered in due time, the Supreme Court is without jurisdiction to pass upon that assignment. *American Freehold Land Mortg. Co. v. Walker*, 115 Ga. 737; *McDaniel v. Allison*, 115 Ga. 751. See also *Heery v. Burkhalter*, 113 Ga. 1043.

467. 2. **Discretion of Court.** — In *California* the extension of the time rests within the discretion of the Superior Court, and the court's exercise of discretion will not be disturbed on appeal unless it shall be made clearly to appear that there was an abuse of discretion. *Ingrim v. Epperson*, 137 Cal. 370.

3. **Order of Extension Construed.** — Where an order extending the time for signing a bill of exceptions in vacation provides only for a bill of exceptions on a motion for a new trial, a bill of exceptions for matters arising on the original trial cannot be signed under said order, and if signed in vacation

468. 9. Signature After Term — a. ORDER EXTENDING TIME.

— See note 1.

469. b. BY CONSENT. — See note 1.**470. c. WHEN ORDER MUST BE MADE. — See note 1.****472. h. DEFINITION OF TIME IN ORDER. — See note 2.****474. k. NEGLIGENCE OF JUDGE. — See note 1.**

10. What Record Must Show — a. GENERALLY. — See note 2.

will not be reviewed on appeal. *Henry v. Couch*, 132 Ala. 570.

468. 1. McElvain v. Bradshaw, 30 Oregon 569, *citing* 3 ENCYC. OF PL. AND PR. 468.

Oregon. — See *Henrichsen v. Smith*, 29 Oregon 475.

It Is Only upon Due Showing of Diligence that a judge can extend the time for submission of a proposed bill of exceptions beyond forty days from the adjournment of the term. *Horbach v. Omaha*, 49 Neb. 851, in which case it was held that the fact that the appellant had been diligent, and that the delay was caused by the default of the stenographer who prepared the bill, did not authorize the submission of the bill after the expiration of eighty days from the adjournment of the term.

469. 1. Objection Waived. — Where the bill of exceptions is not signed until after the adjournment of the term, nevertheless a party by his conduct in negligently failing to take advantage in apt time of such irregularity waives the point. *Robinson v. Denver*, etc., R. Co., 24 Colo. 98.

By a Stipulation of the Parties the time may be extended, and the order extending the time may be made by a judge in vacation. *Payne v. Long*, 131 Ala. 438.

470. 1. Colorado Statute. — Code Colo., § 408, provides as follows: "In vacation, at chambers, the judges of the courts of record, in their respective districts and counties, may hear and determine any and all motions and demurrers." In *Winter v. People*, 27 Colo. 136, the court said: "The words 'all motions' are broad enough to include a motion after final judgment for additional time for tendering a bill of exceptions; but we think, taking the section as a whole, 'motions' are restricted to interlocutory applications made during the pendency of the cause in court, and do not embrace such as are made after final judgment." *Citing* *Beulah Marble Co. v.*

Dixon, 12 Colo. App. 525; *Van Duzer v. Towne*, 12 Colo. App. 4.

Mississippi Statute. — Under Act Miss. 1896 (Laws 1896, p. 91), regulating the preparation and authentication of stenographers' notes and bills of exceptions, the judge in vacation, before the expiration of the sixty days allowed by law therefor, can extend thirty days' additional time within which a bill of exceptions may be prepared and authenticated. *Louisville*, etc., R. Co. v. *McDonald*, 79 Miss. 641.

472. 2. See McElvain v. Bradshaw, 30 Oregon 569.

474. 1. Williams v. People, 25 Colo. 251; *Liverpool*, etc., Ins. Co. v. *Kearney*, 2 Indian Ter. 67, in which cases the court *cited* 3 ENCYC. OF PL. AND PR. 474.

"The Reason for this Ruling is that, when the party has prepared his bill and tendered it to the judge within the time allotted, he has performed his duty, and the failure of the judge to sign and seal within such time would arise from no fault on his part." *Williams v. People*, 25 Colo. 251, *quoting* *Fechheimer v. Trounstiene*, 12 Colo. 282.

2. How Seasonable Tender Shown. — In determining whether or not a bill of exceptions has been tendered to the trial judge within the time prescribed by law, reference may be had to either the bill of exceptions, the certificate of the judge, or the transcript of the record. *Bonds v. Berdett*, 113 Ga. 113, *per* *Lewis, J.*, *citing* among other cases *Evans v. State*, 112 Ga. 763.

A Record Entry of the Filing of Original Papers in a cause sufficiently shows the filing of a bill of exceptions, such bill being an original paper within Rev. Stat. Ohio, § 6716. *Myers v. Jenkins*, 63 Ohio St. 101.

Presumption that Bill Was Filed in Time. — In *Chism v. Barnes*, 104 Ky. 310, wherein there was an order reciting that "the bill of exceptions heretofore tendered by the defendant on a former

476. XL FILING BILL — 1. Generally. — See note 3.

478. Effect of Failure to File in Time. — See note 1.

479. 2. Where Filed. — See note 1.

481. 5. Extension of Time — a. GENERALLY. — See note 1.

day of the present term having been examined by the court was signed, sealed," etc., it was held that it was to be presumed that the bill was tendered in time.

Settlement Presumed. — Where a notice for a new trial states that the motion will be made on a bill of exceptions thereafter to be settled, and it appears that such motion was so made, the appellate court will presume that the bill was settled before the hearing and decision of the motion, though it appears that the bill was settled on the same day on which the motion for the new trial was heard. *Pendo v. Beakey*, 15 S. Dak. 344.

476. 3. Louisville, etc., R. Co. v. Malone, 116 Ala. 604, wherein the court cited 3 ENCYC. OF PL. AND PR. 476. See also the following cases:

Colorado. — *Pettit v. People*, 24 Colo. 517.

Indiana. — *Berry v. Chicago, etc., R. Co.*, 158 Ind. 668, which case was decided under *Burns's Stat. Ind.*, § 638a; *Gifford v. Hess*, 15 Ind. App. 450.

Missouri. — *Wilson v. St. Louis, etc., R. Co.*, 167 Mo. 323; *State v. Rolley*, 135 Mo. 677; *Jaco v. Southern Missouri, etc., R. Co.*, 94 Mo. App. 567.

Montana. — *Burns v. Napton*, 26 Mont. 360.

Texas — *Harper v. State*, 41 Tex. Crim. 353.

Computation of Time. — Where an order of court gives a party "until" a certain day to file his bill of exceptions, the bill may be filed on the day specified as the limit of the time. *Blalock v. State*, 108 Tenn. 185.

Parol Evidence Is Admissible to show that the bill was signed at a time when the judge had no power to act. *Louisville, etc., R. Co. v. Malone*, 116 Ala. 604.

Bill of Exceptions Containing Evidence — Indiana Statute. — Under Act Ind. 1897, p. 244, a bill of exceptions containing the evidence must be filed in open court or with the clerk after it has been approved and signed by the trial judge, otherwise the evidence will not be reviewed. *Kirkman v. State*, 158 Ind. 156.

478. 1. Texas. — *Highsmith v. State*, 41 Tex. Crim. 32.

In Missouri. — *Girdner v. Bryan*, 94 Mo. App. 27, in which case the bill was filed out of time and was disregarded.

After Settlement and Signature a bill of exceptions in *Montana* becomes a part of the record, and hence will not be stricken even though it must be disregarded because not filed in time. *Kranich v. Helena Consol. Water Co.*, 26 Mont. 379.

479. 1. Colorado. — *Pettit v. People*, 24 Colo. 517.

Indiana. — *Gifford v. Hess*, 15 Ind. App. 450.

481. 1. Jordan v. Jordan, 48 W. Va. 601, citing 2 ENCYC. OF PL. AND PR. 481. See also *National Union v. Stoll*, 65 Ohio St. 547; *Harris v. Mercur*, 202 Pa. St. 313.

An Unauthorized Extension of Time for Filing a bill of exceptions will not operate as an extension of the time for signing, though the latter extension be authorized by statute. *National Union v. Stoll*, 65 Ohio St. 547.

In Utah the time for filing the bill may be extended by order of the court. See *Rev. Stat. Utah*, § 3329; *Olson v. Oregon Short Line R. Co.*, 24 Utah 460; *Gorringe v. Read*, 24 Utah 455.

Appeal from Order Extending Time. — In *Kaltschmidt v. Weber*, 136 Cal. 675, after a judgment of nonsuit had been entered the plaintiff served upon the defendant a proposed bill of exceptions to be used upon his motion for a new trial, to which the defendant served proposed amendments. Thereafter the defendant objected to the settlement of the bill upon the ground that it was not presented within the time allowed by law, and the plaintiff applied to be relieved from his neglect upon the ground that it was excusable and owing to inadvertence, whereupon the court granted the plaintiff's motion for relief. It was held that the order granting such motion was not appealable, it not being "a special order made after final judgment" within the meaning of *Code Civ. Pro. Cal.*, § 963, subd. 2. It was declared that the action of the court in the settlement of

485. 8. How Filing Shown — *a. GENERALLY.* — See notes 1, 2.

487. XII. CONSTITUTING PART OF RECORD. — See note 2.

489. XIII. REMEDY FOR REFUSAL TO SETTLE AND SIGN — 2. Appropriate Remedy for Refusal — Mandamus — *a. GENERALLY.* — See note 2.

490. Mandamus. — See note 1.

491. c. SCOPE OF WRIT — (1) *Generally.* — See note 1.

(2) *When Judge Will Be Compelled to Act* — *Incorrect Bill.* — See note 2.

Cannot Act Arbitrarily. — See note 3.

492. Other Instances. — See note 1.

the bill should have been incorporated in the record on the motion for a new trial, and that the court's action could be reviewed on an appeal from the order made on such motion.

In *Montana* an order made after judgment and which extends the time for filing a bill of exceptions is an appealable order, under Code Civ. Pro. Mont., § 1722, which authorizes an appeal from any special order made after final judgment. *Beach v. Spokane Ranch, etc., Co.*, 21 Mont. 184.

485. 1. Indiana. — *Harris v. State*, 155 Ind. 15, which case was decided under Burns's Stat. Ind. 1894, § 1916. *Missouri.* — *State v. Rolley*, 135 Mo. 677.

"**Short Record.**" — In *Missouri* it is necessary that at least some minute to show the filing of exceptions should appear in the abstract upon an appeal founded on a "short record;" otherwise an appellate court cannot review the bill of exceptions as part of the record. *Jaco v. Southern Missouri, etc., R. Co.*, 94 Mo. App. 567, in which case the court cited *Clements v. Turner*, 162 Mo. 466; *Ricketts v. Hart*, 150 Mo. 64; *State v. Rolley*, 135 Mo. 677; and *Finlay v. Gill*, 80 Mo. App. 458.

2. File Marks of Clerk. — The filing cannot be shown by mere recitals in the bill or by the file marks of the clerk thereon. *Harris v. State*, 155 Ind. 15.

487. 2. In re Elliott, 63 Kan. 319, citing 3 ENCYC. OF PL. AND PR. 487. See also *Glaser v. Hackett*, 38 Fla. 84; *Kranich v. Helena Consol. Water Co.*, 26 Mont. 379.

In *Ohio* there must be a journal entry showing that the bill of exceptions was ordered to be made a part of the record. *Riverside Rubber Co. v. Midland Mfg. Co.*, 63 Ohio St. 66.

Copied in Record. — In *Florida* when

the bill is signed by the trial judge it becomes a part of the record in the cause, and the original is not sent to the Supreme Court but the clerk certifies it as a part of the record of the proceedings below. *Glaser v. Hackett*, 38 Fla. 84.

489. 2. McElvain v. Bradshaw, 30 Oregon 569, citing 3 ENCYC. OF PL. AND PR. 489.

Kansas. — See *McClure v. Scates*, 64 Kan. 282.

Mississippi. — *Roach v. Tallahatchie County*, 78 Miss. 303.

490. 1. Tennessee. — *State v. Cooper*, 107 Tenn. 202.

491. 1. State v. Cooper, 107 Tenn. 202, citing 3 ENCYC. OF PL. AND PR. 491.

2. State v. Cooper, 107 Tenn. 202, citing 3 ENCYC. OF PL. AND PR. 491.

Amendments. — Mandamus will not lie to compel the trial judge to amend a bill of exceptions by incorporating particular matters therein. *Montana Ore Purchasing Co. v. Lindsay*, 25 Mont. 24.

3. State v. Cooper, 107 Tenn. 202, citing 3 ENCYC. OF PL. AND PR. 491.

492. 1. Not Presented in Time. — Where a bill of exceptions is not filed with the clerk or presented to the trial judge within the time prescribed by law, and no sufficient excuse is shown for the delay, the judge will not be compelled to sign it. *Burns v. Napton*, 26 Mont. 360.

Successor to Trial Judge. — A mandamus will not be issued to compel the successor of the judge who tried the action to sign a bill of exceptions, in the absence of a statute making the extended notes and certified report of the official reporter conclusive evidence of the facts therein settled. *Henrichsen v. Smith*, 29 Oregon 475.

By Ex-judge. — Under statutes providing that a judge "may" settle and

493. 3. **Petition to Establish Exceptions** — *a.* **GENERALLY.** — See note 7.

495. *b.* **SCOPE OF REMEDY.** — See note 1.

496. *f.* **SUBSTANTIAL PROOF ONLY REQUISITE.** — See note 6.

497. 4. **Signature by Bystanders** — *a.* **GENERALLY.** — See note 1.

498. *c.* **WHAT CERTIFICATE MUST SHOW.** — See note 2.

5. **Remedy Where Bill Is Irregular** — *a.* **GENERALLY** — **Motion to Strike Out.** — See note 8.

sign a bill of exceptions after the expiration of his term of office, the decisions are conflicting as to whether an ex-judge may be compelled by mandamus to sign and settle such bills.

In *California* it has been held that mandamus will not lie in such case. *Leach v. Aitken*, 91 Cal. 484.

In *Montana* mandamus will lie. *Montana Ore Purchasing Co. v. Lindsay*, 25 Mont. 24.

In *Washington* mandamus will not lie. *State v. Allyn*, 7 Wash. 285.

493. 7. *Nevada.* — Gen. Stat., § 3213, provides: "The point of the exception shall be particularly stated, and may be delivered in writing to the judge, or, if the party require it, shall be written down by the clerk. When delivered in writing or written down by the clerk, it shall be made conformable to the truth, or be at the time corrected until it is so made conformable. When not delivered in writing or written down by the clerk as above, it may be entered in the judge's minutes and afterwards settled in a statement of the case as provided in this act; provided, that if the judge shall in any case refuse to allow any exception in accordance with the facts, any party aggrieved thereby may petition the Supreme Court for leave to prove the same, and shall have the right so to do, in such mode and manner and according to such regulations as the Supreme Court may by rules impose, and such exceptions as are allowed by said Supreme Court shall become a part of the record of the cause." *Lewis v. Hyams*, 25 Nev. 242.

495. 1. *Lewis v. Hyams*, 25 Nev. 242.

496. 6. *Nevada Statute.* — Where a statute fully provides for a record of exceptions taken (Gen. Stat. Nev., § 3213), so as to obviate any question as to what exceptions were taken, the court would not be justified in allowing exceptions alleged to have been taken

and refused simply on the conflicting statements of witnesses based upon their memory of what occurred, but in such case the action of the court in reference to such exceptions, in its settlement of the statement of the case, either on motion for a new trial or on appeal, or in settling a bill of exceptions must be regarded as being correct. *Lewis v. Hyams*, 25 Nev. 242.

497. 1. In *Florida* it is provided by Rev. Stat., §§ 1268, 2071, that the judge shall sign a bill of exceptions if it fairly states the truth of the matter and exceptions designed to be taken, and that in the event the judge refuses to sign such a bill when tendered to him three persons may sign in his presence. *Bryan v. State*, 41 Fla. 643.

Mississippi — *On Appeal from Board of Supervisors.* — Code Miss. 1892, § 737, providing for bills of exceptions to be signed by attorneys, where the judge refuses to sign, has no application to appeals from the board of supervisors, under code, § 79. *Roach v. Tallahatchie County*, 78 Miss. 303.

498. 2. *Williams v. Pitt*, 38 Fla. 162, in which case the court quoted 3 ENCYC. OF PL. AND PR. 498, and said: "If parties to litigation might manufacture bills of exceptions to suit themselves, and upon the refusal of the judge, for good reason, to sign them, have the same signed by three persons who do not claim to know anything concerning the matters about which they are signing, and who certify nothing except that the judge has refused to sign, and that they have signed, the administration of justice in appellate courts would become a veritable farce. No judgment of the courts of original jurisdiction could stand where dishonest litigants saw fit to prepare untruthful bills of exceptions setting up fictitious, erroneous proceedings. A bill of exceptions imports verity."

8. **Effect of Quashal of Appeal.** — A

501. XIV. ALTERATIONS AND AMENDMENTS — 1. Alterations.

— See note 2.

2. Mutilations. — See notes 4, 5.**502. 3. Amendments — a. WHERE MADE.** — See notes 2, 3, 4, 5.**503. Continuance.** — See note 1.**Amendment by Record.** — See note 2.**b. IN TRIAL COURT — (1) At Trial Term.** — See note 3.**504. See note 1.****505. (2) After Expiration of Term.** — See notes 1, 2.

question involving an examination of the bill of exceptions cannot be considered after the bill has been quashed. *Reed v. Rice*, 48 Neb. 586.

Motion to Affirm Judgment. — In *Davis v. People*, 24 Colo. 102, assignments of error were all directed to alleged errors occurring at the trial upon matters that could only be reversed for review by a bill of exceptions properly authenticated, and as there was no such bill of exceptions the court on motion affirmed the judgment.

Order Denying Motion to Strike Out Bill of Exceptions. — In *Baxter v. Coughlin*, 80 Minn. 322, the court said: "There is no appeal from the order denying the motion to strike out the bill of exceptions, and such order is not reviewable on this appeal. The order was made in a proceeding or motion subsequent to the order granting a new trial, is no part thereof and in no way connected with it. As it involves the 'merits of the action, or some part thereof,' it is an appealable order, and should be reviewed by a direct appeal * * * or perhaps it might be reviewed on appeal from the judgment." *Citing* 3 ENCYC. OF PL. AND PR. 498, 499.

501. 2. Louisville, etc., R. Co. v. Malone, 116 Ala. 604, wherein the bill of exceptions was stricken because it was altered after it had been signed and subsequently signed again at a time when the judge had no power to act.

4. Parol Evidence Is Admissible to show that the bill was altered by the judge after it had been signed by him. *Louisville, etc., R. Co. v. Malone*, 116 Ala. 604.

5. Compare *Scaggs v. Western Home Town Mut. F. Ins. Co.*, 94 Mo. App. 88.

502. 2. Nelson v. Jordeth, 13 S. Dak. 30; *Wright v. Lee*, 10 S. Dak. 263, in which cases the court cited 3 ENCYC. OF PL. AND PR. 502. See also *O'Haire v. Burns*, 25 Colo. 158.

3. How Amendment Made. — Where it is alleged that some of the evidence has been left out of the bill of exceptions the deficiency cannot be supplied by a certificate of the presiding judge. *Dale v. Hall*, 64 Ark. 221.

4. Magoon v. Ahmi, 11 Hawaii 233, citing 3 ENCYC. OF PL. AND PR. 502.

5. Florida. — *Mizell v. Travelers Ins. Co.*, 40 Fla. 148, in which case the court followed *Glaser v. Hackett*, 38 Fla. 84.

Seal. — In *Williams v. People*, 25 Colo. 251, the plaintiff in error was permitted to withdraw the bill of exceptions for the purpose of having it sealed, the seal having been omitted through inadvertence.

503. 1. Magoon v. Ahmi, 11 Hawaii 233, citing 3 ENCYC. OF PL. AND PR. 503.

2. Magoon v. Ahmi, 11 Hawaii 233; *Nelson v. Jordeth*, 13 S. Dak. 30, in each of which cases the court cited 3 ENCYC. OF PL. AND PR. 503.

3. Upon Proper Notice a bill of exceptions incorrectly made up through inadvertence or mistake may be amended by a *nunc pro tunc* order, so as to make it conform to the facts. *Nosler v. Coos Bay Nav. Co.*, 40 Oregon 305.

504. 1. In Missouri it is provided by statute that all exceptions taken during the trial "shall be embraced in the same bill of exceptions." In *Atchison v. Chicago, etc., R. Co.*, 94 Mo. App. 572, it was held that when a judge approves and signs a part of a bill of exceptions and orders the same to be made a part of the record, he exhausts his jurisdiction in respect to signing the bill and cannot thereafter sign a remainder, supplemental or additional bill of exceptions.

505. 1. Laches in Applying for Amendment. — In *O'Haire v. Burns*, 25 Colo. 158, the court said: "An omission or error in a bill of exceptions is the act of the party tendering the same, and not of the court; and the rule in

505. (3) *Based on Memoranda.* — See note 4.

507. XV. FORM AND CONSTRUCTION — 1. Form — *a.* SUBSTANTIAL COMPLIANCE WITH STATUTE. — See note 1.

508. Not Entry. — See note 1.

509. 2. Construction and Effect — *a.* AGAINST APPELLANT. — See note 3.

510. See note 1.

511. *b.* WHERE BILL OMITTED. — See note 1.

512. *c.* OMISSIONS IN BILL. — See note 1.

513. 3. Verity of Bill — *a.* GENERALLY. — See note 1.

relation to amendments thereto is, therefore, different from that which obtains where it is sought to supply or correct a record order of the court. * * * A bill of exceptions may be withdrawn for the purpose of applying to the trial court for an amendment thereto, but such application must be made in apt time, and without unnecessary delay, and so with the application to the trial court for such amendment; and this is the rule regardless of whether or not there is any dispute before the trial court regarding the facts which it is sought to have incorporated in such amendment."

505. 2. Amendment After Return on Appeal. — See *Landis v. Henderson*, 85 Minn. 246, where an amendment was allowed after a return had been made.

4. Amendment upon Personal Recollection of Judge. — In *Nester v. Carney Bros. Co.*, 98 Ill. App. 630, the court said: "No case cited by appellant's counsel holds that the trial court is confined to the records and files of the particular case under consideration at the time of making the amendment. It is a well-settled general rule that such an amendment cannot be made from the personal recollection of the judge alone, nor unless there is some paper, minute or memorandum made and preserved as part of the record, on which to base the amendment."

507. 1. Matters of Form. — In view of the fact that it is often necessary to prepare bills of exceptions in haste, the court will regard them with indulgence to the extent of overlooking mere matters of form. *Overton v. Lohmann*, 67 Ark. 464.

Erasures and Interlineations. — Amendments or corrections allowed to a proposed bill of exceptions must be incorporated in an engrossed bill. The corrections cannot be made by erasures

and interlineations, or by attaching the proposed amendments to the bill. *Dyea Electric Light Co. v. Easton*, 15 S. Dak. 572. See also *Yellowstone Nat. Bank v. Gagnon*, 25 Mont. 268.

508. 1. *State v. Rigall*, 169 Mo. 659; *Hawkeye First State Bank v. Noel*, 94 Mo. App. 498.

Signed Entry. — It is not sufficient that it appears from the record that the party saved his exception at the time when the ruling complained of was made, and an entry by the clerk upon his minutes that the defendant "excepted and saves his exceptions" is of no significance whatever. *State v. Rigall*, 169 Mo. 659.

509. 3. *Overton v. Lohmann*, 67 Ark. 464, wherein the court cited 3 ENCYC. OF PL. AND PR. 509.

510. 1. *Arkansas.* — *Overton v. Lohmann*, 67 Ark. 464.

Conflict Between Bill and Certificate Thereto. — Statements in a bill of exceptions that it does not contain all the evidence must be taken as true, though the certificate to the bill states that it contains all the evidence. *Greene v. Greene*, 49 Neb. 546.

511. 1. *Nosler v. Coos Bay Nav. Co.*, 40 Oregon 305, citing 3 ENCYC. OF PL. AND PR. 511.

512. 1. Matters of Which Court Will Take Judicial Notice. — It is immaterial that the bill of exceptions omits matters of which the court will take judicial notice. *Perry v. State*, 113 Ga. 936.

513. 1. *Bryan v. State*, 41 Fla. 643, in which case the court cited 3 ENCYC. OF PL. AND PR. 513. See also the following cases:

Alabama. — *Ratliff v. State*, 122 Ala. 104.

Arkansas. — *Daniel v. St. Louis Nat. Bank*, 67 Ark. 223.

Florida. — *Glaser v. Hackett*, 38 Fla. 84; *Williams v. Pitt*, 38 Fla. 162.

514. See notes 1, 2.

b. CONFLICT IN RECORD — Where Record Controls. — See note 3.

515. Statement of Facts. — See note 2.

Georgia. — Planters, etc., Mut. F. Assoc. *v.* De Loach, 113 Ga. 802.

Montana. — See *Montana Ore Purchasing Co. v. Lindsay*, 25 Mont. 24.

Judge's Certificate. — Planters', etc., Mut. F. Assoc. *v.* De Loach, 113 Ga. 802, holding that after a bill of exceptions has been duly certified it is not within the power of the judge to alter or change the same in any way or by an additional certificate. *Following Dyson v. Southern R. Co.*, 113 Ga. 327. See also *Glaser v. Hackett*, 38 Fla. 84.

Attack upon Bill for Fraud Practiced upon Judge. — A bill of exceptions in due form and properly attested cannot be attacked in the Supreme Court even for fraud and deceit practiced upon the trial judge in procuring it. The Supreme Court is not the court in which to correct such a wrong. *Glaser v. Hackett*, 38 Fla. 84.

Unsworn Explanations by the Trial Judge incorporated in the bill of exceptions, and bearing upon the evidence as to his qualification to try the case, such question having been raised by a motion for a change of venue, cannot be considered by the Appellate Court either against or in support of such motion. *Gaines v. State*, 38 Tex. Crim. 202.

514. 1. *Florida.* — *Bryan v. State*, 41 Fla. 643.

Stipulation to Vary Bill of Exception. — In *Florida* it is the settled rule of the court not to permit bills of exceptions

in proper form and duly attested to be added to or varied by agreement of counsel. *Glaser v. Hackett*, 38 Fla. 84, in which case the court cited *Pickett v. Bryan*, 34 Fla. 38, wherein it was declared that the court will not consider agreements of counsel to amend and supply deficiencies in bills of exceptions properly certified to by the trial judge and found in the transcript.

2. Effect of Judge's Certificate. — Alleged deficiencies in the bill of exceptions cannot be supplied by a certificate of the presiding judge substantiating the allegation of the appellee that some of the evidence has been left out. *Dale v. Hall*, 64 Ark. 221.

A Defendant Cannot Be Heard in Argument to impeach a bill of exceptions signed by the judge as the defendant's bill of exceptions, and which the defendant accepts and makes a part of his record. *Ratliff v. State*, 122 Ala. 104.

3. Alabama. — *Butler v. Savannah Guano Co.*, 122 Ala. 326

Conflict Between Judgment Entry and Bill of Exceptions. — Where a conflict arises between a bill of exceptions and the judgment entry as to a matter which should be set forth in the judgment, the recital in the judgment entry will prevail. *Butler v. Savannah Guano Co.*, 122 Ala. 326.

515. 2. *Scott v. Childers*, 24 Tex. Civ. App. 349, following *Ramsey v. Hurley*, 72 Tex. 194, cited in the second paragraph of the original note.

BILLS OF PARTICULARS.

518. I. DEFINITION AND ORIGIN. — See notes 1, 2.

519. III. PURPOSE AND EFFECT — 1. To Amplify Pleading. — See notes 1, 3.

2. To Prevent Surprise and Restrict Proof. — See note 4.

520. See notes 1, 2.

3. Not to Disclose the Evidence. — See note 3.

IV. HOW OBTAINED — 1. Statutory Demand or Notice. — See note 4.

518. 1. *Roscoe Lumber Co. v. Standard Silica Cement Co.*, 62 N. Y. App. Div. 421, *quoting* 3 ENCYC. OF PL. AND PR. 518.

2. *Westbrooks v. State*, 76 Miss. 710, *citing* 3 ENCYC. OF PL. AND PR. 518.

519. 1. *Dudley v. Duval*, 29 Wash. 528; *Blackburn v. Washington Gold Min. Co.*, 19 Wash. 361; *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611 [each *quoting* 3 ENCYC. OF PL. AND PR. 519]; *Columbia Acc. Assoc. v. Rockey*, 93 Va. 678.

3. *Morrisette v. Wood*, 128 Ala. 505; *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611 [each *citing* 3 ENCYC. OF PL. AND PR. 519]; *Dempsey v. Bergen County Traction Co.*, 74 N. Y. App. Div. 474; *Taylor v. Security Mut. L. Ins. Co.*, 73 N. Y. App. Div. 319; *Columbia Acc. Assoc. v. Rockey*, 93 Va. 678.

4. *Blackburn v. Washington Gold Min. Co.*, 19 Wash. 361 [*quoting* 3 ENCYC. OF PL. AND PR. 519]; *Taylor v. Security Mut. L. Ins. Co.*, 73 N. Y. App. Div. 319; *Gilhooly v. American Surety Co.*, 87 Hun (N. Y.) 395; *Baker v. Sutton*, 86 Hun (N. Y.) 588, *per* Herrick, J.; *Columbia Acc. Assoc. v. Rockey*, 93 Va. 678.

520. 1. *Morrisette v. Wood*, 128 Ala. 505 [*citing* 3 ENCYC. OF PL. AND PR. 519]; *Maxwell v. Devalinger*, 2 Penn. (Del.) 504.

Pleading Explicit. — *Voorhees v. Barr*, 59 N. J. L. 123.

2. *Dudley v. Duval*, 29 Wash. 528, *quoting* 3 ENCYC. OF PL. AND PR. 519, 520.

3. *Blackburn v. Washington Gold Min. Co.*, 19 Wash. 361 [*quoting* 3

ENCYC. OF PL. AND PR. 520]; *Rhinelander v. Haan*, 66 N. Y. App. Div. 505; *Barone v. O'Leary*, 44 N. Y. App. Div. 418; *Carrie v. Davis*, 41 N. Y. App. Div. 520; *Werner v. Franklin Nat. Bank*, 40 N. Y. App. Div. 485; *Niemoller v. Duncombe*, 33 N. Y. App. Div. 536; *Hamilton v. American Vote Registering Mach. Co.*, 24 N. Y. App. Div. 544; *Manning v. International Nav. Co.*, 24 N. Y. App. Div. 143; *Phalen v. Roberts*, 21 N. Y. App. Div. 603; *Moses v. Hatch*, 22 N. Y. App. Div. 21; *Morrill v. Kazis*, 8 N. Y. App. Div. 304; *Caziarc v. Abram French Co.*, 91 Hun (N. Y.) 641; *Hayes v. St. Mary's Lodging House*, 89 Hun (N. Y.) 27; *Bender v. Bender*, 88 Hun (N. Y.) 448; *Gilhooly v. American Surety Co.*, 87 Hun (N. Y.) 395; *Van Olinda v. Hall*, 82 Hun (N. Y.) 357; *Voorhees v. Barr*, 59 N. J. L. 123.

Names of Witnesses. — A bill of particulars will not be granted for the purpose of disclosing the names of the adverse party's witnesses. *Barone v. O'Leary*, 44 N. Y. App. Div. 418; *Moses v. Hatch*, 22 N. Y. App. Div. 21; *Caziarc v. Abram French Co.*, 91 Hun (N. Y.) 641; *Voorhees v. Barr*, 59 N. J. L. 123.

The names of the persons with whom a transaction was had may be given, although the persons named are witnesses, where it is necessary to disclose such names in order to give to the defendant information of a transaction. *Taylor v. Security Mut. L. Ins. Co.*, 73 N. Y. App. Div. 319.

4. In New York. — *Fischer-Hansen v. Stierngranat*, 65 N. Y. App. Div. 162; *Webster v. Fitchburg R. Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 442.

521. 2. By Motion — *a.* REQUISITES OF MOTION. — See note 2.

522. *b.* WHEN TO BE MADE. — See notes 1, 3.

523. V. WHEN GRANTED — 1. **Generally.** — See notes 3, 4.

524. Discretionary. — See note 1.

525. 2. Particulars of Defense. — See note 2.

521. 2. Affidavit of Necessity. — An affidavit of necessity is necessary in *New York*, except in actions on an account. *Badger v. Gilroy*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 466.

The affidavit should allege facts showing the necessity for the bill of particulars. *Davidow v. Auerbach*, 15 N. Y. App. Div. 424.

It must state that the information is necessary, that the party has no means of obtaining the information, and that the information is entirely within the knowledge of the adverse party. *Dorgan v. Scheer*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 801.

By Attorney or Stranger — *By Attorney.* — A motion for a bill of particulars will not be granted upon the affidavit of the moving party's attorney. *Gallerstein v. Manhattan R. Co.*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 506; *Stevens v. Smith*, 38 N. Y. App. Div. 119; *Mori v. Pearsall*, (N. Y. City Ct. Gen. T.) 14 Misc. (N. Y.) 251; *Groff v. Hagan*, (N. Y. City Ct. Gen. T.) 13 Misc. (N. Y.) 322; *Van Olinda v. Hall*, 82 Hun (N. Y.) 357, *per* Mayham, J.

Reasons. — *Wolff v. Kaufman*, 65 N. Y. App. Div. 29; *Webster v. Fitchburg R. Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 442; *Mungall v. Bursley*, 51 N. Y. App. Div. 380; *Jacobs v. Friedman*, (N. Y. City Ct. Gen. T.) 28 Misc. (N. Y.) 441; *Mayer v. Mayer*, 29 N. Y. App. Div. 393.

Want of Knowledge. — The moving papers must show that the party has no means of obtaining the information required, and that it is necessary to prevent surprise on the trial. *Villiers v. Third Ave. R. Co.*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 17.

Where the affidavit is made for a corporation by one of its officers, it is not sufficient to state a want of knowledge on the part of the particular officer, but it should state that the information cannot be obtained through any of its officers or agents or other means within the party's reach. *Sidney B. Bowman Cycle Co. v. Dyer*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 620.

522. 1. Before and After Issue. — *Bullock v. Bullock*, 85 Hun (N. Y.) 373. See also *National Gramophone Corp. v. American Talking Mach. Co.*, 50 N. Y. App. Div. 162.

3. *Fowler v. Meyers*, 59 Ill. App. 248; *Standard Oil Co. v. Fidelity, etc., Co.*, (Ky. 1899) 51 S. W. Rep. 571; *De Gregori v. Saitta*, 50 N. Y. App. Div. 476.

523. 3. Thalheim v. State, 38 Fla. 169; *Marks v. Greenwald*, (N. Y. City Ct. Gen. T.) 12 Misc. (N. Y.) 554.

4. *Sullivan v. Waterman*, 21 R. I. 72 [citing 3 ENCYC. OF PL. AND PR. 523]; *Thalheim v. State*, 38 Fla. 169; *Alleghany Iron Co. v. Chesapeake, etc., R. Co.*, 69 N. Y. App. Div. 87; *Kennedy v. Mostert*, 48 N. Y. App. Div. 49; *Fox v. Davidson*, 44 N. Y. App. Div. 283; *Baldwin v. Nesmith*, 33 N. Y. App. Div. 634; *Marco v. Bird*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 377.

524. 1. District of Columbia. — *Vansant v. Lindsley*, 2 App. Cas. (D. C.) 421.

Idaho. — *State v. Rathbone*, (Idaho 1901) 67 Pac. Rep. 186.

New York. — *Spencer v. Ft. Orange Paper Co.*, 74 N. Y. App. Div. 74; *Ahrens v. Moadinger*, 41 N. Y. App. Div. 355; *Marco v. Bird*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 377; *Van Olinda v. Hall*, 82 Hun (N. Y.) 357.

North Carolina. — *Townsend v. Williams*, 117 N. Car. 330.

Rhode Island. — *Sullivan v. Waterman*, 21 R. I. 72.

Washington. — *Turner v. Great Northern R. Co.*, 15 Wash. 213.

Compare *Gilmore v. People*, 87 Ill. App. 128.

Review on Appeal. — See *Lauer v. District of Columbia*, 11 App. Cas. (D. C.) 453; *Vansant v. Lindsley*, 2 App. Cas. (D. C.) 421; *Gilmore v. People*, 87 Ill. App. 128; *Spencer v. Ft. Orange Paper Co.*, 74 N. Y. App. Div. 74; *Boughton v. Scott*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 838; *Sidney B. Bowman Cycle Co. v. Dyer*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 620.

525. 2. Spencer v. Ft. Orange

526. See note 1.

527. See note 1.

3. Bill Unnecessary. — See note 2.

Paper Co., 74 N. Y. App. Div. 74; Taylor v. Security Mut. L. Ins. Co., 73 N. Y. App. Div. 319; Burnham v. Wells, 50 N. Y. App. Div. 175; Madden v. Underwriting Printing, etc., Co., (N. Y. Super. Ct. Spec. T.) 10 Misc. (N. Y.) 27.

Times and Places. — Caziarc v. Abram French Co., 91 Hun (N. Y.) 641; Kelly v. Kelly, (N. Y. Super. Ct. Spec. T.) 12 Misc. (N. Y.) 457, *per* Gildersleeve, J.

Payment. — Where the defendant pleads payment as a defense, he should not be required to give a bill of particulars stating the time, place, and to whom the payment was made. Barone v. O'Leary, 44 N. Y. App. Div. 418.

Statute of Limitations. — Where the statute of limitations is pleaded as a defense a bill of particulars will not be required. Rosenstock v. Dessar, 40 N. Y. App. Div. 620.

526. 1. Keyes v. George C. Flint Co., 69 N. Y. App. Div. 141; Dorgan v. Scheer, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 829; Fruin-Bambrick Constr. Co. v. Marks, 48 N. Y. App. Div. 51; Rosenberg v. Hammerstein, 12 N. Y. App. Div. 579; Keteltas v. Gilmour, (N. Y. City Ct. Gen. T.) 10 Misc. (N. Y.) 788.

Counterclaim for Damages. — A bill of particulars will be required as to the special but not as to the general damages. Baltimore Mach. Works v. McKelvey, 71 N. Y. App. Div. 340; Mussinan v. Willner Wood Co., 69 N. Y. App. Div. 448; Commercial Nat. Bank v. Hand, 9 N. Y. App. Div. 614.

Where, in an action for goods sold and delivered, the defendant sets up as a counterclaim for damages a breach of warranty of quality by the plaintiff, he may be required to furnish a bill of particulars stating the orders he was unable to fill by reason of such default, the particular goods rejected, and the profits claimed to have been lost. Henry v. Talcott, 38 N. Y. App. Div. 630, *modifying* 26 Misc. (N. Y.) 79.

527. 1. Stanley v. Block, 56 N. Y. App. Div. 549; Hopkins v. Rathbun, 45 N. Y. App. Div. 123; King v. Ross, 21 N. Y. App. Div. 475; American Credit Indemnity Co. v. Bondy, 17 N. Y. App. Div. 328. *Compare* Stell v. Moyer, 9 Pa. Dist. 516.

2. District of Columbia. — Carver v. O'Neal, 11 App. Cas. (D. C.) 353; Vansant v. Lindsley, 2 App. Cas. (D. C.) 421.

New York. — Wolff v. Kaufman, 65 N. Y. App. Div. 29; Reed v. Marks, 56 N. Y. App. Div. 272; Pelonsky v. C. L. Pierson Mfg. Co., (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 778; National Gramophone Corp. v. American Talking Mach. Co., 50 N. Y. App. Div. 162; Werner v. Franklin Nat. Bank, 40 N. Y. App. Div. 485; Baxter v. Corrigan, 40 N. Y. App. Div. 614; Henry v. Talcott, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 79; Saalfeld v. Cutting, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 661; Niemoller v. Duncombe, 33 N. Y. App. Div. 536; McClellan v. Duncombe, 26 N. Y. App. Div. 353; Phalen v. Roberts, 21 N. Y. App. Div. 603; American Credit Indemnity Co. v. Bondy, 17 N. Y. App. Div. 328; Davidow v. Auerbach, 15 N. Y. App. Div. 424; Morrill v. Kazis, 8 N. Y. App. Div. 304; Bells Asbestos Co. v. H. W. Johns Mfg. Co., (Supm. Ct. App. Div.) 38 N. Y. Supp. 902; Watertown Paper Co. v. West, 3 N. Y. App. Div. 451; Powell v. Schenck, 88 Hun (N. Y.) 185; Bullock v. Bullock, 85 Hun (N. Y.) 373.

North Carolina. — State v. Howard, 129 N. Car. 584.

Virginia. — Richmond v. Leaker, 99 Va. 1.

Washington. — Turner v. Great Northern R. Co., 15 Wash. 213.

West Virginia. — Clarke v. Ohio River R. Co., 39 W. Va. 732.

Action on Sealed Instrument. — Where an action is brought on an instrument under seal and the defendant is thereby estopped to deny consideration, he is not entitled to a bill of particulars as to the circumstances out of which the indebtedness arose. Bender v. Bender, 88 Hun (N. Y.) 448.

When Requested Merely to Restrict Proof. — Where the party requesting a bill of particulars has equal knowledge of the facts, and the object is merely to limit the evidence the other party may produce to maintain his side of the issue, the motion should be denied. Cochrane Carpet Co. v. Howells, (Supm. Ct. Gen. T.) 30 N. Y. Supp. 1029.

528. See note 2.

529. 4. **Facts Already Known.** — See notes 1, 2.

530. 5. **Impossibility or Uncertainty.** — See notes 2, 3.

531. VI. **FORM AND REQUISITES** — 1. **Generally.** — See note 1.

532. 2. **Definiteness** — In General. — See note 2.

Effect of Serving Amended Complaint. — Where, before the hearing of a motion for a bill of particulars, the plaintiff in good faith files an amended complaint, it supersedes the original pleading and deprives the motion of its basis. *Callahan v. Gilman*, 11 N. Y. App. Div. 522.

But where, merely for the purpose of defeating the motion, an amended complaint is filed substantially the same as the original, the bill of particulars will be required. *Hanser v. Luther*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 730.

528. 2. *Byrnes v. Lewis*, 83 Hun (N. Y.) 310.

529. 1. *Sullivan v. Waterman*, 21 R. I. 72 [quoting 3 ENCYC. OF PL. AND P. 529]; *Henry v. Talcott*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 79; *Hayes v. St. Mary's Lodging House*, 89 Hun (N. Y.) 27; *Powell v. Schenck*, 88 Hun (N. Y.) 185.

Exception to the Rule. — Where the general allegations of a complaint cover a large number of acts or items, proof of any one of which would establish the plaintiff's cause of action, the defendant will not be required to prepare to defend against every possible one that might be so proved; he is entitled, although all are within his knowledge, to a bill of particulars stating the particular charge or charges upon which the plaintiff intends to rely. *Dietz v. Leber*, 33 N. Y. App. Div. 563; *Macdonough v. Hayman*, 23 N. Y. App. Div. 575; *Roberts v. Safety Buggy Co.*, 1 N. Y. App. Div. 74.

Peculiarly Known to Applicant. — *Slingerland v. International Contracting Co.*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 319; *Oviatt v. Oviatt*, (N. Y. Super. Ct. Spec. T.) 14 Misc. (N. Y.) 127.

3. *Slingerland v. International Contracting Co.*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 319; *Ahrens v. Moadinger*, 41 N. Y. App. Div. 355; *Cochrane Carpet Co. v. Howells*, (Supm. Ct. Gen. T.) 30 N. Y. Supp. 1029.

530. 2. *Carrie v. Davis*, 41 N. Y. App. Div. 520; *Sullivan v. Waterman*, 21 R. I. 72.

Affidavit of Inability. — See *Ketcham v. Ketcham*, 32 N. Y. App. Div. 26. Compare *Madden v. Underwriting Printing, etc., Co.*, (N. Y. Super. Ct. Spec. T.) 10 Misc. (N. Y.) 27.

In an order for a bill of particulars the court should not require an inspection of papers which the party swears he is unable to furnish, but may require the party to state the character of the alleged writings, and when and in whose possession he last saw them. *Moses v. Hatch*, 22 N. Y. App. Div. 21.

Where it appears from the pleadings and affidavits that the party has sufficient knowledge to give a more particular statement of facts than he has given in his pleading, and to swear to it on information and belief, he will be required to furnish the bill of particulars. *Rosenberg v. Hammerstein*, 12 N. Y. App. Div. 579.

Information in Books of Adversary. — Where the order for a bill of particulars involves information contained in books of the adverse party, an order for his examination should be granted. *Campbell v. Brock's Commercial Agency*, 38 N. Y. App. Div. 137.

Modifying Order. — Where an order requiring certain particulars to be furnished under penalty of excluding evidence has not been fully complied with, but the party has in good faith furnished all the information in his power, the order may be modified accordingly. *Cruikshank v. Cruikshank*, 30 N. Y. App. Div. 381.

3. *Manning v. International Nav. Co.*, 24 N. Y. App. Div. 143, per *O'Brien, J.*; *Hatch v. Matthews*, 85 Hun (N. Y.) 522.

531. 1. *Jules v. State*, 85 Md. 305; *Columbia Acc. Assoc. v. Rockey*, 93 Va. 678.

532. 2. **Instances of Insufficient Bills.** — A bill setting out certain specific acts of negligence which subsequently adds that "the said defendants were negligent in other respects, whereby plaintiff's intestate's death was caused," is insufficient. *Baker v. Sutton*, 86 Hun (N. Y.) 588.

534. 3. Verification — Order of Court. — See note 5.

535. 4. Objections for Defects. — See note 3.

On or After Trial. — See note 5.

VII. MORE SPECIFIC BILL — 1. Generally. — See note 6.

536. See notes 1, 2.

537. VIII. AMENDMENTS. — See note 1.

538. IX. CONSTRUCTION. — See note 1.

X. FAILURE TO FURNISH — 2. Effect in General — Time to Plead. — See notes 2, 3.

539. Precluding Evidence. — See note 1.

2. Remedy — Non Pros. and Dismissal. — See note 2.

Striking Out Pleading. — See note 3.

534. 5. Compare *Manning v. Benedict*, 31 N. Y. App. Div. 51.

Where the complaint is not verified the court should not order the bill of particulars to be verified. *Brauer v. Oceanic Steam Nav. Co.*, 26 N. Y. App. Div. 623.

535. 3. *Voorhees v. Barr*, 59 N. J. L. 123.

5. *Southern Bldg., etc., Assoc. v. Price*, 88 Md. 155.

6. *Michigan*. — *Tanner v. Page*, 106 Mich. 155.

New Jersey. — *Voorhees v. Barr*, 59 N. J. L. 123.

North Carolina. — *Townsend v. Williams*, 117 N. Car. 330, *per Clark, J.*
Pennsylvania. — *Rohrbach v. Heckman*, 12 Pa. Super. Ct. 64.

Virginia. — *Columbia Acc. Assoc. v. Rockey*, 93 Va. 678; *George Campbell Co. v. Angus*, 91 Va. 438.

Washington. — *Dudley v. Duval*, 29 Wash. 528; *Plummer v. Weil*, 15 Wash. 427.

See also *McGirr v. Campbell*, 47 N. Y. App. Div. 621.

A Motion to Strike Out the bill or any part thereof is not the proper remedy. *Voorhees v. Barr*, 59 N. J. L. 123.

A Motion for Nonsuit is not the proper remedy. *Rohrbach v. Heckman*, 12 Pa. Super. Ct. 64.

536. 1. *Jules v. State*, 85 Md. 305; *Townsend v. Williams*, 117 N. Car. 330, *per Clark, J.*; *Columbia Acc. Assoc. v. Rockey*, 93 Va. 678, *per Riely, J.*; *George Campbell Co. v. Angus*, 91 Va. 438; *Dudley v. Duval*, 29 Wash. 528.

2. *Tanner v. Page*, 106 Mich. 155, holding that a bill of particulars which describes generally the character of the plaintiff's claim is, in the absence of a motion for a more specific bill, sufficient.

537. 1. *Lafin v. Shackelford*, (C. C. A.) 98 Fed. Rep. 372 [*citing* 3 ENCYC. OF PL. AND PR. 537]; *Brownell Imp. Co. v. Critchfield*, 96 Ill. App. 84; *Anderson Carriage Co. v. Pungs*, 127 Mich. 543.

A bill of particulars may be amended, but is not a part of an indictment to which it refers. *Jules v. State*, 85 Md. 305.

The allowance of an amendment is discretionary with the trial court. *Goforth v. Stingley*, 79 Miss. 398.

Adding Items at Trial. — See *Brownell Imp. Co. v. Critchfield*, 96 Ill. App. 84; *Anderson Carriage Co. v. Pungs*, 127 Mich. 543.

538. 1. *Illinois*. — *O'Leary v. People*, 88 Ill. App. 60.

New York. — *Roscoe Lumber Co. v. Standard Silica Cement Co.*, 62 N. Y. App. Div. 421.

2. *Plummer v. Weil*, 15 Wash. 427, *citing* 3 ENCYC. OF PL. AND PR. 538.

3. Compare *Plummer v. Weil*, 15 Wash. 427.

539. 1. *Columbia Acc. Assoc. v. Rockey*, 93 Va. 678, *per Riely, J.*

2. In *Washington*, under Code Pro., § 409 (Ball. Annot. Codes and Stat. Wash. 1897, § 5085, subdiv. 7), the action may be dismissed or judgment of nonsuit entered. *Plummer v. Weil*, 15 Wash. 427.

3. See *Wilson v. St. John's Hospital*, 92 Ill. App. 413.

When Striking Out Improper. — Striking out is improper where the answer consists both of allegations amounting to a general denial and a counterclaim; in such cases the remedy should be by excluding proof of those matters whereof the bill of particulars should have been furnished. *Raff v. Koster*, 37 N. Y. App. Div. 534.

Waiver. — Going to trial without de-

539. XI. RELATION OF BILL TO EVIDENCE — I. Restriction of Evidence — a. GENERALLY. — See note 4.

541. See note 1.

542. b. BY ORDER OF COURT. — See note 5.

2. Bill as Evidence Per Se. — See note 6.

543. XII. VARIANCE BETWEEN BILL AND PLEADING. — See note 2.

XIII. SPECIFIC ACTIONS — 1. On Special Contracts Generally. — See note 3.

2. Accounts. — See note 4.

544. See note 1.

manding a compliance with an order for furnishing a bill of particulars or moving to strike out the pleading waives the right to object thereafter that it was not furnished. *Wilson v. St. John's Hospital*, 92 Ill. App. 413.

539. 4. Alabama. — *Morrisette v. Wood*, 128 Ala. 505.

Illinois. — *O'Leary v. People*, 88 Ill. App. 60.

Mississippi. — *Goforth v. Stingley*, 79 Miss. 398.

New York. — *Dempsey v. Bergen County Traction Co.*, 74 N. Y. App. Div. 474. See also *Star Brewery v. Farnsworth*, 172 Ill. 247; *Cochrane Carpet Co. v. Howells*, (Supm. Ct. Gen. T.) 30 N. Y. Supp. 1029.

541. 1. Mercier v. Traveler's Ins. Co., 24 Wash. 147; *Spokane, etc., Lumber Co. v. Loy*, 21 Wash. 501, each citing 3 ENCYC. OF PL. AND PR. 541.

542. 5. See Jacobs v. Friedman, (N. Y. City Ct. Gen. T.) 28 Misc. (N. Y.) 441. Compare *Jones v. Northern Trust Co.*, 67 Minn. 410.

In California the procuring of the order before trial is necessary. *McCarthy v. Mt. Tecarte Land, etc., Co.*, 110 Cal. 687.

6. Roscoe Lumber Co. v. Standard Silica Cement Co., 62 N. Y. App. Div. 421.

543. 2. Immaterial Variance. — Where the declaration is on the common counts in assumpsit it is immaterial that the bill of particulars discloses a special contract fully executed on the part of the plaintiff. *Southern Bldg., etc., Assoc. v. Price*, 88 Md. 155.

Conflicting Statements. — Where a complaint and a bill of particulars filed therewith contain conflicting statements, the averments of the complaint are controlling. *Chapman v. Elgin, etc., R. Co.*, 11 Ind. App. 632.

3. General Damages. — Where a complaint asks only general damages for the breach of a contract, a bill of particulars will not be required. *Bolognesi v. Hirzel*, 58 N. Y. App. Div. 530.

4. Definition. — The word "account," as used in Code Civ. Pro. N. Y., § 531, applies to almost every claim on contract which consists of several items. *Badger v. Gilroy*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 466.

Both Debit and Credit. — *Badger v. Gilroy*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 466; *Dow v. Williams*, 4 Pa. Dist. 659.

Account Settled. — In an action to reopen an account settled for alleged errors therein, the plaintiff may be required to furnish a bill of particulars stating the particular errors complained of. *Coit v. Goodhart*, 5 N. Y. App. Div. 444.

Goods and Materials Furnished. — In an action on an account for goods and materials furnished, there must be filed with the complaint a bill of particulars as an exhibit. *Townsend v. Cleveland Fire-Proofing Co.*, 18 Ind. App. 568.

544. 1. In Minnesota and New York. — See *St. Louis County v. American L. & T. Co.*, 75 Minn. 489; *Badger v. Gilroy*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 466.

In Alabama. — Under Civ. Code Ala., § 3290, where an account is the foundation of the action the defendant is entitled to a list of the particulars composing it upon notice to the plaintiff's attorney given at any time previous to the trial. *Morrisette v. Wood*, 128 Ala. 505.

In California. — Under Code Civ. Pro. Cal., § 454, a party must deliver a copy of the account sued on within five days after demand or be precluded from

545. Proper Matters of Account. — See note 4.

546. Successive Acts of Service. — See note 1.

548. 4. Divorce. — See note 1.

5. Dower. — See note 2.

550. 10. Torts — *a.* IN GENERAL. — See note 2.

b. ACTIONS BASED UPON NEGLIGENCE — Particulars of Negligence. — See note 3.

551. Injuries Received. — See note 1.

giving evidence thereof; but the statute is not mandatory and the enforcement of the penalty rests within the discretion of the trial judge. *McCarthy v. Mt. Tecarte Land, etc., Co.*, 110 Cal. 687.

In Oregon, in an action on an account, if the items are not set out in the pleadings or a copy of the account filed therewith, the plaintiff must, within five days after written demand therefor, deliver to the adverse party a copy of the account, or be precluded from giving evidence thereof; and where the copy filed is defective the court may order a further account. See *Davis v. Hofer*, 38 Oregon 150.

545. 4. *Morrisette v. Wood*, 128 Ala. 505, *quoting* 3 ENCYC. OF PL. AND PR. 535 [545].

A bill of particulars is properly ordered showing the items of work and materials and their value. *Rhinelander v. Haan*, 66 N. Y. App. Div. 505.

Where an action is to recover for specific services rendered for a fixed price, a bill of particulars will not be required. *White v. West*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 397.

546. 1. *Attorneys*. — See *Cantine v. Russell*, 57 N. Y. App. Div. 315, in which case a bill of particulars was required stating each item of service and its value; *Dempsey v. Bergen County Traction Co.*, 74 N. Y. App. Div. 474, in which case, the employment of the attorney being denied, he was required to give a bill of particulars stating the terms and nature of his contract, when and with whom made, each item of service, and at whose request it was rendered.

Contractors. — In an action to recover for services rendered in "performing all the general services of a contractor," the plaintiff may be required to furnish a bill of particulars stating in detail the services rendered and their value. *McGuire v. Hall*, 61 N. Y. App. Div. 571.

548. 1. *Adultery* — *Time, Place, Parties*. — *Hunter v. Hunter*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 672. See also *Kelly v. Kelly*, (N. Y. Super. Ct. Spec. T.) 12 Misc. (N. Y.) 457. Compare *Oviatt v. Oviatt*, (N. Y. Super. Ct. Spec. T.) 14 Misc. (N. Y.) 127.

Where, in opposition to an application for a bill of particulars, the party files an affidavit of inability to furnish the particulars required and alleges that he will not attempt to prove any other specific act than that alleged in his pleading, the application should be denied. *Ketcham v. Ketcham*, 32 N. Y. App. 26.

2. *Govin v. De Miranda*, 87 Hun (N. Y.) 227.

550. 2. *Anti-Kalsomine Co. v. Kent Circuit Judge*, 119 Mich. 434; *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, *per* Brannon, P.

3. *King v. Brookfield*, 72 N. Y. App. Div. 483; *Daly v. Bloomingdale*, 71 N. Y. App. Div. 563; *Field v. New York Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 111; *Wilson v. American Steel, etc., Plate Co.*, 56 N. Y. App. Div. 527; *Gallerstein v. Manhattan R. Co.*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 852; *Myers v. Albany R. Co.*, 5 N. Y. App. Div. 596; *Baker v. Sutton*, 86 Hun (N. Y.) 588. Compare *Stillman v. Brush Electric Light Co.*, 92 Hun (N. Y.) 504.

Death by Wrongful Act. — *Stillman v. Brush Electric Light Co.*, 92 Hun (N. Y.) 504. See also *Manning v. International Nav. Co.*, 24 N. Y. App. Div. 143.

551. 1. *English v. Westchester Electric R. Co.*, 69 N. Y. App. Div. 576; *Steinau v. Metropolitan St. R. Co.*, 63 N. Y. App. Div. 126. See also *Villiers v. Third Ave. R. Co.*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 17.

The plaintiff may be required to furnish a bill of particulars showing the expenses incurred and length of time disabled, but not of the nature, location, and extent of the injuries

552. *c.* CONSPIRACY, CONVERSION, AND ESCAPE — *Conversion.* — See note 1.

d. LIBEL AND SLANDER. — See note 3.

553. *Defense.* — See note 1.

554. *e.* MALICIOUS PROSECUTION. — See note 1.

f. SEDUCTION AND CRIM. CON. — See note 2.

11. Qui Tam Actions and Criminal Prosecutions. — See note 4.

sustained. *Steinau v. Metropolitan St. R. Co.*, 63 N. Y. App. Div. 126.

The plaintiff may be required to furnish a bill of particulars stating the nature and extent of the injuries, but not their probable effect. *Schweit v. Metropolitan St. R. Co.*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 409.

Permanent Injuries. — When the complaint alleges that some of the injuries sustained are permanent, the defendant is entitled to a bill of particulars specifying the injuries alleged to be permanent. *English v. Westchester Electric R. Co.*, 69 N. Y. App. Div. 576; *Cavanagh v. Metropolitan St. R. Co.*, 70 N. Y. App. Div. 1; *Curtin v. Metropolitan St. R. Co.*, 65 N. Y. App. Div. 610.

552. 1. See *Jones v. Northern Trust Co.*, 67 Minn. 410, holding that the defendant is not entitled to the bill as a matter of right upon a simple demand.

2. *Rowe v. Washburne*, 62 N. Y. App. Div. 131; *White v. Pease*, 82 Fed. Rep. 562.

Particulars of Damages. — A bill of particulars of the special damages may be ordered, but not of the general damages sustained. *Bell v. Heatherton*, 66 N. Y. App. Div. 603.

Where No Special Damages Are Claimed. — Where the complaint does not sufficiently allege special damages to warrant proof thereof, the defendant is not entitled to a bill of particulars in that regard. *Rowe v. Washburne*, 62 N. Y. App. Div. 131.

In an action for general damages for publication of words libelous *per se*, a bill of particulars will not be required. *Cruikshank v. Bennett*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 232.

Not to Disclose Proof. — *Burnham v. Wells*, 50 N. Y. App. Div. 175.

553. 1. *Burnham v. Wells*, 50 N. Y. App. Div. 175; *Madden v. Under-*

writing Printing, etc., Co., (N. Y. Super. Ct. Spec. T.) 10 Misc. (N. Y.) 27; *Stell v. Moyer*, 9 Pa. Dist. 516.

554. 1. But see *Dietz v. Leber*, 33 N. Y. App. Div. 563, in which case the bill was allowed.

2. See *Vasant v. Lindsley*, 2 App. Cas. (D. C.) 421.

4. See *Kirby v. U. S.*, 174 U. S. 47; *Rosen v. U. S.*, 161 U. S. 29.

Contra. — In *Mississippi* bills of particulars are not granted in criminal cases. *Westbrooks v. State*, 76 Miss. 710.

Indictment Too General. — When an indictment is good as a pleading, but too general adequately to inform the defendant of the exact charge that he will be required to meet, the prosecution may be required to furnish to him a bill of particulars. *Thalheim v. State*, 38 Fla. 169; *Gilmore v. People*, 87 Ill. App. 128; *New Orleans v. Chappuis*, 105 La. 179, *per Nicholls*, C. J. See also *Lauer v. District of Columbia*, 11 App. Cas. (D. C.) 453.

The refusal to grant a bill of particulars in such a case is not reversible error, where it appears that no injury has resulted therefrom. *State v. Hatfield*, 66 N. J. L. 443.

Discretion. — The granting of a bill of particulars in a criminal case is within the sound discretion of the trial judge. *Thalheim v. State*, 38 Fla. 169; *Com. v. Zuern*, 16 Pa. Super. Ct. 588.

Embezzlement. — *Thalheim v. State*, 38 Fla. 169; *Com. v. Roberts*, 22 Pa. Co. Ct. 214. See also *State v. Hatfield*, 66 N. J. L. 443.

Fraudulent Pretenses. — A defendant indicted for obtaining money by fraudulent pretenses is entitled to a bill of particulars. *Jules v. State*, 85 Md. 305.

Conspiracy. — A bill of particulars may be granted to a defendant indicted for conspiracy. *Towne v. People*, 89 Ill. App. 258.

BILLS OF PEACE.

556. I. DEFINITION. — See note 1.

557. II. DIVISION INTO TWO CLASSES. — See note 1.

III. GROUNDS OF JURISDICTION — GENERALLY. — See notes 2, 3, 4, 5.

558. IV. REQUISITES OF JURISDICTION — 1. In Cases of First Class — a. IN GENERAL. — See note 1.

559. b. NUMBER AND RELATION OF PARTIES — Multifariousness. — See note 4.

556. 1. See *Eureka, etc., R. Co. v. California, etc., R. Co.*, (C. C. A.) 109 Fed. Rep. 509, to the effect that it must appear that the rights of all parties concerned can be adjudicated in one action before a bill of peace will lie.

557. 1. Suit in Behalf of Plaintiffs and Others. — In *Corey v. Sherman*, (Iowa 1894) 60 N. W. Rep. 232, decided under Code Iowa, § 3464, it was held that policy holders in an insurance company might institute a suit for the benefit of themselves and of plaintiffs whose names did not appear, to vacate an order appointing a receiver, all the policies being similar and there being over two thousand holders with identical interests.

2. *American Cent. Ins. Co. v. Landau*, 56 N. J. Eq. 513; *Bryan v. Bryan*, 61 N. J. Eq. 45; *Earle v. Gorham Mfg. Co.*, 2 N. Y. App. Div. 460; *Mengel v. Lehigh Coal, etc., Co.*, 24 Pa. Co. Ct. 152. Compare *Marsh v. Kaye*, 168 N. Y. 196, wherein it was held that there was no sufficient showing for relief.

3. *Stovall v. McCutchen*, 107 Ky. 577; *Barrington v. Ryan*, 88 Mo. App. 85; *Dinsmore v. Southern Express Co.*, 92 Fed. Rep. 714. See also *Zanhizer v. Hefner*, 47 W. Va. 418.

Instance Where Bill of Peace Will Lie. — If a creditor divides an unascertained indebtedness against his debtor, with his consent, among various creditors of such creditor, and then assigns the residuum of such indebtedness to a trustee for the benefit of all his other creditors, and such trustee and such other assignees bring and threaten to bring separate suits in their several

names at law for the purpose of determining the amount of such indebtedness at the instance of such debtor, a court of equity, to avoid a multiplicity of suits, will take jurisdiction of such indebtedness, ascertain and determine the amount thereof, and, as ancillary to such relief, will enjoin the prosecution of the several claims against such indebtedness at law. *St. Lawrence Boom, etc., Co. v. Price*, 49 W. Va. 432.

4. *Stockwell v. Fitzgerald*, 70 Vt. 468.

5. *German Alliance Ins. Co. v. Van Cleave*, 191 Ill. 410. See also *Jones v. Hardy*, 127 Ala. 221.

There Must Be Community of Interest of parties plaintiff or defendant before equity will take jurisdiction to avoid a multiplicity of suits or harassing and unnecessary litigation. *People's Nat. Bank v. Marye*, 107 Fed. Rep. 570; *Hale v. Allinson*, (C. C. A.) 106 Fed. Rep. 258; *Sang Lung v. Jackson*, 85 Fed. Rep. 502.

558. 1. *Chicago City R. Co. v. General Electric Co.*, 74 Ill. App. 465; *Dinsmore v. Southern Express Co.*, 92 Fed. Rep. 714.

If the Plaintiff Has a Remedy at Law, he must show that his loss will be severe and irreparable before a court of equity will take jurisdiction and enjoin a multiplicity of suits. *Ewing v. Webster City*, 103 Iowa 226.

559. 4. Where One General Question Affects Numerous Persons and their rights can be adjudicated in one action, equity will take jurisdiction to prevent a multiplicity of suits. *Steigerwalt v. Rife*, 9 Pa. Super. Ct. 363.

560. *c.* INSTANCES OF JURISDICTION. — See note 1.

562. *d.* WHEN JURISDICTION WILL NOT BE ASSUMED. —

See notes 1, 2, 4.

563. *2.* In Cases of Second Class. — See note 4.

565. *3.* In Analogous Cases. — See note 1.

560. 1. See *Stockwell v. Fitzgerald*, 70 Vt. 468; *French v. Union Pac. R. Co.*, 92 Fed. Rep. 28.

562. 1. *Ewing v. Webster City*, 103 Iowa 226.

2. *Balogh v. Lyman*, 6 N. Y. App. Div. 271; *Thomas v. Council Bluffs Canning Co.*, (C. C. A.) 92 Fed. Rep. 422.

4. *People's Nat. Bank v. Marye*, 107 Fed. Rep. 570.

Suit to Enjoin Attachments. — In *Penninsular Constr. Co. v. Merritt*, 90 Md. 589, the court decided that a bill of peace would not lie, saying: "The attachments which are pending are indeed quite numerous, but each of them was instituted in an appropriate jurisdiction; each is based upon a distinct and independent cause of action, evidenced with the particularity required by the statute and verified by affidavit. So far, therefore, as these attachments alone are concerned we can conceive of no ground upon which we could declare them vexatious, and of no reason why the mere number of such suits should be made the occasion of divesting the courts of law of their conceded jurisdiction."

563. *4.* *Bowling v. Crook*, 104 Ala. 130.

Where Right Has Not Been Established at Law. — A court of equity will not assume jurisdiction of a case at law for the purpose of avoiding a multiplicity of suits when the difference is between only two persons and no right has been established at law. *Cleland v. Campbell*, 78 Ill. App. 624. See also *McGuire v. Pensacola City Co.*, (C. C. A.) 105 Fed. Rep. 677.

565. 1. **Practice in Oregon.** — In the case of *Tobin v. Portland Flouring Mills Co.*, 41 Oregon 269, it was decided that under Hill's Annot. Laws Oregon, § 385, where over one hundred depositors of grain in a warehouse commenced an action against the owners of such warehouse to recover the value of wheat shipped therefrom without authority, an action cannot be maintained in the name of a few depositors only, for the benefit of all. See also *Washington County v. Williams*, (C. C. A.) 111 Fed. Rep. 801, in which case it was held that where a county issued bonds payable to bearer, one bondholder could not sue the county for all, as an adequate remedy at law existed in favor of each bondholder.

BILLS OF REVIEW.

570. I. DEFINITION AND USE. — See note 1.

571. See notes 1, 2, 3.

570. 1. *Durant v. D'Auxy*, 107 Ga. 456 [quoting 3 ENCYC. OF PL. AND PR. 570, 571]. See also the following cases:
Michigan. — *Simmons v. Conklin*, (Mich. 1901) 88 N. W. Rep. 625.

Tennessee. — *Fuller v. Jackson*, (Tenn. Ch. 1901) 62 S. W. Rep. 274.

Virginia. — *Dellinger v. Foltz*, 93 Va. 729.

West Virginia. — *Dingess v. Marcum*, 41 W. Va. 763.

A Bill of Review in an Admiralty Court is permitted by the practice of that court in the absence of other remedy. It may be filed to review a decree of such court after the term at which it was enrolled. It lies in admiralty where in a suit *in rem* or *in personam* property has been disposed of without personal notice to the owner. The Columbia, 100 Fed. Rep. 890, in which case Thomas, J., exhaustively reviewed the authorities.

Bill to Impeach Decree. — In *George v. Nowlan*, 38 Oregon 537, the court said that the bill could not "be sustained as a bill of review for error apparent on the face of the record, because its object is to impeach and set aside the decree entirely, and not to reverse or correct it." See also *Carver v. Jarvis-Conklin Mortg. Trust Co.*, 73 Fed. Rep. 9.

Material Alteration. — Unless the alteration in the decree sought to be made by a bill of review is material a bill of review will not lie. *Glover v. Jones*, 95 Me. 303.

Finality of Decree. — To give the court jurisdiction of a bill of review the decree which it seeks to modify must be a final decree. *Savage v. Johnson*, 127 Ala. 401; *Spoor v. Tilson*, 97 Va. 279.

Modification by Consent. — Where both the court and the counsel representing the party in whose favor a decree has been entered agree to modify the language so as to remove any possi-

bility of misinterpretation a bill of review will not be entertained. *Simmons v. Conklin*, (Mich. 1901) 88 N. W. Rep. 625.

571. 1. *Karr v. Freeman*, 166 Ill. 299 [citing 3 ENCYC. OF PL. AND PR. 570-573]; *Campbell v. Snyder*, 27 Oregon 249; *Blair v. Ritchie*, 73 Vt. 109; *Hill v. Phelps*, (C. C. A.) 101 Fed. Rep. 650. *Contra*, *Moore v. Perry*, 13 Tex. Civ. App. 204.

2. *Blair v. Ritchie*, 73 Vt. 109 [citing generally 3 ENCYC. OF PL. AND PR., title BILLS OF REVIEW]; *Hill v. Phelps*, (C. C. A.) 101 Fed. Rep. 650; *Boston, etc., Electric St. R. Co. v. Bemis Car-Box Co.*, (C. C. A.) 98 Fed. Rep. 121.

Other Grounds. — No grounds other than errors apparent on the face of the decree and newly discovered evidence are grounds for bills of review. *Morton v. Sneed*, (Tenn. Ch. 1897) 39 S. W. Rep. 736. See also *Boswell's Estate*, 6 Pa. Dist. 352.

Extraneous Facts. — Courts will not entertain bills of review based on extraneous facts. *Murphy v. Schoder*, 126 Mich. 607, in which case the application for the bill was based on the arrest and detention of an attorney in the case. See also *Cox v. Hartsville Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 237.

Fraud as Ground for Relief. — If fraud is relied upon to sustain a bill of review, it must be fraud in the procurement of the decree, and not in the alleged mistakes in accounts rendered five years before the decree was entered in a suit for an accounting. *Bodkin v. Rollyson*, 48 W. Va. 453.

Wisconsin Statute. — Stat. Wis., § 2600, has abolished the right to a bill of review on the ground of newly discovered evidence, and substituted therefor a motion for a new trial. *Crowns v. Forest Land Co.*, 102 Wis. 97.

3. *Hill v. Phelps*, (C. C. A.) 101 Fed. Rep. 650

573. II. REVIEW OF CONSENT DECREES. — See note 1.

III. JURISDICTION OF BILL — 1. In Same Court. — See notes 2, 3.

574. 3. After Decision on Appeal. — See note 3.

575. IV. ERROR APPARENT — 1. What Constitutes Generally. — See note 3.

578. 2. Formal Irregularities and Matters in Discretion. — See note 1.

3. Must Be Prejudicial. — See note 3.

579. 4. Face of Decree. — See note 1.

5. Matters of Fact. — See note 2.

580. V. NEWLY DISCOVERED MATTER — *Requisites of New Matter.* — See note 1.

581. See notes 1, 2.

573. 1. *Alder v. Van Kirk Land, etc., Co.*, 114 Ala. 551; *Watts v. Rice*, 192 Ill. 123; *Camden v. Ferrell*, 50 W. Va. 119; *Hill v. Phelps*, (C. C. A.) 101 Fed. Rep. 650.

2. *State v. White*, 40 Fla. 297; *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 169 Mass. 157; *Hall v. Waddill*, 78 Miss. 16; *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, (C. C. A.) 107 Fed. Rep. 781.

3. *State v. White*, 40 Fla. 297; *Morton v. Sneed*, (Tenn. Ch. 1897) 39 S. W. Rep. 736. See also *Murphy v. Johnson*, 107 Tenn. 552.

574. 3. *Hall v. Waddill*, 78 Miss. 16, wherein the court said: "We cannot approve what is said on this subject in *Southard v. Russell*, *supra*. We approve and adopt as the correct rule what is said in *Putnam v. Clark*, 35 N. J. Eq. 149, which is also approved by the learned editors of 3 ENCYC. OF PL. AND PR. 575, and also the courts whose decisions are cited in note 3, p. 574, of said volume."

575. 3. *Dingess v. Marcum*, 41 W. Va. 763.

578. 1. *Bodkin v. Rollyson*, 48 W. Va. 453.

"**Snap Judgment.**" — Leave of court to file a bill of review will be granted where it can be shown that a "snap judgment" was taken. *Kinsel v. Kinsel*, 126 Mich. 693.

3. *Wilson v. Schaefer*, 107 Tenn. 300.

579. 1. *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27. But see the case of *Axtell v. Pulsifer*, 155 Ill. 141, in which a bill of review was granted where a court had inadvertently allowed a default to be taken and a de-

murrer to the complaint was undisposed of at the time.

2. *Arkansas*. — *Wood v. Wood*, 59 Ark. 441.

Tennessee. — *Cox v. Hartsville Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 237; *Loftis v. Buller*, (Tenn. Ch. 1900) 58 S. W. Rep. 886.

A Record of the Evidence has no place in a bill of review, as courts will not inquire into matters of fact. *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 169 Mass. 157.

580. 1. *Dingess v. Marcum*, 41 W. Va. 763 [quoting 3 ENCYC. OF PL. AND PR. 580-583]; *Glover v. Jones*, 95 Me. 303; *Saunders v. Savage*, (Tenn. Ch. 1900) 63 S. W. Rep. 218.

Relevancy of New Matter. — In order that the court can pass upon and sustain a bill of review such new matter must be set out in the bill. *Griffith v. Griffith*, (Tenn. Ch. 1898) 46 S. W. Rep. 340.

581. 1. *Alabama*. — *Allgood v. Piedmont Bank*, 130 Ala. 237.

Michigan. — *Mosher v. Mosher*, 108 Mich. 612.

New Jersey. — See *Clayton v. Clayton*, 59 N. J. Eq. 310.

Tennessee. — *Fuller v. Jackson*, (Tenn. Ch. 1901) 62 S. W. Rep. 274; *Griffith v. Griffith*, (Tenn. Ch. 1898) 46 S. W. Rep. 340.

2. *Warren v. Adams*, 26 Colo. 404 [citing 3 ENCYC. OF PL. AND PR. 580]; *Allgood v. Piedmont Bank*, 130 Ala. 237; *Mosher v. Mosher*, 108 Mich. 612; *Wilson v. Schaefer*, 107 Tenn. 300.

Decree Entered by Default. — A bill brought on the grounds of newly discovered matter will not lie to a decree

583. See notes 1, 2.

[*Fraud*. — Where fraud has been used to abuse the powers of court with the design of accomplishing a sinister purpose, a bill of review will lie. See note 2*a*.]

584. VI. TIME FOR FILING — 1. For Error Apparent. — See note 1.

585. 2. For New Matter. — See note 2.

586. VII. PERFORMANCE OF DECREE — When Performance Dispensed with. — See note 5.

VIII. LEAVE TO FILE — 1. When Necessary. — See note 6.

587. See notes 1, 2.

entered by default. *Camden v. Ferrell*, 50 W. Va. 119.

583. 1. *Watts v. Rice*, 192 Ill. 127 [citing 3 ENCYC. OF PL. AND PR. 583]. See also the following cases:

Alabama. — *Allgood v. Piedmont Bank*, 130 Ala. 237; *Alder v. Van Kirk Land, etc., Co.*, 114 Ala. 551.

Arkansas. — *Bartlett v. Gregory*, 60 Ark. 453.

Michigan. — *Mosher v. Mosher*, 108 Mich. 612.

Virginia. — *Sanders v. Burk*, (Va. 1895) 22 S. E. Rep. 516.

United States. — *Society of Shakers v. Watson*, (C. C. A.) 77 Fed. Rep. 512.

Reasonable Diligence. — The rule is that if by the exercise of reasonable diligence new matter could not have been discovered or produced in the former suit, it may be pleaded in support of a bill of review. *Warren v. Adams*, 26 Colo. 404, citing generally 3 ENCYC. OF PL. AND PR., article BILLS OF REVIEW.

2. *Elzas v. Elzas*, 183 Ill. 132; *Society of Shakers v. Watson*, (C. C. A.) 77 Fed. Rep. 512.

2*a*. *The Columbia*, 100 Fed. Rep. 890 [citing ENCYC. OF PL. AND PR. as follows: "In 3 ENCYC. OF PL. AND PR. 570-600, the past and present use of bills of review in the courts of the United States and of the several states is set forth instructively"]. See also *Mitchell v. Rice*, 132 Ala. 120; *Adamski v. Wiczorek*, 93 Ill. App. 357; *Reed v. Stanly*, 8 Fed. Rep. 430.

584. 1. *Copeland v. Bruning*, 104 Fed. Rep. 169, citing 3 ENCYC. OF PL. AND PR. 584. See also the following cases

Idaho. — *McMillan v. Wooley*, (Idaho 1898) 51 Pac. Rep. 1029

Oregon. — *George v. Nowlan*, 38 Oregon 537.

Pennsylvania. — *Buck v. Buck*, 195 Pa. St. 373.

United States. — *Halsted v. Forest Hill Co.*, 109 Fed. Rep. 820; *Reed v. Stanley*, (C. C. A.) 97 Fed. Rep. 521; *Duncan v. Atlantic, etc., R. Co.*, 88 Fed. Rep. 840; *White v. Joyce*, 158 U. S. 128.

Laches. — "We understand that laches constitutes no bar to a pure bill of review brought within five years for error apparent upon the record." *Manufacturers Paper Co. v. Lindblom*, 68 Ill. App. 539.

Rule in United States Courts. — Attempting to appeal when no appeal lies will not suspend the time within which a bill of review must be filed. *Blythe Co. v. Hinckley*, (C. C. A.) 111 Fed. Rep. 827.

In *West Virginia* the rule is that three years is the limitation for a bill of review. *Dunfee v. Childs*, 45 W. Va. 155.

585. 2. *Clayton v. Clayton*, 59 N. J. Eq. 310.

586. 5. See *Manufacturers Paper Co. v. Lindblom*, 68 Ill. App. 539, which lays down the rule that no stay of proceedings against an original decree for the payment of money will be ordered upon the filing of a bill of review unless the money mentioned in the decree is paid into court or a bond filed to indemnify the parties in whose favor the original decree ran.

6. *Arkansas*. — *Wood v. Wood*, 59 Ark. 441.

West Virginia. — *Dunfee v. Childs*, 45 W. Va. 155.

Matter of Right. — A bill of review for error apparent will be received as a matter of right. *Kennedy's Estate*, 15 Pa. Co. Ct. 494.

587. 1. *Crowns v. Forest Land Co.*, 102 Wis. 106, citing 3 ENCYC. OF PL. AND PR. 587. See also the following cases:

587. 2. How Obtained. — See note 4.

588. See note 4.

Counter-affidavits. — See note 5.

3. Discretionary with Court. — See note 6.

589. See note 1.

5. Effect of Filing Without Leave. — See note 3.

590. IX. PARTIES TO BILL. — See notes 3, 4.

592. XI. FRAME OF BILL — Stating Part. — See notes 1, 2.

593. Prayer. — See note 4.

Illinois. — *Cole v. Littledale*, 164 Ill. 630.

West Virginia. — *Dunfee v. Childs*, 45 W. Va. 155.

587. 2. But see *Cox v. Hartsville Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 237, in which it was held that the consent of the chancellor to file a bill of review to impeach a decree of the Supreme Court for fraud was not necessary.

4. Filing a Telegram which is supposed to be material evidence does not comply only with the rule requiring an affidavit. *Elzas v. Elzas*, 183 Ill. 132.

588. 4. *Cole v. Littledale*, 164 Ill. 630.

5. Loth v. Loth, 116 Mich. 634; *Boston, etc., Electric St. R. Co. v. Bemis Car-Box Co.*, (C. C. A.) 98 Fed. Rep. 121, the latter case holding that where the contention is of such a character that a court would be embarrassed by relying on evidence in support of a petition to file a bill of review permission will be granted.

6. Elzas v. Elzas, 183 Ill. 132.

Demurrer After Leave Granted. — It is discretionary with the court whether or not it will entertain a bill of review, and permission to file such a pleading will not estop the court from dismissing it on demurrer. *McGuire v. Gallagher*, 95 Tenn. 349.

589. 1. In the Federal Courts leave to file a supplemental bill in the nature of a bill of review will be granted, of course, without inquiry as to the nature of the contents of the bill. See *Seymour v. White County*, (C. C. A.) 92 Fed. Rep. 115. See also SUPPLEMENTAL PLEADINGS.

Bill Based on Announcement of New Doctrine of Law. — I: is proper exercise of the discretion of the court to deny leave to file a bill of review when three years have elapsed since the decree was rendered and the petition to file is based on the fact that an opinion has been rendered in the meantime an-

nouncing a doctrine of law contrary to that which prevailed at the time the decree sought to be reviewed was rendered. *Ingles v. Bryan*, 117 Mich. 113.

3. Objection Waived. — Where parties appear and demur to a bill of review they are estopped from objecting that it was filed without permission. *Manufacturers Paper Co. v. Lindblom*, 68 Ill. App. 539.

590. 3. *Allgood v. Piedmont Bank*, 130 Ala. 237; *Chancellor v. Spencer*, 40 W. Va. 337.

Infants may bring a bill of review to alter a decree of a probate court in a guardianship matter; or this may be done after they have obtained their majority. *Miller v. Miller*, 21 Tex. Civ. App. 382.

Persons Not Aggrieved by the decree cannot bring a bill of review. *Wilson v. Schaefer*, 107 Tenn. 300.

4. Cutter v. Iowa Water Co., 96 Fed. Rep. 777.

592. 1. The Error Relied upon Must Be Specifically Pointed Out by recitals of the portion of the proceedings, orders, reports, etc., relied upon to sustain the bill. *Heiskell v. Galbraith*, (Tenn. Ch. 1900) 59 S. W. Rep. 346.

A Bill of Review for Fraud must state particularly how complainants were put upon inquiry, how they discovered the fraud, that it could not have been discovered by ordinary prudence, etc. *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, (C. C. A.) 107 Fed. Rep. 781. But it would be well to compare *Hinesley v. Sheets*, (Ind. 1897) 46 N. E. Rep. 94, with the cases above cited.

2. Wethered v. Elliott, 45 W. Va. 436, in which case the court *quoted* 3 ENCYC. OF PL. AND PR. 591, 592.

593. 4. *Allgood v. Piedmont Bank*, 130 Ala. 237.

Bill Must Pray Modification of Decree. — A court will not assume jurisdiction of a bill of review which prays only for

594. XIII. EFFECT OF FILING BILL. — See note 3.

XIV. DEFENSES TO AND PROCEEDINGS ON BILL — 1. For Error Apparent. — See note 7.

595. See note 1.

597. XVI. EFFECT OF REVERSAL ON PURCHASER. — See note 2.

XVIII. BILLS IN NATURE OF BILLS OF REVIEW — 1. Nature and Use. — See notes 4, 5.

598. Supplemental Bill. — See note 5. See also SUPPLEMENTAL PLEADINGS.

Leave of Court. — See note 6.

further relief and contains no petition to alter or modify the decree already entered, and especially is this true if the decree covers the scope of the relief prayed for in the original pleadings. *Hill v. Phelps*, (C. C. A.) 101 Fed. Rep. 650

594. 3. Manufacturers Paper Co. v. Lindblom, 68 Ill. App. 539, wherein it was declared that "an order staying proceedings on the decree until the hearing should have been applied for, and if granted, it would have been as effectual as an injunction, and in conformity with proper practice upon bills of review."

7. Axtell v. Pulsifer, 155 Ill. 141.

595. 1. Axtell v. Pulsifer, 155 Ill. 141.

597. 2. Jordan v. Hardie, 131 Ala. 72; *Loftis v. Butler*, (Tenn. Ch. 1900) 58 S. W. Rep. 886; *Shepherd v. Chapman*, (Va. 1895) 21 S. E. Rep. 468; *Dunn v. Renick*, 40 W. Va. 349.

4. Durant v. D'Auxy, 107 Ga. 456 [quoting with approval 3 ENCYC. OF PL AND PR. 570, 571]; *Simmons v. Conklin*, (Mich. 1901) 88 N. W. Rep. 625; *Fuller v. Jackson*, (Tenn. Ch. 1901) 62 S. W. Rep. 274; *Dellinger v. Foltz*, 93

Va. 729; *Dingess v. Marcum*, 41 W. Va. 763.

5. Manufacturers Paper Co. v. Lindblom, 68 Ill. App. 539.

Requisite Allegations. — Where a bill in the nature of a bill of review is filed to set aside or alter a decree it should set forth affirmatively that the complainant cannot protect himself by motion for a new trial by application to vacate or modify the judgment by appeal or by any method other than by the bill filed. *McMillan v. Wooley*, (Idaho 1898) 51 Pac. Rep. 1029.

598. 5. See Noeker v. Howry, 119 Mich. 626, in which case it was held that under the circumstances of the case it was within the discretion of the Circuit Court to permit the filing of a supplemental bill in the nature of a bill of review.

Ex Parte Evidence. — It is error to dispose of bills in the nature of bills of review on *ex parte* evidence. *Silman v. Stump*, 47 W. Va. 641.

6. Contra -- Bill for Fraud Filed Without Leave. — A bill in the nature of a bill of review which alleges fraud may be filed without leave of court. *Ritchie v. Burke*, 109 Fed. Rep. 16.

BILLS TO ENFORCE DECREES.

- 601. II. EQUITY JURISDICTION.** — See note 2.
602. III. NATURE OF BILL. — See notes 2, 3.
IV. WHEN MAINTAINABLE — 1. Generally. — See note 4.
603. 2. By Person Not a Party. — See note 2.
604. 3. What Decrees — State and Federal Courts. — See note 2.
V. ENFORCEMENT. — See note 4.
 Inequitable Decrees. — See note 5.
605. See note 1.
 Who Can Call Decree in Question. — See note 4.

601. 2. *Lancaster v. Snow*, 184 Ill. 534; *Oberlein v. Wells*, 163 Ill. 101; *Central Trust Co. v. Western North Carolina R. Co.*, 112 Fed. Rep. 471; *Fidelity Ins., etc., Co. v. Norfolk, etc., R. Co.*, 88 Fed. Rep. 815; *Shainwald v. Lewis*, 69 Fed. Rep. 487. See also *Central Trust Co. v. Western North Carolina R. Co.*, 89 Fed. Rep. 24.

602. 2. Compare *Lancaster v. Snow*, 184 Ill. 534.

3. *Shainwald v. Lewis*, 69 Fed. Rep. 487.

Supplemental Bill. — See *Central Trust Co. v. Western North Carolina R. Co.*, 89 Fed. Rep. 24, 112 Fed. Rep. 471.

Style of Bill Immaterial. — Where the bill in form and substance is a bill to enforce a decree and the plaintiff is entitled to the relief demanded, the court should entertain the bill. *Shainwald v. Lewis*, 69 Fed. Rep. 487, in which case the bill was styled "a bill of revivor and supplement."

4. *Oberlein v. Wells*, 163 Ill. 101; *Buchanan v. Knoxville, etc., R. Co.*, (C. C. A.) 71 Fed. Rep. 324, *per Severens, J.* See also *Lancaster v. Snow*, 184 Ill. 534.

To maintain a bill to enforce a prior decree it must be alleged and proved that the decree has not been and cannot be carried into execution without further assistance of the court. *Raft River Land, etc., Co. v. Langford*, (Idaho 1896) 46 Pac. Rep. 1024.

603. 2. See *Baker v. Baker*, 89 Fed. Rep. 673.

604. 2. Enjoining Proceedings in State Courts. — Rev. Stat. U. S., § 720, does not prevent a federal court from enjoining proceedings in a state court when necessary to enforce its own decree. *Central Trust Co. v. Western*

North Carolina R. Co., 89 Fed. Rep. 24, 112 Fed. Rep. 471; *Mercantile Trust, etc., Co. v. Roanoke, etc., R. Co.*, 109 Fed. Rep. 3, *per Paul, J.*; *Fidelity Ins., etc., Co. v. Norfolk, etc., R. Co.*, 88 Fed. Rep. 815; *James v. Central Trust Co.*, (C. C. A.) 98 Fed. Rep. 489. See also *State Trust Co. v. Kansas City, etc., R. Co.*, 110 Fed. Rep. 10.

4. **Reopening Previous Decree.** — A party who seeks the aid of a court of chancery in executing a former decree does so at the risk of opening up the former decree as respects the relief to be granted. *O'Brien v. Wheelock*, 184 U. S. 450, *per Fuller, J.*

5. *Lancaster v. Snow*, 184 Ill. 534, *per Phillips, J.*; *National Foundry, etc., Works v. Oconto City Water Supply Co.*, (C. C. A.) 113 Fed. Rep. 793; *Buchanan v. Knoxville, etc., R. Co.*, (C. C. A.) 71 Fed. Rep. 324, *per Severens, J.*; *Compton v. Jesup*, (C. C. A.) 68 Fed. Rep. 263, *per Lurton, J.*

To What Cases Applicable. — The rule that the court will look into the justice of the former decree applies only where the aid of the court is asked to carry out an ineffective decree, and not to a case where the former decree is complete and the plaintiff is only asking to enjoin an invasion of rights acquired thereunder. *Buchanan v. Knoxville, etc., R. Co.*, (C. C. A.) 71 Fed. Rep. 324, *per Severens, J.*

605. 1. Enforcing Decree upon Equitable Terms. — A court of equity will lend its aid to enforce an ineffective decree only upon such terms and conditions as are just. *Compton v. Jesup*, (C. C. A.) 68 Fed. Rep. 263, *per Lurton, J.*

4. Compare *Compton v. Jesup*, (C. C. A.) 68 Fed. Rep. 263, *per Taft, J.*

BILLS TO IMPEACH DECREES AND JUDGMENTS,

ON THE GROUNDS OF FRAUD, SURPRISE, AND THE LIKE.

608. II. BILLS TO IMPEACH DECREES — 1. For Fraud in General.

— See notes 1, 2.

2. Consent Decrees. — See note 3.

3. For Surprise, Accident, etc. — See note 4.

610. 4. Technical Character of Bill. — See notes 1, 2.

5. Without Leave of Court. — See note 3.

608. 1. *Mitchell v. Rice*, 132 Ala. 120; *Farwell v. Great Western Tel. Co.*, 161 Ill. 522; *Harper v. Mangel*, 98 Ill. App. 526.

2. *McGlathery v. Richardson*, 129 Ala. 653.

3. *Camden v. Ferrell*, 50 W. Va. 119, wherein the court held that an original bill, and not a bill of review, lies to reverse a decree by default on newly discovered evidence. *Citing 3 ENCYC. OF PL. AND PR.* 608. See also *Swanson v. Jordan*, (Tenn. Ch. 1898) 52 S. W. Rep. 1102; *Reid v. Louisville, etc., R. Co.*, (Miss. 1895) 16 So. Rep. 675.

4. See *Ernst Tosetti Brewing Co. v. Koehler*, 200 Ill. 369; *Karr v. Freeman*, 166 Ill. 299; *Cresse v. Security Land Invest. Co.*, 54 N. J. Eq. 447.

In Iowa chancery will grant no relief upon an application to set aside an order of the Probate Court, in the absence of a showing of fraud or mistake in the procurement of the order. *Hendron v. Kinner*, 110 Iowa 544.

In New Hampshire a decree of the Probate Court obtained by fraud or error is properly attacked only by petition to modify or vacate the same. *Reed v. Prescott*, 70 N. H. 88.

Oregon — Newly Discovered Evidence. — By statute (*Bellinger's Annot. Code Oregon*, 1902, § 391), bills of review are abolished, and it is provided that a decree in equity may be impeached or set aside by an original suit. And, as such a suit to set aside or impeach a decree on the ground of newly discovered evidence can only be maintained upon similar grounds to those

which would be sufficient to maintain a bill of review, mere cumulative evidence is not sufficient. *Hilts v. Ladd*, 35 Oregon 237.

Void Decree. — A bill may be filed in a court of equity to enjoin the execution of a judgment or decree void upon its face. *George v. Nowlan*, 38 Oregon 537. See also *Campbell v. Snyder*, 27 Oregon 249.

610. 1. See *Silman v. Stump*, 47 W. Va. 641.

2. See *Hendryx v. Perkins*, (C. C. A.) 114 Fed. Rep. 801.

Denomination of Bill Immaterial. — See *Manufacturers Paper Co. v. Lindblom*, 68 Ill. App. 539; *McTeer v. Briscoe*, (Tenn. Ch. 1899) 61 S. W. Rep. 564.

A Bill in Equity Is Not Restricted by Its Name, and, though self-named a bill of review, if in substance and effect it is more than a mere bill of review, the court will interpret and apply its allegations in their broader scope to meet the ends of justice. *Murphy v. Johnson*, 107 Tenn. 552.

3. *McDonald v. Pearson*, 114 Ala. 630; *Farwell v. Great Western Tel. Co.*, 161 Ill. 522; *Cox v. Hartsville Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 237; *Ritchie v. Burke*, 109 Fed. Rep. 16. See also *Salliotte v. Williams*, (Mich. 1902) 89 N. W. Rep. 584.

Where Bill Combines Other Features. — *Schaefer v. Wunderle*, 154 Ill. 577.

Leave of the United States Supreme Court is not necessary, though the decree sought to be impeached is based upon a mandate therefrom. *Brown v. Walker*, 84 Fed. Rep. 532.

- 611.** 6. Proof of Fraud, and Relief Thereon. — See note 5.
613. 8. Bills by Infants, Persons Non Compotes Mentis, etc. — See notes 1, 3.
 9. Requisites of Bill to Impeach for Fraud. — See note 4.
614. 10. Multifarious Remedies. — See note 1.
 11. Defenses. — See note 2.
615. III. BILLS TO IMPEACH JUDGMENTS — 1. Equitable Jurisdiction in General. — See note 4.
616. See note 2.

611. 5. *Wilson v. Hoffman*, (N. J. 1901) 50 Atl. Rep. 592, in which case the court held that a *bona fide* purchaser who conveys the property purchased will confer a good title, even upon a vendee with notice of the fraud. See also *Fox v. Robbins*, (Tex. Civ. App. 1901) 62 S. W. Rep. 815.

613. 1. *Harrison v. Wallton*, 95 Va. 721, in which case the court held that an infant can impeach a decree only upon grounds which would invalidate it in the case of a person of full age.

Order Mortgaging Infant's Real Estate. — An original action in equity may be maintained by an infant to set aside an order mortgaging his realty, when the same was procured by fraud and collusion. *Warren v. Union Bank*, 157 N. Y. 259, reversing 28 N. Y. App. Div. 7.

3. See *Lee v. Heuman*, 10 Tex. Civ. App. 666.

4. *McDonald v. Pearson*, 114 Ala. 630.

614. 1. See *Wilson v. Schaefer*, 107 Tenn. 300.

Where the Prayers for Relief Are Antagonistic, one being based on the theory of invalidity of the decree, and the other on the theory of its validity, the bill is multifarious. *Cutter v. Iowa Water Co.*, 96 Fed. Rep. 777.

2. **An Order Denying a Motion to Open** the judgment made in the court rendering the same will not preclude a court of equity from granting relief. *Herd v. Tuohy*, 133 Cal. 55.

The Affirmance of a Decree or Judgment upon a writ of error to the Appellate Court does not bar a bill to impeach the same for errors not apparent on the face of the record. *Cassidy v. Automatic Time Stamp Co.*, 185 Ill. 431; *Karr v. Freeman*, 166 Ill. 299.

615. 4. *Hinesley v. Sheets*, (Ind. App. 1897) 46 N. E. Rep. 94, citing 3 ENCYC. OF PL. AND PR. 615, 616. See also the following cases:

California. — *Sohler v. Sohler*, 135

Cal. 323. See also *Painter v. J. B. Painter Co.*, 133 Cal. 129.

Illinois. — *Cassidy v. Automatic Time Stamp Co.*, 185 Ill. 431; *Elting v. Biggsville First Nat. Bank*, 173 Ill. 368; *Prussian Nat. Ins. Co. v. Chichocky*, 94 Ill. App. 168.

Indiana. — *Astbury v. Frisz*, 148 Ind. 513.

Massachusetts. — *Brooks v. Twitchell*, 182 Mass. 443.

616. 2. **Where Relief at Law** — *California*. — *Hollenbeak v. McCoy*, 127 Cal. 21.

Georgia. — *Johnson v. Driver*, 108 Ga. 595.

Illinois. — *Chapman v. Kane*, 97 Ill. App. 567; *Reid v. Stock Yards L. Coal, etc., Co.*, 88 Ill. App. 32; *Garden City Wire, etc., Co. v. Kause*, 67 Ill. App. 108.

Kansas. — *Myers v. Jones*, 61 Kan. 191; *Supreme Lodge, etc., v. Carey*, 57 Kan. 655.

Louisiana. — *Landry v. Bertrand*, 48 La. Ann. 48.

Maryland. — *Chappell Chemical, etc., Co. v. Sulphur Mines Co.*, 85 Md. 681.

Missouri. — *Missouri, etc., R. Co. v. Hoereth*, 144 Mo. 136. Compare *Baldwin v. Davidson*, 139 Mo. 118.

Nebraska. — *Mayer v. Nelson*, 54 Neb. 434; *Bankers' L. Ins. Co. v. Robbins*, 53 Neb. 44; *Woodward v. Pike*, 43 Neb. 777. But see *Meyers v. Smith*, 59 Neb. 30.

North Dakota. — *Kitzman v. Minnesota Thresher Mfg. Co.*, 10 N. Dak. 26.

Oklahoma. — *Crist v. Cosby*, 11 Okla. 635.

Rhode Island. — *Dowell v. Goodwin*, 22 R. I. 287.

Tennessee. — *Duffield v. Owen*, (Tenn. Ch. 1897) 42 S. W. Rep. 691. But see *Williams v. Pile*, 104 Tenn. 273.

Texas. — *Dunson v. Spradley*, (Tex. Civ. App. 1897) 40 S. W. Rep. 327; *Houston, etc., R. Co. v. Ellisor*, (Tex. Civ. App. 1896) 37 S. W. Rep. 972; *Mc-*

617. 2. Method of Invoking Relief. — See notes 2, 3.**3. Grounds for Relief.** — See note 4.

Hugh v. Sparks, 15 Tex. Civ. App. 57. But see *Smith v. Carroll*, (Tex. Civ. App. 1902) 66 S. W. Rep. 863.

Utah. — *Baer v. Higson*, (Utah 1903) 72 Pac. Rep. 180.

Virginia. — *Preston v. Kindrick*, (Va. 1897) 27 S. E. Rep. 588.

United States. — *Travelers' Protective Assoc. v. Gilbert*, (C. C. A.) 111 Fed. Rep. 269; *Atkinson v. Allen*, (C. C. A.) 71 Fed. Rep. 58.

Contra. — See *Leonard v. Capital Ins. Co.*, 101 Iowa 482, wherein the court held that a court of chancery has jurisdiction to set aside, cancel, and enjoin the enforcement of void judgments, even though there be a remedy by appeal. See also *Norwich Union F. Ins. Soc. v. Stang*, 9 Ohio Cir. Dec. 576; *Howenstine v. Sweet*, 7 Ohio Cir. Dec. 498.

Relief at Law Must Be Pleaded. — The defense of an adequate remedy at law must be pleaded in order that the defendant may avail himself of it as a matter of right. *Johnson v. Huber*, 106 Wis. 282.

Though the court may, in its discretion, dismiss the action on that ground, even when such a defense has not been interposed. *Metropolitan El. R. Co. v. Johnston*, 84 Hun (N. Y.) 83.

617. 2. See *Noeker v. Howry*, 119 Mich. 626; *Wilson v. Hoffman*, (N. J. 1901) 50 Atl. Rep. 592; *Robinson v. McDowell*, 125 N. Car. 337; *Graham v. East Texas Land, etc., Co.*, (Tex. Civ. App. 1899) 50 S. W. Rep. 579; *Crowns v. Forest Land Co.*, 102 Wis. 97.

3. *Hinesley v. Sheets*, (Ind. App. 1897) 46 N. E. Rep. 94, in which case the court held that a bill which does not contain a full review of the judgment and other proceedings in the original action, but raises merely the issue of fraud by one of the parties in suborning the testimony of witnesses on the trial, must be considered not as a bill of review, but as a bill to vacate the judgment for fraud.

4. Alabama. — See *Hall v. Griffin*, 119 Ala. 214.

California. — *Herd v. Tuohy*, 133 Cal. 55.

Georgia. — *Berry v. Burghard*, 111 Ga. 117; *Donaldson v. Roberts*, 109 Ga. 832; *Johnson v. Driver*, 108 Ga. 595; *Durant v. D'Auxy*, 107 Ga. 456; *Brown v. Brown*, 99 Ga. 312.

Idaho. — *McMillan v. Wooley*, (Idaho 1898) 51 Pac. Rep. 1029.

Illinois. — *Renner v. Kannally*, 193 Ill. 212; *Schroer v. Pettibone*, 163 Ill. 42; *Farwell v. Great Western Tel. Co.*, 161 Ill. 522; *West Chicago St. R. Co. v. Stoltzenfeldt*, 100 Ill. App. 142; *Denker v. Carter*, 93 Ill. App. 599; *Moore v. Cohen*, 70 Ill. App. 160; *Hopper v. Davies*, 70 Ill. App. 682; *Newman v. Schueck*, 58 Ill. App. 328. See *Harris v. McDonald*, 194 Ill. 75; *Henry v. Seager*, 80 Ill. App. 172; *Harris v. McDonald*, 79 Ill. App. 638; *Lewis v. Firemen's Ins. Co.*, 67 Ill. App. 195.

Indiana. — *Syfers v. Keiser*, (Ind. App. 1903) 66 N. E. Rep. 1021.

Indian Territory. — *Robberson v. Crow*, 3 Indian Ter. 174.

Iowa. — *Miller v. Minneapolis, etc., R. Co.*, (Iowa 1903) 93 N. W. Rep. 76; *Murphy v. Coddihy*, 111 Iowa 645; *Charles C. Taft Co. v. Bounani*, 110 Iowa 739; *Fulliam v. Drake*, 105 Iowa 615; *Larson v. Williams*, 100 Iowa 110. See *Brakke v. Hoskins*, 98 Iowa 233.

Kentucky. — *Combs v. Sewell*, (Ky. 1900) 59 S. W. Rep. 526; *Turner v. Colson*, (Ky. 1900) 55 S. W. Rep. 551; *Trimble v. Scott*, (Ky. 1897) 38 S. W. Rep. 697.

Maryland. — *Hilton v. Tyrrell*, 93 Md. 657.

Michigan. — *Farmers' F. Ins. Co. v. Johnston*, 113 Mich. 426.

Missouri. — *Bracken v. Milner*, (Mo. App. 1903) 73 S. W. Rep. 225; *Smoot v. Judd*, 161 Mo. 673; *Lee v. Harmon*, 84 Mo. App. 157; *Straub v. Simpson*, 74 Mo. App. 230; *Herwick v. Koken Barber Supply Co.*, 61 Mo. App. 454.

Montana. — *Schilling v. Reagan*, 19 Mont. 508. See *Bennett Bros. Co. v. Congdon*, 20 Mont. 208.

Nebraska. — *Kaufmann v. Drexel*, 56 Neb. 229; *Radzuweit v. Watkins*, 53 Neb. 412; *Paul v. Davidson*, 43 Neb. 505.

New Jersey. — *Isham v. Cooper*, 56 N. J. Eq. 398.

New York. — *Warren v. Union Bank*, 157 N. Y. 259; *Metropolitan El. R. Co. v. Johnston*, 84 Hun (N. Y.) 83; *Ingalls v. Merchants' Nat. Bank*, 51 N. Y. App. Div. 305. See *Levy v. Passavant*, 19 N. Y. App. Div. 71; *Wright v. Smith*, 13 N. Y. App. Div. 536.

Oklahoma. — *Crist v. Cosby*, 11 Okla. 635.

619. 4. Character of Relief Granted — In General. — See notes 1, 2, 3.

Oregon. — *Huntington v. Crouter*, 33 *Oregon* 408; *Handley v. Jackson*, 31 *Oregon* 552.

Rhode Island. — *Dowell v. Goodwin*, 22 R. I. 287; *Rafferty v. Potter*, 21 R. I. 517.

Tennessee. — *Southern R. Co. v. McDonald*, (Tenn. Ch. 1900) 59 S. W. Rep. 370; *Gray v. Ward*, (Tenn. Ch. 1898) 52 S. W. Rep. 1028; *Williams v. Pile*, 104 *Tenn.* 273.

Texas. — *McLane v. San Antonio Nat. Bank*, (Tex. Civ. App. 1902) 68 S. W. Rep. 63; *Lindsley v. Sparks*, 20 *Tex. Civ. App.* 56; *Ayres v. Parrish*, 15 *Tex. Civ. App.* 541; *Moore v. Britton*, 15 *Tex. Civ. App.* 237; *Bates v. Wills Point Bank*, 11 *Tex. Civ. App.* 73; *Wofford v. Booker*, 10 *Tex. Civ. App.* 171.

Utah. — *Bailey v. Stevens*, 11 *Utah* 175.

Vermont. — *Delaney v. Brown*, 72 *Vt.* 344.

Virginia. — *Greer v. Hale*, 95 *Va.* 533.

Washington. — *Noerdlinger v. Huff*, (Wash. 1903) 72 *Pac. Rep.* 73.

West Virginia. — *Graham v. Citizens' Nat. Bank*, 45 *W. Va.* 701; *Smith v. Johnson*, 44 *W. Va.* 278.

Wisconsin. — *Johnson v. Huber*, 106 *Wis.* 282; *Hall v. Hall*, 98 *Wis.* 192; *Ford v. Hill*, 92 *Wis.* 188.

United States. — *New River Mineral Co. v. Seeley*, (C. C. A.) 120 *Fed. Rep.* 193; *Bucki, etc., Lumber Co. v. Atlantic Lumber Co.*, (C. C. A.) 116 *Fed. Rep.* 1; *Holton v. Davis*, (C. C. A.) 108 *Fed. Rep.* 138; *Allen v. Allen*, (C. C. A.) 97 *Fed. Rep.* 525; *Perry v. Johnston*, 95 *Fed. Rep.* 322; *Crapo v. Hazelgreen*, (C. C. A.) 93 *Fed. Rep.* 316; *Broadis v. Broadis*, 86 *Fed. Rep.* 951; *Platt v. Threadgill*, 80 *Fed. Rep.* 192; *Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co.*, (C. C. A.) 76 *Fed. Rep.* 479; *Nelson v. Killingley First Nat. Bank*, 70 *Fed. Rep.* 526; *Celina v. Eastport Sav. Bank*, (C. C. A.) 68 *Fed. Rep.* 401.

Reformation of Contract. — A court of equity may entertain a bill to reform a written contract upon which a judgment at law was rendered, and to perpetually enjoin the judgment as not supported by the reformed contract. *Stevens v. Hertzler*, 114 *Ala.* 563.

619. 1. After a Motion for a New Trial Has Been Refused the judgment

cannot be successfully attacked by a bill in equity on the same grounds. *Telford v. Brinkerhoff*, 163 *Ill.* 439; *Hendrickson v. Bradley*, (C. C. A.) 85 *Fed. Rep.* 508; *Folsom v. Ballard*, (C. C. A.) 70 *Fed. Rep.* 12.

Irregularities in Judgment. — Chancery has no jurisdiction to enjoin any judgment or decree for irregularities attending, and errors committed by the court in the rendition thereof. *Levystein v. O'Brien*, 106 *Ala.* 352; *Hull v. Calkins*, 137 *Cal.* 84; *Calman v. Stuckart*, 70 *Ill.* App. 310; *Hart v. O'Rourke*, 151 *Ind.* 205; *Fitch v. Byall*, 149 *Ind.* 554; *Davis v. Clements*, 148 *Ind.* 605; *Fulliam v. Drake*, 105 *Iowa* 615; *Leet v. Leet*, 12 *N. Y. App. Div.* 11; *Henderson v. Moore*, 125 *N. Car.* 383. See also *Publishing House v. Heyl*, 61 *Kan.* 634; *Chappell Chemical, etc., Co. v. Sulphur Mines Co.*, 85 *Md.* 681; *Missouri, etc., R. Co. v. Warden*, 73 *Mo. App.* 117; *Fox v. McClay*, 48 *Neb.* 820; *George v. Nowlan*, 38 *Oregon* 537; *Long v. Eisenbeis*, 18 *Wash.* 423; *Graham v. Citizens' Nat. Bank*, 45 *W. Va.* 701.

Reformation of Judgment. — A court of equity has no power to reform a judgment in ejectment so as to make a description of lands therein apply to certain other lands. *Meyer v. Calera Land Co.*, 133 *Ala.* 554.

Right of Appeal Cut Off. — Where there has been a trial and judgment at law, and the right of appeal has been cut off by the death of the presiding judge before signing the bill of exceptions, a court of equity has power to grant relief against such judgment. *Kansas, etc., R. Co. v. Fitzhugh*, 61 *Ark.* 341; *Little Rock, etc., R. Co. v. Wells*, 61 *Ark.* 354. See *Waldo v. Thweatt*, 64 *Ark.* 126; *Scroggin v. Hammett Grocer Co.*, 66 *Ark.* 183; *Grafton, etc., R. Co. v. Davisson*, 45 *W. Va.* 12.

Where a bill of exceptions has been duly filed, a petition claiming that the same cannot be found must also plead inability to supply the same. *Lincoln v. Bell*, (Neb. 1902) 91 *N. W. Rep.* 287.

2. *Graham v. Citizens' Nat. Bank*, 45 *W. Va.* 701, wherein the court said: "Equity does not grant a new trial in the law forum. It only gets control of the person by injunction, tries the merits by a jury, and then dissolves or perpetuates the injunction, that being

620. See note 1.

Ordering Acknowledgment of Satisfaction. — See note 2.

Compelling Account for Amount Collected. — See note 3.

Enjoining Part. — See note 5.

Improper Use of Judgment. — See note 6.

Temporary Injunction. — See notes 7, 8.

IV. CHARACTERISTICS OF BOTH CLASSES OF BILLS —

1. Parties — a. IN GENERAL. — See note 9.

621. b. PARTIES PLAINTIFF. — See notes 1, 2.

Stranger to Judgment. — See note 4.

622. Receiver of Corporation. — See note 1.

c. PARTIES DEFENDANT — In General. — See notes 2, 4.

the process by which it executes its function." See also *Lieserowitz v. West Chicago St. R. Co.*, 80 Ill. App. 248; *Wood v. Davis*, 108 Fed. Rep. 130; *Carver v. Jarvis-Conklin Mortg. Trust Co.*, 73 Fed. Rep. 9.

619. 3. See *Jackson v. Miles*, 98 Ga. 512.

Protection Against Two Assignees. — A court of equity has jurisdiction to entertain a bill for relief by a judgment debtor against two alleged assignees of said judgment claiming adversely to each other. *Moore v. Red*, (Miss. 1898) 22 So. Rep. 948.

620. 1. See *Grafton, etc., R. Co. v. Davisson*, 45 W. Va. 12.

2. *Smith v. Taylor*, 78 Mo. App. 630.

Setting Off Indebtedness Against Judgment. — A court of equity may interfere and set off an indebtedness of an insolvent judgment creditor to the judgment debtor against the judgment. *Dunham Lumber Co. v. Holt*, 123 Ala. 336, 124 Ala. 181; *Twigg v. Hopkins*, 85 Md. 301. See also *Owen v. Gerson*, 119 Ala. 217; *Zinn v. Dawson*, 47 W. Va. 45.

3. See *Heath v. Halfhill*, 106 Iowa 131.

5. See *Ross v. Cox*, 69 Ill. App. 430; *George v. Nowlan*, 38 Oregon 537; *Hamburger v. Kosminsky*, (Tex. Civ. App. 1901) 61 S. W. Rep. 958; *Jordan v. Chester*, (Tex. Civ. App. 1897) 43 S. W. Rep. 904.

6. See *Brennan v. Berlin Iron Bridge Co.*, 73 Conn. 412.

7. Pending Appeal. — A court of equity will not grant a stay of proceedings pending an appeal from the judgment. *Ludwig v. Lazarus*, 10 N. Y. App. Div. 62.

8. Contra. — *Geisberg v. O'Laughlin*, (Minn. 1903) 93 N. W. Rep. 310.

9. *Harrison v. Wallton*, 95 Va. 721

[*citing* 3 ENCYC. OF PL. AND PR. 620]; *McGlathery v. Richardson*, 129 Ala. 653. See *Tarver v. New England Mortg. Security Co.*, 96 Ga. 536.

621. 1. See *Fox v. Robbins*, (Tex. Civ. App. 1901) 62 S. W. Rep. 815.

An Allegation that the Complainant Was a Party to the original action must be made in a complaint attacking collaterally an order of a court of law. *Davis v. Taylor*, 140 Ind. 439.

2. See *Bigham v. Kistler*, 114 Ga. 453.

Creditors who were not parties to a creditors' bill cannot attack the validity of a decree rendered thereon, except after obtaining leave of court. *Continental Trust Co. v. Toledo, etc., R. Co.*, 99 Fed. Rep. 171.

An Assignee of the Defendant in the original judgment is properly joined with the latter as a plaintiff in an action to impeach the judgment for fraud. *Frankel v. Garrard*, (Ind. 1903) 66 N. E. Rep. 687.

Substitution of Parties. — Upon the death of the plaintiff, after filing the bill, her personal representative and heirs may be substituted as parties plaintiff. *Burnett v. Milnes*, 148 Ind. 230.

4. *Decatur First Nat. Bank v. Pullen*, 129 Ala. 638; *Largey v. Bartlett*, 18 Mont. 265; *Richardson v. Loree*, (C. C. A.) 94 Fed. Rep. 375.

622. 1. See *Ingalls v. Merchants' Nat. Bank*, 51 N. Y. App. Div. 305; *Denton v. Baker*, (C. C. A.) 93 Fed. Rep. 46.

2. See *East Riverside Irrigation Dist. v. Holcomb*, 126 Cal. 315.

4. *White v. Bleckley*, 105 Ga. 173; *Farwell v. Great Western Tel. Co.*, 161 Ill. 522.

In Appellate Court. — *Tapana v. Shafray*, (Mo. App. 1902) 71 S. W. Rep. 119.

622. 2. Jurisdiction — *a.* WITHIN STATE. — See note 7.

623. *b.* BEYOND STATE. — See note 2.

625. *c.* STATE AND FEDERAL COURTS. — See note 1.

622. 7. *Herd v. Tuohy*, 133 Cal. 55; *Mosby v. Gisborn*, 17 Utah 257. See also *Ashcraft v. Knoblock*, 146 Ind. 169; *Holderman v. Tedford*, 7 Kan. App. 657; *Brennen v. Cist*, 9 Ohio Dec. 18; *Howensline v. Sweet*, 7 Ohio Cir. Dec. 498; *Barnes v. Barnes*, 16 Pa. Co. Ct. 534; *Ellis v. Harrison*, 24 Tex. Civ. App. 13; *Noerdlinger v. Huff*, (Wash. 1903) 72 Pac. Rep. 73.

Contra. — *Smith v. Morrill*, 12 Colo. App. 233.

Where Court Rendering Judgment Had No Jurisdiction. — *Leonard v. Capital Ins. Co.*, 101 Iowa 482.

Impeaching Decree of Appellate Court. — See *Hibernia Nat. Bank v. Standard Guano Chemical, etc., Co.*, 51 La. Ann. 1321; *Meyers v. Smith*, 59 Neb. 30; *Carver v. Jarvis-Conklin Mortg. Trust Co.*, 73 Fed. Rep. 9; *Nelson v. Killingley First Nat. Bank*, 70 Fed. Rep. 526.

In *Alabama* a court of equity will not reopen a decree of the Court of Probate in the absence of special equities which would justify reopening the judgment of a court of law. *Knabe v. Rice*, 106 Ala. 516.

In *Iowa*, under the statute providing that a suit to enjoin proceedings on a judgment must be brought in the county and court in which the judgment was obtained, a district court cannot restrain proceedings on a judgment of the Supreme Court. *Oberholtzer v. Hazen*, 101 Iowa 340.

In *Kentucky* one court cannot grant an injunction to stay proceedings on a judgment rendered in another court. *Shackelford v. Patterson*, (Ky. 1901) 62 S. W. Rep. 1040; *Jacobson v. Wernert*, (Ky. 1897) 41 S. W. Rep. 281.

In *Massachusetts* a court of equity cannot set aside or vacate the judgment at common law of another district court, but a judgment upon the law side of a court may be released or discharged upon the equity side thereof. *Brooks v. Twitchell*, 182 Mass. 443.

In *Tennessee* the Chancery Court has jurisdiction to review a decree of any court for fraud. *Cox v. Hartsville Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 237.

Relief from Justice's Judgment. — In *Indiana* a justice of the peace has no

equity jurisdiction, and, therefore, an action for equitable relief against a justice's judgment is properly brought in the Circuit Court of the same county. *Frankel v. Garrard*, (Ind. 1903) 66 N. E. Rep. 687.

The statutes of *Indiana* do not authorize the Circuit or Superior Courts to relieve a party from a justice's judgment taken against him through his excusable neglect, even though a transcript thereof has been filed with the clerk of an upper court. *Fitch v. Byall*, 149 Ind. 554.

In *Texas* a void judgment of a justice's court, for an amount so small as to render the remedy by appeal unavailable, may be enjoined by the District Court. *Rumfield v. Neal*, (Tex. Civ. App. 1898) 46 S. W. Rep. 262; *Jennings v. Shiner*, (Tex. Civ. App. 1897) 43 S. W. Rep. 276; *Gulf, etc., R. Co. v. Blankenbeckler*, 13 Tex. Civ. App. 249.

623. 2. *Davis v. Cornue*, 151 N. Y. 172.

625. 1. *National Surety Co. v. State Bank*, (C. C. A.) 120 Fed. Rep. 593, wherein the court stated the rule as follows: "A federal circuit court, sitting in equity, has jurisdiction to enjoin the enforcement of an unconscionable judgment of a state or of a national court for new causes, such as fraud, accident, or mistake, which prevented the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment. But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the courts which rendered the judgment or decree. The reason of this rule is that cases of the former class present new controversies, which have never been raised in other courts, of which the federal courts cannot escape jurisdiction if they arise between citizens of different states, and involve the requisite amount (25 Stat. 433; 1 U. S. Comp. St. 1901, tit. 13, c. 7, § 629, p. 508), while cases of the latter class involve a jurisdiction which does not exist — a jurisdiction of the federal

625. *Accessory Jurisdiction of Federal Court.* — See note 4.

626. *3. Allegations and Proof* — *a. AVERMENTS IN GENERAL.* — See notes 2, 3, 4, 5.

627. See notes 2, 3, 4.

courts to review and revise the acts and decisions of courts of co-ordinate jurisdiction upon questions which they have lawfully considered and adjudged." See also *Howard v. De Cordova*, 177 U. S. 609; *Sayers v. Burkhardt*, (C. C. A.) 85 Fed. Rep. 246; *McNeil v. McNeil*, 78 Fed. Rep. 834; *Carver v. Jarvis-Conklin Mortg. Trust Co.*, 73 Fed. Rep. 9.

625. *4. Broadis v. Broadis*, 86 Fed. Rep. 951; *Bradshaw v. Miners' Bank*, (C. C. A.) 81 Fed. Rep. 902. See also *Richardson v. Loree*, (C. C. A.) 94 Fed. Rep. 375.

626. *2. Davis v. Clements*, 148 Ind. 605, holding that the complaint must allege what the record of the case, in which the decree sought to be enjoined was rendered, shows as to the parties thereto, and the manner in which the decree was entered.

3. Colorado. — *Haley v. Breeze*, 13 Colo. App. 432; *Brewer v. Mock*, 14 Colo. App. 454.

Illinois. — *Off v. Title G., etc., Co.*, 87 Ill. App. 472.

Oklahoma. — *Mosley v. Southern Mfg. Co.*, 4 Okla. 492.

4. Uehlein v. Burk, (Iowa 1903) 94 N. W. Rep. 243; *Hasler v. Schopp*, 70 Mo. App. 469.

5. Roberts v. Moore, 113 Ga. 170; *Rogan v. Eads*, 101 Ill. App. 509; *Piereson v. Linn*, 101 Ill. App. 624; *Tompkins v. Lang*, 74 Ill. App. 500; *Tootle v. Ellis*, 63 Kan. 422; *McBride v. Wakefield*, 58 Neb. 442; *Bankers L. Ins. Co. v. Robbins*, 53 Neb. 44; *Hockaday v. Jones*, 8 Okla. 156; *Meinert v. Harder*, 39 Oregon 609; *Dashner v. Wallace*, (Tex. Civ. App. 1902) 68 S. W. Rep. 307; *Massachusetts Ben. L. Assoc. v. Lohmiller*, (C. C. A.) 74 Fed. Rep. 23.

Where Defendant Not Served. — See *Handley v. Jackson*, 31 Oregon 552.

Where a Judgment Is Void, as rendered without jurisdiction, a petition in equity to set the same aside need not allege a defense to the original action. *Keely v. East Side Imp. Co.*, 16 Colo. App. 365; *Henkle v. Holmes*, 97 Iowa 695. See *Leonard v. Capital Ins. Co.*, 101 Iowa 482.

627. *3. Fickes v. Vick*, 50 Neb. 401; *Longdale Iron Co. v. Quesenberry*, 50 W. Va. 451.

3. Alabama. — *Foshee v. McCreary*, 123 Ala. 493; *Owen v. Gerson*, 119 Ala. 217; *Raisin Fertilizer Co. v. McKenna*, 114 Ala. 274.

Georgia. — *Reynolds, etc., Mortg. Co. v. Martin*, (Ga. 1902) 42 S. E. Rep. 796; *Fitzgerald v. Bowen*, 114 Ga. 691; *Dodge v. Williams*, 107 Ga. 410; *Redwine v. McAfee*, 101 Ga. 701; *Owens v. Van Winkle Gin, etc., Co.*, 96 Ga. 408.

Illinois. — *Telford v. Brinkerhoff*, 163 Ill. 439; *Weeks v. Holmes*, 101 Ill. App. 435; *Spraker v. Bartlett*, 73 Ill. App. 522. See also *Ingwersen v. Buchholz*, 88 Ill. App. 73; *Brady v. Horvath*, 79 Ill. App. 17.

Indiana. — See *Adams School Tp. v. Irwin*, 150 Ind. 12.

Iowa. — *Steiner v. Lenz*, 110 Iowa 49; *Seddon v. State*, 100 Iowa 378.

Kansas. — *Howard v. Eddy*, 56 Kan. 498; *Ohio, etc., Mortg., etc., Co. v. Carter*, 9 Kan. App. 621; *Kimble v. Short*, 2 Kan. App. 130.

Kentucky. — *Mitchell v. Kirby*, (Ky. 1897) 38 S. W. Rep. 507; *Payton v. McQuown*, 97 Ky. 757.

Maryland. — *Maryland Steel Co. v. Marney*, 91 Md. 360; *Twigg v. Hopkins*, 85 Md. 301.

Minnesota. — *O'Brien v. Larson*, 71 Minn. 371.

Mississippi. — *Lott v. Michel*, (Miss. 1895) 16 So. Rep. 794.

Nebraska. — *Barr v. Post*, 59 Neb. 361; *Broken Bow v. Broken Bow Water Works Co.*, 57 Neb. 548; *Bankers' L. Ins. Co. v. Robbins*, 53 Neb. 44; *Losey v. Neidig*, 52 Neb. 167; *Norwegian Plow Co. v. Bollman*, 47 Neb. 186.

New York. — *Gardiner v. Van Alstyne*, 22 N. Y. App. Div. 579, *affirmed* 163 N. Y. 573.

Oklahoma. — *Crist v. Cosby*, 11 Okla. 635; *Herbein v. Moore*, 10 Okla. 317; *Hockaday v. Jones*, 8 Okla. 156.

Oregon. — *Meinert v. Harder*, 39 Oregon 609.

Pennsylvania. — *Lockard v. Keyser*, 18 Pa. Super. Ct. 172.

Tennessee. — *Huff v. Miller*, (Tenn. Ch. 1900) 58 S. W. Rep. 876; *Noll v. Chattanooga Co.*, (Tenn. Ch. 1896) 3 S. W. Rep. 287.

Texas. — *Bergstrom v. Kiel*, (Tex.

627. *b. AVERMENT OF FRAUD.* — See notes 5, 6. See also FRAUD.

628. See note 1.

c. PROOF OF FRAUD. — See note 3.

629. *V. WHAT CONSTITUTES FRAUD—1. In General.* — See note 2.

630. See notes 1, 2, 3.

Civ. App. 1902) 67 S. W. Rep. 781; Lindsley *v.* Sparks, (Tex. Civ. App. 1897) 40 S. W. Rep. 605; Bailey *v.* Boydston, (Tex. Civ. App. 1895) 33 S. W. Rep. 281; Sherman Steam Laundry Co. *v.* Carter, 24 Tex. Civ. App. 533; San Antonio, etc., R. Co. *v.* Manning, 20 Tex. Civ. App. 504; Alexander *v.* Banner, 10 Tex. Civ. App. 111.

Washington. — Spokane Cooperative Min. Co. *v.* Pearson, 28 Wash. 118.

Wisconsin. — Nye *v.* Sochor, 92 Wis. 40.

United States. — Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., (C. C. A.) 116 Fed. Rep. 1; Travelers' Protective Assoc. *v.* Gilbert, (C. C. A.) 111 Fed. Rep. 269; Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., (C. C. A.) 107 Fed. Rep. 781; Massachusetts Ben. L. Assoc. *v.* Lohmiller, (C. C. A.) 74 Fed. Rep. 23.

Unavailable Defense in Justice's Court. — In Davis *v.* Pou, 108 Ala. 443, a tenant was sued in a justice's court for unlawful detention and damages by his landlord, who had previously been divested of the title to the land through foreclosure proceedings. The tenant pleaded attornment to the purchaser thereunder, but such defense was stricken out as involving the question of title. A bill to restrain the collection of the judgment was demurred to, and the demurrer sustained for want of equity, although it appeared that the landlord was insolvent and that the tenant had, therefore, no adequate remedy at law.

627. 4. Hockaday *v.* Jones, 8 Okla. 156; Meinert *v.* Harder, 39 Oregon 609. See Morrison *v.* Morrison, 105 Ala. 637.

5. Willems *v.* Willems, 72 Ill. App. 200; Ohio, etc., Mortg., etc., Co. *v.* Carter, 9 Kan. App. 621; New York, etc., Transp. Co. *v.* Tyroler, 25 N. Y. App. Div. 161; Howenstine *v.* Sweet, 7 Ohio Cir. Dec. 498; Travelers' Protective Assoc. *v.* Gilbert, (C. C. A.) 111 Fed. Rep. 269. See Griffith *v.* Griffith, (Tenn. Ch. 1898) 46 S. W. Rep. 340.

Characterizing Transaction as Fraudulent. — If the acts set forth are wrong-

ful or necessarily fraudulent, it is not necessary to charge that they were wrongfully or fraudulently performed. Warren *v.* Union Bank, 157 N. Y. 259.

6. Heller *v.* Dyerville Mfg. Co., 116 Cal. 127; Coleman *v.* Coleman, 113 Ga. 149; Calman *v.* Stuckart, 70 Ill. App. 310. And see Harrison *v.* Wallton, 95 Va. 721.

628. 1. Wood *v.* Davis, 108 Fed. Rep. 130.

3. Holton *v.* Davis, (C. C. A.) 108 Fed. Rep. 138 [*citing* 3 ENCYC. OF PL. AND PR. 628]; Minor *v.* Minor, (Pa. 1902) 53 Atl. Rep. 765.

The Burden of Proof. — Johnson *v.* Stebbins-Thompson Realty Co., 167 Mo. 325.

629. 2. See Dunham Lumber Co. *v.* Holt, 123 Ala. 336; McDonald *v.* Pearson, 114 Ala. 630; Kannally *v.* Renner, 84 Ill. App. 51; Asbury *v.* Frisz, 148 Ind. 513; Burnett *v.* Milnes, 148 Ind. 230; McConnell *v.* Hicks, 64 Kan. 828; Fears *v.* Riley, 148 Mo. 49; Warren *v.* Union Bank, 157 N. Y. 259, *reversing* 28 N. Y. App. Div. 7; Norwich Union F. Ins. Soc. *v.* Stang, 9 Ohio Cir. Dec. 576; Tibbits *v.* Miller, 9 Okla. 677; Hennig *v.* Mann, 18 Pa. Co. Ct. 177; Cox *v.* Hartsville Bank, (Tenn. Ch. 1900) 63 S. W. Rep. 237; West *v.* Magness, (Tenn. Ch. 1898) 46 S. W. Rep. 469; Edwards *v.* Turner, (Tenn. Ch. 1897) 47 S. W. Rep. 144; Smith *v.* Quarles, (Tenn. Ch. 1897) 46 S. W. Rep. 1035; Fox *v.* Robbins, (Tex. Civ. App. 1901) 62 S. W. Rep. 815; Nye *v.* Sochor, 92 Wis. 40; John V. Farwell Co. *v.* Hilbert, 91 Wis. 437; Chadron Bank *v.* Anderson, 6 Wyo. 518; Graver *v.* Faurot, (C. C. A.) 76 Fed. Rep. 257.

630. 1. Mulcahey *v.* Dow, 131 Cal. 73; Hanley *v.* Hanley, 114 Cal. 600; Hasler *v.* Schopp, 70 Mo. App. 469; Mosby *v.* Gisborn, 17 Utah 257; Camp *v.* Ward, 69 Vt. 286; U. S. *v.* Beebe, 180 U. S. 343, *reversing* (C. C. A.) 92 Fed. Rep. 244; Ritchie *v.* McMullen, (C. C. A.) 79 Fed. Rep. 522.

2. Seals *v.* Weldon, 121 Ala. 319; Covington *v.* Chamblin, 156 Mo. 574;

630. 2. Perjury — Forged Instrument — Perjury. — See note 4.

631. Forged Instrument. — See note 1.

632. VI. LACHES — In General. — See notes 1, 2, 3.

Computation of Time. — See note 4.

Objection, How Taken. — See note 6.

Fears *v.* Riley, 148 Mo. 49; Hamilton *v.* McLean, 139 Mo. 678.

630. 3. Tapania *v.* Shaffray, (Mo. App. 1902) 71 S. W. Rep. 119.

Consent Decree. — To give equity to a bill to impeach a consent decree for fraud, it must be clearly shown that the decree, or the consent upon which it was based, was procured by fraud. Adler *v.* Van Kirk Land, etc., Co., 114 Ala. 551.

4. Holton *v.* Davis, (C. C. A.) 108 Fed. Rep. 138 [citing 3 ENCYC. OF PL. AND PR. 629, 630]; Wood *v.* Davis, 108 Fed. Rep. 130, citing 3 ENCYC. OF PL. AND PR. 630, and holding that while evidence to show that the testimony in the original court was produced through some fraudulent agreement or combination which resulted in such false testimony as controlled the result may be considered, the question whether the testimony as given was sufficient to justify the judgment cannot be considered. See also Sohler *v.* Sohler, 135 Cal. 323; Steen *v.* March, 132 Cal. 616; Willems *v.* Willems, 72 Ill. App. 200; Maryland Steel Co. *v.* Marney, 91 Md. 360; Watkins *v.* Landcn, 67 Minn. 136; Marshall *v.* Marshall, 7 Okla. 240; Noll *v.* Chattanooga Co., (Tenn. Ch. 1896) 38 S. W. Rep. 287; Camp *v.* Ward, 69 Vt. 286; Nelson *v.* Killingley First Nat. Bank, 70 Fed. Rep. 526.

Conflicting Authorities. — Meyers *v.* Smith, 59 Neb. 30, 36. See Barr *v.* Post, 59 Neb. 361.

631. 1. See Hamilton *v.* McLean, 139 Mo. 678, 169 Mo. 51.

632. 1. Reynolds, etc., Mortg. Co. *v.* Martin, (Ga. 1902) 42 S. E. Rep. 796; Griffin *v.* Smyly, 105 Ga. 475; Philadelphia *v.* Wallace, 7 Pa. Dist. 721.

2. See Shehan *v.* Stuart, (Iowa 1902) 90 N. W. Rep. 614.

3. See Raisin Fertilizer Co. *v.* McKenna, 114 Ala. 274; Hildreth *v.*

James, 109 Cal. 299; Keely *v.* East Side Imp. Co., 16 Colo. App. 365; Du Bois *v.* Clark, 12 Colo. App. 220; Smith *v.* Morrill, 12 Colo. App. 233; Brooks *v.* Twitchell, 182 Mass. 443; Westbrook *v.* Thompson, 104 Tenn. 363; McLane *v.* San Antonio Nat. Bank, (Tex. Civ. App. 1902) 68 S. W. Rep. 63; Fox *v.* Robbins, (Tex. Civ. App. 1901) 62 S. W. Rep. 815; East Texas Land, etc., Co. *v.* Graham, 24 Tex. Civ. App. 521; Hendryx *v.* Perkins, (C. C. A.) 114 Fed. Rep. 801; Cutter *v.* Iowa Water Co., 96 Fed. Rep. 777; Denton *v.* Baker, (C. C. A.) 93 Fed. Rep. 46; Sayers *v.* Burkhardt, (C. C. A.) 85 Fed. Rep. 246; McNeil *v.* McNeil, 78 Fed. Rep. 834; Hamburg-Bremen F. Ins. Co. *v.* Pelzer Mfg. Co., (C. C. A.) 76 Fed. Rep. 479.

Deferring Filing Bill until After Judgment. — A defendant at law having only a purely equitable defense to the cause of action is not barred of his equity by the mere fact that he defers filing his bill until judgment has been entered against him at law. Stevens *v.* Hertzler, 114 Ala. 563.

4. Farwell *v.* Great Western Tel. Co., 161 Ill. 522; Larson *v.* Williams, 100 Iowa 110; Watson *v.* Texas, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 830; Dashner *v.* Wallace, (Tex. Civ. App. 1902) 68 S. W. Rep. 307.

When Time for Other Relief Has Expired. — Where the complaint shows that the plaintiff acquired full knowledge of the alleged fraud within the six months' time allowed by statute for the vacating or modification of the decree by motion, an application for equitable relief made after the expiration of said statutory time will be denied. Heller *v.* Dyerville Mfg. Co., 116 Cal. 127.

6. **Objection on Appeal.** — The objection of laches cannot be raised for the first time upon appeal. Elting *v.* Biggsville First Nat. Bank, 173 Ill. 368.

BONDS.

- 639.** III. JOINDER OF ACTIONS — Under Code. — See note 1.
 IV. PARTIES — 1. Plaintiffs — At Common Law. — See note 2.
640. Under Code. — See note 1.
 Assignment. — See note 3.
641. Construction. — See note 1.
 2. Joinder of Plaintiffs. — See note 2.
643. 4. Joinder of Defendants. — See note 1.
644. 5. Attachment Proceedings — Joinder of Plaintiffs. — See note 1.
 Defendants. — See note 2.

639. 1. *State v. Parsons*, 147 Ind. 579; *Deutschman v. Battaille*, (Tex. Civ. App. 1896) 36 S. W. Rep. 489, in which cases it was held that two bonds given by the same principal, but with different sureties, may be sued on in the same action.

2. *People v. Laidlaw*, 120 Mich. 358; *Stephenson v. Monmouth Min., etc., Co.*, 54 U. S. App. 499 [each citing 3 ENCYC. OF PL. AND PR. 639]; *Sister Mary Nonna v. Conlan*, (N. J. 1902) 52 Atl. Rep. 210; *Wilson v. Donnelly*, 19 R. I. 114. See also *State v. Timmons*, 90 Md. 10.

640. 1. *Hollister v. Hubbard*, 11 S. Dak. 461 [quoting 3 ENCYC. OF PL. AND PR. 640]; *Kahn v. Gavit*, 23 Ind. App. 274; *Moede v. Haines*, 66 Minn. 419; *State v. Kaye*, 83 Mo. App. 678; *Franken v. Franken*, 7 Ohio Dec. 425; *Custer County v. Alblen*, 7 S. Dak. 482. See also *New York L. Ins. Co. v. Hamlin*, 100 Wis. 17.

New York. — Compare *Reilly v. Poerschke*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 612.

Contractor's Bonds. — Laborers and materialmen may sue on contractor's bonds given to secure payment for labor and materials furnished in the construction of public works. *Williams v. Markland*, 15 Ind. App. 669; *St. Louis v. Von Phul*, 133 Mo. 561; *Wilson v. Whitmore*, 92 Hun (N. Y.) 466; *Gilmore v. Westerman*, 13 Wash. 390. See also *Lane v. State*, 14 Ind. App. 573; *American Surety Co. v. Thorn-*

Halliwell Cement Co., 9 Kan. App. 8. Compare *Buffalo Cement Co. v. McNaughton*, 90 Hun (N. Y.) 74; *Stephenson v. Monmouth Min., etc., Co.*, 54 U. S. App. 499.

3. *Smith v. Stubbs*, 16 Colo. App. 130; *Kahn v. Gavit*, 23 Ind. App. 274; *Hollenbeck v. Breakey*, 127 Mich. 555.

641. 1. *Missouri.* — *State v. Kaye*, 83 Mo. App. 678.

2. *Montana.* — *Montana Min. Co. v. St. Louis Min., etc., Co.*, 19 Mont. 313.

643. 1. *Whipp v. Casey*, 21 R. I. 506, holding that in an action against the sureties on a joint and several bond the principal is not a necessary party.

Separate Actions Against the Principal and the Sureties of a joint and several bond cannot be maintained at the same time. *Kendrick v. Moss*, 104 Tenn. 376.

Separate Actions Against Sureties. — Where the liability on a bond is several, a separate action may be maintained against each surety on his separate liability without joining the others as party defendants. *Toucey v. Schell*, (Supm. Ct.) 15 Misc. (N. Y.) 350.

644. 1. *Painter v. Munn*, 117 Ala. 322, *per* Brickell, J.

2. See *Kinney v. Reid Ice Cream Co.*, 57 N. Y. App. Div. 206, citing 3 ENCYC. OF PL. AND PR. 644.

Where Plaintiff in Attachment Failed to Sign Bond. — An attachment plaintiff who did not sign the bond may, at his own request, be made a party defendant to an action against his sureties on

644. Forthcoming or Bail Bonds. — See note 3.

645. V. COMPLAINT OR DECLARATION — 1. Legal Effect. — See note 2.

2. Date. — See note 3.

3. Execution and Delivery. — See note 4.

646. 4. Consideration. — See note 1.

647. 6. Demand and Request. — See note 2.

648. 8. Indemnity Bonds. — See note 1.

649. 11. Conditions. — See note 2.

651. 12. Attachment Bonds. — See note 1.

652. See notes 1, 2.

the bond. *State v. Hudson*, 86 Mo. App. 501.

644. 3. Compare *Wilson v. Donnelly*, 19 R. I. 114, holding that a bond given to the sheriff must be sued on in his name.

In Georgia the "levying officer" may sue on the forthcoming bond. *Thompson v. O'Connor*, 115 Ga. 120.

645. 2. *Timmons v. Bank v. Fidelity, etc., Co.*, 120 Fed. Rep. 315, citing 3 ENCYC. OF PL. AND PR. 645.

It is Not Necessary to File the Bond or a copy thereof with the declaration. *Terry v. Johnson*, (Ky. 1901) 60 S. W. Rep. 300; *Timmons v. Bank v. Fidelity, etc., Co.*, 120 Fed. Rep. 315.

Averment of Penalty of Bond. — The declaration must state correctly the amount of the penalty of the bond. *Chicago, etc., R. Co. v. Evans*, 57 Kan. 286.

Averment as to Statute. — An act of the legislature under which the plaintiff is entitled to sue on a bond need not be referred to in the complaint. *Lucas v. Johnson*, (Tex. Civ. App. 1901) 64 S. W. Rep. 823.

3. Compare *Moseley v. State*, 37 Tex. Crim. 18; *Hayden v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 801.

4. *Jacobs v. Hogan*, 73 Conn. 740; *Jacobs v. Curtiss*, 67 Conn. 497; *Boyer v. Sowles*, 109 Mich. 481; *Hazelet v. Holt County*, 51 Neb. 724. See also *Fire Assoc. v. Ruby*, 60 Neb. 216, holding that the words "entered into" comprehend all the acts essential to the making and delivery of the bond.

646. 1. *Pratt v. Cook*, 10 Kan. App. 144; *Robson v. Dayton*, 111 Mich. 440; *Boyer v. Sowles*, 109 Mich. 481; *Northern Assur. Co. v. Hotchkiss*, 90 Wis. 415.

A complaint is bad which does not allege either a consideration or that the

instrument is under seal. *Holmes v. Northern Pac. R. Co.*, 65 N. Y. App. Div. 49.

647. 2. Where a Demand Is Necessary to fix the liability of sureties it should be made and alleged in the complaint. See *Mullally v. Townsend*, 119 Cal. 47.

648. 1. *People v. Myers*, 16 Colo. App. 371; *Kelley v. Seay*, 3 Okla. 527.

649. 2. Alabama. — *Pike County v. Hanchey*, 119 Ala. 36. See also *Ordinary v. Barnes*, 67 N. J. L. 80.

Where Copy of Bond Is Annexed. — The condition is sufficiently stated by including a copy of the bond in the declaration, or annexing a copy and referring thereto. *Hazelet v. Holt County*, 51 Neb. 724; *Ordinary v. Barnes*, 67 N. J. L. 80.

Alleging Compliance with Condition. — Where a bond contains a proviso that its validity is to be dependent upon the happening or performance of some condition, the plaintiff must allege that the condition has been complied with. *Larson v. Winder*, 14 Wash. 647.

651. 1. Where Exemplary or Punitive Damages Are Claimed the complaint must negative the existence of any statutory ground or probable cause for suing out the attachment. *Hamilton v. Maxwell*, 119 Ala. 23; *Painter v. Munn*, 117 Ala. 322.

Bond Foundation of Action. — *Brown v. Tidrick*, 14 S. Dak. 249.

652. 1. *Waring v. Fletcher*, 152 Ind. 620, citing 3 ENCYC. OF PL. AND PR. 651, 652.

2. *Offerdinger v. Ford*, 92 Va. 636, holding that a claim for damages other than as a result of the suing out of the attachment will be regarded as surplusage and is not ground for demurrer.

653. VI. ASSIGNMENT OF BREACHES — 1. Introductory. — See notes 2, 3.

655. 2. Where to Assign — At Common Law. — See note 2.

657. 3. Manner of Assignment — *a.* NEGATIVING CONDITION — Exception to Rule — See note 1.

658. *b.* DESIGNATION OF BREACH. — See note 2.

659. *d.* SEVERAL BREACHES. — See note 2.

660. *f.* TIME. — See note 2.

662. VII. PLEA OR ANSWER — 1. Performance. — See note 1.

663. 2. Non Damificatus. — See note 1.

3. Non Est Factum. — See note 2.

664. 4. Nil Debet. — See note 1.

653. 2. U. S. v. Maloney, 4 App. Cas. (D. C.) 505.

3. Mutual Ben. Ins. Co. v. Brown, 80 Mo. App. 459; **U. S. v. Maloney**, 4 App. Cas. (D. C.) 505.

Averment that Money Has Not Been Paid. — In an action on a bond conditioned to pay a sum of money an allegation that the money has not been paid is sufficient. **Mutual Ben. Ins. Co. v. Brown**, 80 Mo. App. 459.

655. 2. Suggestion on Record. — The plaintiff may suggest breaches upon the record at any time before trial, or after a judgment for the plaintiff on an issue of *non est factum*. **U. S. v. Maloney**, 4 App. Cas. (D. C.) 505.

657. 1. Guy v. McDaniel, 51 S. Car. 436, citing 3 ENCYC. OF PL. AND PR. 657.

658. 2. Alabama. — **Pike County v. Hanchey**, 119 Ala. 36.

Colorado. — **People v. Myers**, 16 Colo App. 371.

New Jersey. — **Ordinary v. Barnes**, 67 N. J. L. 80.

Texas. — **Hagans v. McClain**, (Tex. Civ. App. 1896) 36 S. W. Rep 818.

Virginia. — **Jackson v. Hopkins**, 92 Va. 601.

Attachment Bond. — It is a sufficient allegation of a breach of a bond conditioned to perform the judgment of the court to allege that the plaintiff obtained judgment against the defendant, stating the amount thereof and that such judgment is unpaid in whole or in part. **Winton v. Myers**, 8 Okla. 421.

659. 2. Sloss Iron, etc., Co. v. Macon County, 111 Ala. 554; **Ordinary v. Barnes**, 67 N. J. L. 80, holding that each breach should be separately assigned.

Breaches Assigned in One Count. — The

several breaches may be included in one count of the complaint. **Sloss Iron, etc., Co. v. Macon County**, 111 Ala. 554.

Only One Cause of Action. — A complaint setting out several breaches of the conditions of a bond states but one cause of action. **People v. Dodge**, 11 Colo. App. 177; **Lyman v. Broadway Garden Hotel, etc., Co.**, 33 N. Y. App. Div. 130.

A General Demurrer to the Whole Declaration will not be sustained, if one of the several breaches assigned is sufficient. **Ordinary v. Barnes**, 67 N. J. L. 80.

660. 2. Lyman v. Siebert, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 285.

662. 1. Terre Haute, etc., R. Co. v. Peoria, etc., R. Co., 81 Ill. App. 435; **Robey v. State**, 94 Md. 51.

663. 1. Terre Haute, etc., R. Co. v. Peoria, etc., R. Co., 182 Ill. 501, 81 Ill. App. 435; **U. S. v. Smythe**, 120 Fed. Rep. 30; **Smythe v. U. S.**, (C. C. A.) 107 Fed. Rep. 376 [each citing 3 ENCYC. OF PL. AND PR. 663]; **Fidelity, etc., Co. v. West Chicago St. R. Co.**, 99 Ill. App. 486; **Heisen v. Westfall**, 86 Ill. App. 576; **State v. Corvin**, 51 W. Va. 19; **Poling v. Maddox**, 41 W. Va. 779.

2. Non Est Factum is not a proper plea to an action on a record. **McNamara v. People**, 183 Ill. 164; **Kuhle v. People**, 65 Ill. App. 378.

The plea of *non est factum* raises all questions essential to the execution of the bond. **Cully v. People**, 73 Ill. App. 501.

664. 1. The Plea of Nil Debet is not good where the instrument sued on is entered into in open court and made a matter of record. **McNamara v. People**, 183 Ill. 164.

665. 5. Want or Failure of Consideration. — See note 1.

6. Nul Tiel Record. — See note 2.

668. 13. Several Pleas. — See note 2.

669. 14. Partial Defenses. — See note 1.

670. IX. JUDGEMENT. — See note 1.

665. 1. Chicago Sash, etc., Mfg. Co. v. Haven, 195 Ill. 474 [*citing* 3 ENCYC. OF PL. AND PR. 665]; State v. Kaye, 83 Mo. App. 678. See also Chandler v. Riddle, 119 Ala. 507; Anderson v. Best, 176 Pa. St. 498. Compare Cully v. People, 73 Ill. App. 501; Hollenbeck v. Breakey, 127 Mich. 555.

2. Fellheimer v. Hainline, 65 Ill. App. 384; McNamara v. People, 183 Ill. 164. Compare Blanton v. Com., 91 Va. 1.

668. 2. Poling v. Maddox, 41 W. Va. 779.

Non Est Factum and Statute of Limitations. — See Galbraith v. Knoxville, 105 Tenn. 453.

669. 1. German Mut. Ins. Co. v. Glasco, 14 Ind. App. 95.

670. 1. *Missouri*. — Suburban Mut. Bldg., etc., Assoc. v. Paulus, 80 Mo. App. 36.

In Wisconsin the form of judgment may be for the actual damages sustained. Whereatt v. Ellis, 103 Wis. 348.

BOUNDARIES AND FENCES.

672. I. INTRODUCTORY — JURISDICTION — At Common Law. — See note 1.

673. Equity Jurisdiction. — See note 1.

Statutory Remedies. — See notes 2, 3.

674. II. KIND OF ACTION. — See note 1.

672. 1. Justice of the Peace. — In an action for tearing down a fence where a boundary is in dispute, an answer claiming that the alleged trespass was not on the plaintiff's but on the defendant's land clearly raises the question of title, and the case is properly removed from the jurisdiction of a justice of the peace to the Circuit Court under Stat. Wis., §§ 3619, 3620. *Reilly v. Howe*, 101 Wis. 108. See also *Smith v. Schlink*, 6 Colo. App. 228.

673. 1. *Guice v. Barr*, 130 Ala. 570; *Perry v. Lucas*, 11 Hawaii 350; *Andries v. Detroit*, etc., R. Co., 105 Mich. 557; *Sellwood v. Henneman*, 36 Oregon 575; *Robinson v. Moses*, (Va. 1899) 34 S. E. Rep. 48; *Collins v. Sutton*, 94 Va. 127; *Burns v. Mearns*, 44 W. Va. 744.

Objection on Appeal. — An objection to the jurisdiction of a court of equity in a boundary case may be taken for the first time in the Court of Appeals. *Robinson v. Moses*, (Va. 1899) 34 S. E. Rep. 48; *Collins v. Sutton*, 94 Va. 127.

2. Minnesota. — The object of the Stat. Minn. (1894), §§ 5823, 5829, is not merely to ascertain where the original government lines and corners are located, but to provide a method of establishing disputed boundaries between adjoining land owners according to the respective existing rights of property. *Stadin v. Helin*, 76 Minn. 496.

North Carolina. — Laws N. Car. (1893), c. 22, providing a mode for settling boundary disputes, supersedes the mode of processioning land under 1 Code N. Car., c. 48, and was not designed for the purpose of trying title to land. *Midgett v. Midgett*, 129 N. Car. 21; *Williams v. Hughes*, 124 N. Car. 3.

Oregon. — Under Hill's Annot. Laws Oregon, § 508, requiring the court at the time of entering the decree to ap-

point a commission to mark out the boundary as ascertained or determined by the court, it is error not to appoint such commission, though the evidence shows that the line was plainly indicated. *Robinson v. Laurer*, 27 Oregon 315.

3. Georgia. — *Crawford v. Wheeler*, 111 Ga. 870; *Bowen v. Jackson*, 101 Ga. 817.

Under 2 Code Ga., § 3244, it is held that there can be no lawful proceedings without an application in writing. *Ballard v. Haines*, 115 Ga. 847.

Hawaii. — Board of Education *v.* *Bailey*, 3 Hawaii 702.

Fence Viewers. — Under Code Iowa 1873, §§ 1490, 1492 (Code Iowa 1897, § 2362 *et seq.*), giving fence viewers jurisdiction of controversies over the erection and maintenance of division fences, they have no power to establish or adjudicate on division lines. *Boyd v. Shoop*, 107 Iowa 10. See also *Campbell v. Feyerabend*, 53 Ill. App. 225.

674. 1. Action to Recover Real Property. — An action to compel a conveyance up to the correct division line and to quiet title is an action to recover real property. *Goodnow v. Parker*, 112 Cal. 437.

Louisiana. — In *Dorsett v. Scott*, 51 La. Ann. 892, originally, the action was possessory. In subsequent proceedings, the action, without objection on the part of the plaintiff in the possessory action, was changed into an action of boundary, wherein the rights of the parties were considered and decided. It was held that the plaintiff having waived his right, as set forth in the possessory action, could not ignore the suit to fix the boundary line and return to the possessory action.

Texas — "*Case of Boundary*." — In *Cox v. Finks*, 91 Tex. 318, is stated the

674. III. REQUISITES OF COMPLAINT. — See notes 3, 4.

675. IV. POINTS OF PROCEDURE — 1. Notice. — See note 1.

2. Parties. — See note 2.

3. Defendant's Answer. — See note 3.

4. Report of Commissioners. — See note 4.

676. 5. Questions of Law and Fact — Questions of Law. — See note 1.

test by which it is to be determined whether a case of boundary is presented within the meaning of Rev. Stat. Tex., art. 996, subd. 2. See also *Davis v. McCabe*, (Tex. Civ. App. 1898) 46 S. W. Rep. 837.

674. 3. *Guice v. Barr*, 130 Ala. 570; *Perry v. Lucas*, 11 Hawaii 350; *Sellwood v. Henneman*, 36 Oregon 575; *Collins v. Sutton*, 94 Va. 127.

4. In a *Suit to Enjoin Encroaching upon the Lands of the Plaintiff*, a complaint which discloses a continued, notorious, exclusive, and adverse occupancy of the land by plaintiff and his grantors for a period of twenty years is not bad for failing to allege that the occupancy was under claim or color of title. *Burr v. Smith*, 152 Ind. 469.

675. 1. See generally in support of the text the following cases: *Greenwell v. Paris*, 6 Hawaii 315; *Gonveia v. Loka*, 5 Hawaii 286; *Williams v. Atkinson*, 152 Ind. 98; *Mahei v. Shenhall*, 96 Iowa 634; *Neary v. Jones*, 89 Iowa 556; *Lackey v. Wilson*, 63 Kan. 881; *Emery v. Maguire*, 87 Me. 116; *Day v. Dolan*, 174 Mass. 524; *Scofield v. Haire*, 122 Mich. 265; *Gilson v. Munson*, 114 Mich. 671.

Notice Jurisdictional. — The extent of the jurisdiction of fence viewers depends on the notice of one of the land owners to the other. *Scott v. Jackson* 93 Ill. App. 529.

2. *Muncy v. Mattfield*, (Tex. Civ. App. 1897) 40 S. W. Rep. 345.

3. **Adverse Possession.** — It is error to strike from the answer a defense of title by adverse possession. *Stadin v. Helin*, 76 Minn. 496.

In *Louisiana* an "action of boundary" is not open to a plea of prescription. *Williams v. Bernstein*, 51 La. Ann. 115.

Affidavit Denying Correctness of Line. — In *North Carolina* in an action to determine a boundary line, under Laws N. Car. (1893), c. 22, which requires the answer only to contain a denial of the line set out in the petition, an affidavit denying the correctness of the line should be treated as an answer. *Scott v. Kellum*, 117 N. Car. 664.

4. See generally *Carney v. Wilkinson*, 67 Conn. 345; *Matter of Kamakee*, 3 Hawaii 9.

Report of Commissioners. — As to the effect of the report of boundary commissioners, see *Guice v. Barr*, 130 Ala. 570; *Carney v. Wilkinson*, 67 Conn. 345; *Clayton v. Feig*, 179 Ill. 534; *Newton v. Templeman*, 115 Iowa 643; *Whitcomb v. Dutton*, 89 Me. 212; *Allen v. Hickam*, 156 Mo. 49.

Report of Surveyors. — As to report of surveyors, see *McCombs v. Wall*, 66 Ark. 336; *Spacy v. Evans*, (Ind. 1897) 48 N. E. Rep. 355; *Gullett v. Phillips*, 153 Ind. 227; *Williams v. Atkinson*, 152 Ind. 98; *Wood v. Kuper*, 150 Ind. 622; *Miller v. White*, 28 Ind. App. 371; *Estrel v. Diehl*, 6 Kan. App. 245; *Benson v. Daly*, 38 Neb. 155; *Norwood v. Crawford*, 114 N. Car. 513.

Report of Processioners. — As to the report of processioners, see *Bowen v. Jackson*, 101 Ga. 817; *Liter v. Shirley*, (Ky. 1896) 35 S. W. Rep. 550.

Report of Fence Viewers. — As to the report of fence viewers, see *Emery v. Maguire*, 87 Me. 116; *Day v. Dolan*, 174 Mass. 524; *Roberts v. Sarchet*, 14 Pa. Co. Ct. 372.

Report of Referees. — As to the report of referees, see *Turner Falls Lumber Co. v. Burns*, 71 Vt. 354.

Agreement Made Rule of Court. — When the parties to an action have entered into an agreement which is made a rule of court, submitting the action to arbitrators upon whose award judgment is to be entered, neither party can rescind the rule, nor can plaintiff discontinue the action pending the rule. *Allen v. Hickam*, 156 Mo. 49.

Effect of Submission. — Where the issues are submitted to commissioners, such commissioners become "the court sitting as a jury," within the meaning of Rev. Stat. Mo., § 2084, for a final judgment of such issues. *Allen v. Hickam*, 156 Mo. 49.

676. 1. In *Tucker v. Satterthwaite*, 126 N. Car. 958, it was held that where the only evidence of a line contended for by the defendant was that a sur-

676. Questions of Fact. — See note 2.

677. 6. Judgment. — See note 1.

7. Appeals. — See notes 2, 3.

veyor had seen two old trees at the end of such line, the evidence was not sufficient to go to the jury on that point.

676. 2. *Alabama*. — *Taylor v. Fomby*, 116 Ala. 621; *Wheeler v. State*, 109 Ala. 56.

Illinois. — *La Mont v. Dickinson*, 189 Ill. 628; *Macauley v. Cunningham*, 60 Ill. App. 28.

Kentucky. — *Johnson v. Harris*, (Ky. 1902) 68 S. W. Rep. 844; *Barker Cedar Co. v. Roberts*, (Ky. 1901) 65 S. W. Rep. 123; *Ashcraft v. Cox*, (Ky. 1899) 50 S. W. Rep. 986.

Maine. — *Whitcomb v. Dutton*, 89 Me. 212.

Michigan. — *Manistee Mfg. Co. v. Cogswell*, 103 Mich. 602; *Dauer v. Hildebrandt*, 110 Mich. 272.

Nebraska. — *Kittell v. Jenssen*, 37 Neb. 685.

New Jersey. — *Allen v. Ponitz*, (N. J. 1899) 43 Atl. Rep. 981.

New York. — *Roth v. Rochester*, 90 Hun (N. Y.) 606; *Brown v. Fishel*, 83 Hun (N. Y.) 103; *Egerer v. New York Cent., etc.*, R. Co., 39 N. Y. App. Div. 652.

North Carolina. — *Williams v. Hughes*, 124 N. Car. 3; *Deaver v. Jones*, 119 N. Car. 598.

Pennsylvania. — *Humphrey v. Cooper*, 183 Pa. St. 432; *Kron v. Daugherty*, 9 Pa. Super. Ct. 163.

South Dakota. — *White v. Amrhien*, 14 S. Dak. 270.

Virginia. — *Greif v. Norfolk, etc.*, R. Co., (Va. 1898) 30 S. E. Rep. 438.

Wisconsin. — *Schlei v. Struck*, 109 Wis. 598; *Reilly v. Howe*, 101 Wis. 108.

677. 1. *Brummell v. Harris*, 148 Mo. 430.

The Judgment and Verdict must correspond. *Muncy v. Mattfield*, (Tex. Civ. App. 1897) 40 S. W. Rep. 345.

When Title Is Not in Issue the judgment should not refer to it. *Williams v. Hughes*, 124 N. Car. 3.

Uncertain Judgment — Proof. — In an action to quiet title in which the boundary of lands is in dispute, where a former judgment is uncertain as to the cause of the dispute, evidence that the boundary lines involved were in the former action fixed and determined should be admitted. *Graves v. Hebron*, 125 Cal. 400.

2. When Appeal Lies. — Under Code

Iowa, § 4237, which provides that no appeal shall lie except from a final judgment in such proceedings, an appeal from an order appointing a commission to fix a corner at a certain point and taxing the costs to date will not be entertained. *Oster v. Devereaux*, 115 Iowa 724.

Time to Appeal. — Under Acts 15th Gen. Assem. *Iowa*, c. 8, § 4, providing that "the corners and boundaries established in said survey, as approved in the final judgment of the court, if not appealed from within thirty days, shall be held and considered as permanent and unalterably established according to said survey," if an appeal from a final judgment locating corners is not taken within thirty days, the appellate court will have no jurisdiction of the case. *Richards v. Schneider*, (Iowa 1898) 76 N. W. Rep. 711.

Whether the fence viewers assessed against one more than the costs of a lawful fence, is a question to be settled on appeal, and not on certiorari to review their proceedings. *Miles v. Tomlinson*, 110 Iowa 322.

3. *Ponet v. Wills*, (Cal. 1897) 48 Pac. Rep. 483; *Boundaries of Kapoiono*, 8 Hawaii 1; *In re Kapahulu*, 5 Hawaii 94; *Gullett v. Phillips*, 153 Ind. 227; *Burr v. Smith*, 152 Ind. 469; *Newton v. Templeman*, 115 Iowa 643; *Pearl v. Pittman*, 22 S. W. Rep. 81, 15 Ky. L. Rep. 16; *Taylor v. Arnold*, 17 S. W. Rep. 361, 13 Ky. L. Rep. 516; *Howard v. Lewis*, 17 S. W. Rep. 362, 13 Ky. L. Rep. 508; *Whitcomb v. Dutton*, 89 Me. 212; *Dowdle v. Cornue*, 9 S. Dak. 126, affirmed 9 S. Dak. 514; *Taylor v. Brown*, (Tex. Civ. App. 1897) 39 S. W. Rep. 312.

Review of Evidence — Record. — In proceedings by boundary commissioners, the evidence must be properly presented on appeal or it will not be reviewed. *Maher v. Shenhall*, 96 Iowa 634.

Order Taxing Costs — How Objection Made. — In boundary proceedings, before an appellate court will review an order taxing costs an application must be made to the trial court to retax the costs or to hold the matter of costs in abeyance. *Oster v. Devereaux*, 115 Iowa 724.

Appeal from Survey. — Under *Burns's*

677. 8. Costs. — See note 4.

V. INDICTMENT. — See note 5.

Annot. Stat. Ind. (1894), § 8030, the only power given a trial court on an appeal from a survey is to order a resurvey and to appoint a person to make it. *Miller v. White*, 28 Ind. App. 371.

The burden is on appellant to show that a survey appealed from is incorrect. *Bennett v. Simon*, 152 Ind. 490.

Appellate Jurisdiction — *Illinois*. — A controversy as to the boundary line between the public highway and the land of an abutting owner does not involve a freehold so as to give the state Supreme Court jurisdiction on appeal. *Road Dist. No. 3 v. Miller*, 156 Ill. 221.

677. 4. Roundy v. Smith, 68 N. H. 69; *Taber v. Hall*, (R. I. 1902) 52 Atl. Rep. 686. See also *Neary v. Jones*, 89 Iowa 556, where the costs were equally divided.

Fees of Township Clerk — *Iowa*. — In assessing the costs of a fence, fence viewers have no right to include the fees of the township clerk. *Miles v. Tomlinson*, 110 Iowa 322.

5. Malice. — An information under Rev. Stat. Mo., § 3593, for breaking down a partition fence, need not allege express malice. *State v. Schaefer*, 56 Mo. App. 496.

Height of Fence. — An indictment under Crim. Code Ala., § 3088, for maliciously throwing down a fence, need not allege that the fence was five feet high, as defined in Civ. Code Ala., § 1364. *Hill v. State*, 104 Ala. 64.

Pleading and Proof. — Where ownership is laid in one whom the evidence shows to be a tenant there is no fatal variance. *Hill v. State*, 104 Ala. 64.

BREACH OF THE PEACE.

678. II. COMPLAINT, INFORMATION, OR INDICTMENT — Certainty.

See note 2.

679. Abusive Language Tending to Breach of Peace. — See note 2.

680. III. PROCEEDINGS TO PREVENT BREACHES OF PEACE — 1.

Nature. — See note 3.

2. By Whom Conducted. — See note 8.

681. 4. Complaint — Contents. — See note 7.

682. 7. Appeal. — See note 10. And see APPEALS.

678. 2. See *State v. Tucker*, (Conn. 1902) 52 Atl. Rep. 741, where there were three counts and the state was not required to elect.

679. 2. Under the Missouri Statute prohibiting "loud and offensive or indecent conversation," an information which omits to allege that the conversation was loud is bad. *State v. Gallego*, 57 Mo. App. 515.

680. 3. *Howard v. State*, 121 Ala. 21; *State v. Sargent*, 74 Minn. 242; *Weisselman v. State*, 95 Wis. 274.

8. Imprisonment Is Predicated upon Failure to Give the Security Ordered by the magistrate, and is not punishment

for an offense. *Howard v. State*, 121 Ala. 21.

681. 7. *State v. Sargent*, 74 Minn. 242.

Insufficient Warrant. — Inasmuch as threatening a breach of peace is not an offense, a warrant charging that the defendant had committed the offense of threatening a breach of the peace is bad on its face. *Howard v. State*, 121 Ala. 21.

682. 10. *Weisselman v. State*, 95 Wis. 274, in which case it was held that an appeal will not lie from an order binding over the defendant to keep the peace.

BREACH OF PROMISE OF MARRIAGE.

683. I. FORM AND KIND OF ACTION — Contract. — See note 1.

684. Attachment. — See note 1. See also ATTACHMENT.

Arrest. — See note 2.

II. MISJOINDER OF ACTIONS — Breach of Promise and Defamation of Character. — See note 3.

686. IV. ALLEGATIONS OF COMPLAINT OR DECLARATION —

1. Marriagable Age. — See note 1.

2. Mutual Promise. — See note 2.

3. Time and Place. — See note 3.

687. 5. Breach — Request for Performance. — See notes 2, 3, 4.

688. Readiness to Perform. — See note 3.

683. 1. *Drury v. Merrill*, 20 R. I. 2, citing 3 ENCYC. OF PL. AND PR. 683.

684. 1. *Mainz v. Lederer*, (R. I. 1902) 51 Atl. Rep. 1044.

In Ohio, under Bates's Annot. Stat. Ohio (1897) § 5521, providing that the plaintiff may have an attachment against the defendant's property on the ground of nonresidence, an attachment may issue on this ground in an action for the breach of a contract of marriage, as the action is for a debt or demand arising upon contract. *Albert v. Armstrong*, 7 Ohio Cir. Dec. 705.

2. *Moore v. Mullen*, 77 N. Car. 327.

A defendant in an execution issued in an action for breach of contract for marriage can be imprisoned thereon only on some of the grounds whereon any person may be so dealt with in ordinary actions of assumpsit. *Drury v. Merrill*, 20 R. I. 2.

3. Seduction Alleged as Matter of Aggravation. — A complaint for a breach of promise of marriage which alleges seduction in aggravation of damages is not demurrable for misjoinder of actions. *Geiger v. Payne*, 102 Iowa 581; *Getzelson v. Bernstein*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 627; *Spellings v. Parks*, 104 Tenn. 351.

686. 1. *Tucker v. Hyatt*, 144 Ind. 635.

2. *Edwards v. Edwards*, 93 Iowa 127, wherein the complaint was held sufficient.

Date Blank. — *Spellings v. Parks*, 104 Tenn. 351.

3. *Clark v. Reese*, (Tex. Civ. App. 1901) 64 S. W. Rep. 783.

Admission in Answer. — Where the defendant in his answer admits that he agreed to marry the plaintiff, but denies that any time was ever fixed for such marriage, the pleadings raise an issue of fact as to the time of marriage, and an instruction submitting the issue to the jury is proper. *Hesse v. Seyp*, 88 Mo. App. 66.

When Specified Thing Is Done. — *Clark v. Reese*, (Tex. Civ. App. 1901) 64 S. W. Rep. 783.

687. 2. *Walters v. Stockberger*, 20 Ind. App. 277.

3. *Judy v. Sterrett*, 153 Ill. 94; *Clark v. Corey*, (R. I. 1902) 52 Atl. Rep. 811.

4. *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, wherein it was held that an allegation that the defendant has married another is not objectionable on demurrer, such allegation being inserted to show a breach of the contract. See also *McCarville v. Boyle*, 89 Wis. 651, wherein an allegation of the defendant's marriage was regarded as surplusage.

Where the Time for the Marriage Is Not Fixed by the contract a special request must be alleged in the declaration, unless the defendant has incapacitated himself from performing his engagement, in which case that fact should be alleged. *Clark v. Corey*, (R. I. 1902) 52 Atl. Rep. 811.

688. 3. *Clark v. Corey*, (R. I. 1902) 52 Atl. Rep. 811.

688. 6. Damages Considered under General Issue — Fairly Arising from Breach. — See note 7.

7. Seduction — Evidence When Not Plead. — See note 8.

689. 8. Special Damages. — See note 2.

Punitive, Exemplary, or Vindictive Damages. — See note 3.

690. 9. Variance. — See note 1. See also VARIANCE.

V. ANSWER OR PLEA — ALLEGATIONS AND PROOF — 1. General Denial. — See note 2.

691. 3. Bad Character of Plaintiff — a. GENERALLY. — See note 3.

b. EFFECT OF ALLEGATIONS. — See note 5.

692. See note 1.

693. 7. Statute of Limitations. — See note 1.

VII. INSTRUCTIONS. — See note 4. And see INSTRUCTIONS.

688. 7. Kennedy v. Rodgers, 2 Kan. App. 764; Rutter v. Collins, 103 Mich. 143.

General Rules Applicable to Actions of Tort are applied rather than the rules which govern an action of contract, and certain damages are presumed, without being specially alleged. *Kennedy v. Rodgers, 2 Kan. App. 764; Osmun v. Winters, 25 Oregon 260.*

Humiliation, Contempt, Mortification, Mental Suffering. — *Stribley v. Welz, 4 Ohio Cir. Dec. 520; Osmun v. Winters, 25 Oregon 260.*

8. Geiger v. Payne, 102 Iowa 581; Getzelson v. Bernstein, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 627; Spellings v. Parks, 104 Tenn. 351.

Seduction May Be Alleged and proved in aggravation of damages, even though the plaintiff is given a right to a separate action by statute. *Osmun v. Winters, 25 Oregon 260.*

689. 2. See *Smith v. Hall, 69 Conn. 651*, where the first count of the declaration requested a recovery for the value of services rendered to the defendant pending the engagement and in consideration of the defendant's promise of marriage, and the second count requested a recovery for breach of promise of marriage. The court held that a recovery upon the second count was an equivalent to a performance of the promise of marriage and precluded a recovery under the first count.

3. See *Clark v. Reese, (Tex. Civ. App. 1901) 64 S. W. Rep. 783.*

690. 1. Amendment. — An amended petition in a breach of promise case does not change the cause of action from the original petition; first, where

the same evidence will support both petitions; second, where the same measure of damages will apply to both. *Liese v. Meyer, 143 Mo. 547.*

2. To the effect that matters in mitigation of damages must be specially pleaded, see *Vierling v. Binder, 113 Iowa 337.*

Inability to Perform the Contract must be specially pleaded. *Edge v. Griffin, (Tex. Civ. App. 1901) 63 S. W. Rep. 148.*

Lowd Conduct. — *Clark v. Reese, (Tex. Civ. App. 1901) 64 S. W. Rep. 783, citing 3 ENCYC. OF PL. AND PR. 690.*

691. 3. Keegan v. Sage, (C. Pl. Spec. T.) 31 Abb. N. Cas. (N. Y.) 54, wherein it was held that the answer was not scandalous.

5. Fleetford v. Barnett, 11 Colo. App. 77; Liese v. Meyer, 143 Mo. 547; Duvall v. Fuhrman, 2 Ohio Cir. Dec. 174; Osmun v. Winters, 30 Oregon 177.

692. 1. Duvall v. Fuhrman, 2 Ohio Cir. Dec. 174. But see *Kaufman v. Fye, 99 Tenn. 145.*

693. 1. A complaint alleging a general promise at a time certain with no definite time fixed for the marriage, and which does not allege any definite time of the breach, is not demurrable on the ground that the cause of action is barred by the statute of limitations. *Rime v. Rater, 108 Iowa 61.*

4. Barber v. Geer, 94 Tex. 581, where the declaration alleged a promise of marriage by correspondence, and it was held that the court erred in refusing to charge the jury that the plaintiff could not recover if no contract by correspondence was shown.

Submitting Question as to Which There Is No Evidence. — Where the plaintiff seeks to recover damages for articles purchased by her in preparation for the marriage and such allegation is not supported by evidence, it is error to submit such claim to the jury. *Olmstead v. Hoy*, 112 Iowa 349.

Invoking Province of Jury. — It is error to charge the jury that they must consider the fact of seduction in estimating damages in an action for breach of promise, as it is for the jury to say

whether they will consider this. *Osmun v. Winters*, 25 Oregon 260.

It has been held that an instruction that if the plaintiff obtained from the defendant the letters written by her during their correspondence and destroyed them before instituting suit, it could be presumed that such letters contained evidence in favor of the defendant and against the plaintiff, is properly refused as bearing upon the weight of the evidence. *Ortiz v. Navarro*, 10 Tex. Civ. App. 195.

BRIBERY.

696. III. INDICTMENT — 1. At Common Law. — See note 1.

2. Attempt to Bribe. — See notes 4, 5, 6.

3. Under Statutes — a. GENERALLY. — See note 8.

697. See note 1.

b. DUPLICITY. — See note 2.

c. ALLEGATION OF VALUE. — See note 3.

696. 1. State v. Miles, 89 Me. 142, wherein the substantial parts of an indictment are set out in full.

4. State v. Durnam, 73 Minn. 130.

5. State v. Miles, 89 Me. 142, distinguishing People v. Markham, 64 Cal. 157.

Defendant's Intention in Receiving Bribe. — It is not necessary to allege in the indictment that the defendant "intended to vote for said ordinance because of the money so solicited." *Higgins v. State, 157 Ind. 57.*

6. People v. Hurley, 126 Cal. 351, holding that where by statute an "offer to receive" a bribe is a crime, an indictment therefor need not allege that a bribe was offered.

8. People v. Seeley, 137 Cal. 13; Cohen v. State, 104 Ga. 734; Higgins v. State, 157 Ind. 57; Com. v. Donovan, 170 Mass. 228; State v. Bauer, 1 Ohio Dec. 199, 1 Ohio N. P. 103; Armstrong v. Van De Vanter, 21 Wash. 682; State v. Milby, 26 Wash. 661.

Averments in Conjunctive. — An indictment charging that the defendant "did receive and consent to receive" a bribe is not insufficient because the statute uses the words "receive or consent to receive." *State v. Wynne, 118 N. Car. 1206.*

Terms of Agreement. — An indictment which follows the statute in charging a juror with the acceptance of a bribe need not more particularly describe the agreement under which the money was received. *Com. v. Milliken, 174 Mass. 79.*

Offense Insufficiently Charged. — An indictment charging that the defendant did wilfully, feloniously, etc., "give a bribe" to a certain officer with intent corruptly to influence his official

conduct, but not containing any averment of any act of the defendant which brings his alleged conduct within the legal meaning of bribery, does not substantially follow the language of the statute and is demurrable. *People v. Ward, 110 Cal. 369.*

697. 1. Where Statute Does Not Name Ingredients of Offense. — If the statute does not set forth all of the elements of the offense intended to be punished, an indictment which simply follows the words of the statute is not sufficient. *State v. Howard, 66 Minn. 309.*

2. Baum v. State, 157 Ind. 282.

Performance of Act for Which Bribe Was Accepted. — An indictment which alleges the acceptance of a bribe and, in addition, that the defendant performed the particular act for the doing of which he accepted the bribe, but which does not specifically allege that such act was criminal, is not void for duplicity. *People v. Willis, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 549.*

Use of Conjunctive. — Where the statute contains the expression "action, vote, opinion, or judgment," an indictment setting forth that the bribe was given to influence the "action, vote, opinion, and judgment" of the defendant does not charge more than one crime. *State v. Bauer, 1 Ohio Dec. 199, 1 Ohio N. P. 103.*

3. People v. Ward, 110 Cal. 369; Armstrong v. Van De Vanter, 21 Wash. 682.

The Word "Dollars" necessarily implies money, and an indictment setting forth the offer of "two dollars" as a bribe contains an allegation of value. *State v. Downs, 148 Ind. 324.*

Promissory Note as Bribe. — Pen. Code N. Y., § 72, provides for bribery by

698. See note 1.

e. BRIBERY OF OFFICIALS. — See notes 3, 5.

699. See notes 2, 3.

Classes of Officers — See note 6.

700. *f.* BRIBERY OF VOTERS. — See notes 2, 3, 4.

means of a "promise" or "agreement" to give something of value, and, therefore, an allegation that a public officer agreed to accept promissory notes as a bribe is a sufficient allegation of value. *People v. Willis*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 549. See also *Com. v. Donovan*, 170 Mass. 228.

698. 1. *State v. Howard*, 66 Minn. 309.

Where the Thing Offered Is Named and its value is apparent, it need not be alleged in terms that the bribe was "something of value." *People v. Seeley*, 137 Cal. 13.

3. *State v. Gear*, 5 Ohio Dec. 569, 7 Ohio N. P. 551.

5. *State v. Winstandley*, 154 Ind. 443 [quoting *obiter* 3 ENCYC. OF PL. AND PR. 698]; *State v. Howard*, 66 Minn. 309, holding that the indictment must specifically charge knowledge on the part of the defendant of the official character of the person bribed and also the intent to influence his official action.

Jurisdiction of Officer. — An indictment charging an assessor with offering to receive a bribe to reduce an assessment must set forth that the property assessed was located within his jurisdiction. *Gunning v. People*, 189 Ill. 165, reversing 86 Ill. App. 676.

699. 2. *People v. Seeley*, 137 Cal. 13, holding that an allegation that an agreement to accept a bribe was made "unlawfully and feloniously" is equivalent to an allegation that the agreement was made with corrupt intent.

In an Action to Recover a Penalty for the Bribing of Voters, under a statute, the complaint need not allege a wilful and corrupt intent on the part of the defendant. *Epps v. Smith*, 121 N. Car. 157.

3. *Ruffin v. State*, 36 Tex. Crim. 565.

Averment that Act or Omission Sought Would Be Violation of Duty. — The act or omission to act which is the object sought to be accomplished by the person attempting to bribe a public official

need not be alleged to be in violation of the officer's duty. But if such allegation is made as a distinct charge, then the indictment should set out the matters or acts constituting such violation of duty. *Rath v. State*, 35 Tex. Crim. 142.

Legal Effect of Act or Omission Sought.

— In an indictment for corruptly giving to a common councilman a bribe with intent to influence his vote on the question of the removal of a municipal officer, allegations as to whether the latter was legally in office and whether he could be affected by any vote of the council are not material. The gist of the offense being the intent to influence official action, it is sufficient if it be alleged that the matter might come before the council. *Com. v. Donovan*, 170 Mass. 228.

6. *State v. Gear*, 5 Ohio Dec. 569, 7 Ohio N. P. 551; *King v. U. S.*, (C. C. A.) 112 Fed. Rep. 988, which was an indictment against an officer of the war department under Rev. Stat. U. S., § 5501.

700. 2. **Voting for Ticket.** — An allegation in an indictment that an elector was bribed to vote the "Republican ticket" is sufficient, there being no distinction between the voting of a ticket and voting for the candidate. *State v. Downs*, 148 Ind. 324.

3. *Baum v. State*, 157 Ind. 282, holding that the indictment need not name the candidates, nor give the purpose of the election, nor state the place where it is to be held.

4. *Bradley v. Clark*, 133 Cal. 196; *Com. v. Root*, 96 Ky. 533. See also ELECTIONS.

Averment that Vote Was Influenced. —

The indictment need not allege that the elector would have voted differently if he had not been bribed. *State v. Downs*, 148 Ind. 324.

But it must be stated that the elector was influenced to vote one way or the other, the mere allegation that he was bribed to vote not being sufficient. *Com. v. Steele*, 97 Ky. 27.

BRIDGES.

702. II. ACTIONS FOR NEGLIGENCE AND DEFECTIVE BRIDGES —

1. Parties Defendant. — See notes 1, 4.

703. 2. Statutory Restrictions — b. PRELIMINARY NOTICE. — See notes 2, 3.

c. **COMPLAINT.** — See notes 7, 10.

706. Defective Bridge — Damages. — See note 5.

707. Due Care. — See note 2.

Statutory Requisites. — See note 3.

702. 1. *Piqua v. Geist*, 59 Ohio St. 163.

4. Steamboat. — In *Ohio* it has been held under a statute that a steamboat is a proper party defendant in a suit for injuring a bridge. *Steam Canal Boat Tempest v. Lucas County*, 7 Ohio Cir. Dec. 137.

703. 2. Under a notice that the back of the plaintiff's head was injured it may be shown that the head was bloody, bruised, and that there was a bunch on the back side of the head. *Lynds v. Plymouth*, 73 Vt. 216.

3. Other Injuries than those presented to the county may be claimed in the complaint. *Homan v. Franklin County*, 98 Iowa 692.

The Amount of Damages sued for need not be the same as demanded from the county in the notice. *Homan v. Franklin County*, 98 Iowa 692.

7. Daly v. New Haven, 69 Conn. 644.

10. How Objection Taken. — Objection to a complaint which does not specifi-

cally allege the defects in a bridge should be taken by demurrer. *Bettys v. Denver Tp.*, 115 Mich. 228.

706. 5. Averment of Notice. — An allegation that a superstructure of a bridge was removed by the direction of the board of commissioners is a sufficient averment of notice. *Atchison County v. Sullivan*, 7 Kan. App. 152.

Constructive Notice. — A complaint alleging that the bridge had been out of repair "a long space of time" does not show constructive notice to the town. *Cullman v. McMinn*, 109 Ala. 614. But see *Homan v. Franklin County*, 98 Iowa 692.

707. 2. *Independent Tp. v. Guldner*, 7 Kan. App. 699.

3. Under a statute providing that suit shall be brought within thirty days after the injury, a complaint is bad when it shows on its face that the suit was not commenced until more than thirty days after the injury. *Swaney v. Gage County*, (Neb. 1902) 90 N. W. Rep. 542.

BRIEFS.

- 712.** **II. FORM** — Spacing and Type. — See note 1.
 Typewriting. — See notes 2, 3.
713. **III. CONTENTS** — 1. Generally. — See notes 2, 3.
714. See notes 1, 2.
715. See notes 1, 2, 3.

712. 1. In South Dakota. — A rule that the size of type shall not be smaller than a certain standard does not prohibit the use of larger type. *Swenson v. Christopherson*, 10 S. Dak. 342.

2. Suspension of Rules. — The United States Circuit Court of Appeals will not suspend the rule requiring printed briefs in favor of an appellant prosecuting the appeal *in forma pauperis*. *Reed v. Pennsylvania Co.*, (C. C. A.) 111 Fed. Rep. 714.

3. Texas. — See *Bermea Land, etc., Co. v. Adoue*, 20 Tex. Civ. App. 655.

713. 2. Kansas Grain, etc., Co. v. Hartstein, 6 Kan. App. 864; *Bauer v. School Dist. No. 127*, 78 Mo. App. 442; *Power v. Stocking*, 26 Mont. 478; *Smith v. Denniff*, 23 Mont. 65; *Anderson v. Carlson*, 23 Mont. 43; *Beck v. O'Connor*, 21 Mont. 109; *Missouri, etc., R. Co. v. Jahn*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1042; *Gates v. Parmly*, 113 Wis. 147; *Conger v. Dingman*, 98 Wis. 417.

3. Shrimpton v. Keyes, 17 Ind. App. 305; *Pruett v. Warren*, 87 Mo. App. 566; *Warren v. Humble*, 26 Mont. 495; *Rehberg v. Greiser*, 24 Mont. 487; *Anderson v. Carlson*, 23 Mont. 43; *Beck v. O'Connor*, 21 Mont. 109; *Manley v. Okell*, 19 Pa. Super. Ct. 240; *I. S. Mayfield Lumber Co. v. Carver*, (Tex. Civ. App. 1901) 66 S. W. Rep. 216; *Arnold v. Chamberlin*, (Tex. Civ. App. 1896) 33 S. W. Rep. 767; *Nephi First Nat. Bank v. Brown*, 20 Utah 85.

Under a claim that a statute is unconstitutional a brief should point out the section of the Constitution violated. *Farmers, etc., Ins. Co. v. Wiard*, 59 Neb. 451.

Circuit Court of Appeals. — Under rule 24 of the Circuit Court of Appeals a brief must contain, (1) a statement of

the case, (2) a specification of the errors relied upon, and (3) a brief of the argument. *Milwaukee v. Shailer, etc., Co.*, 34 C. C. A. 112.

In Washington. — The rule requiring findings to be printed in the brief, applies only where the findings are contested. *Matter of Seattle*, 26 Wash. 602.

But when contested, the findings and exceptions thereto must be incorporated. *Inter-State Sav., etc., Assoc. v. Benson*, 28 Wash. 578.

714. 1. Chamberlain v. Lesley, 39 Fla. 452; *Porter v. Parslow*, 39 Fla. 50; *McAlester Coal, etc., Co. v. Patterson*, (Indian Ter. 1902) 69 S. W. Rep. 840; *Peele v. Provident Fund Soc.*, 147 Ind. 543; *Citizens' St. R. Co. v. Union Trust Co.*, 19 Ind. App. 402; *Patterson v. Patterson*, 3 Kan. App. 342; *Bauer v. School Dist. No. 127*, 78 Mo. App. 442; *Nephi First Nat. Bank v. Brown*, 20 Utah 85.

Inapplicable Authorities. — A rule providing that a brief must contain authorities is not violated because the authorities are inapplicable. *Fishback v. Bramel*, 6 Wyo. 293.

2. Custer County v. Moon, 8 Okla. 205; *Mansfield v. Neese*, 21 Tex. Civ. App. 584.

715. 1. Florida. — *Porter v. Parslow*, 39 Fla. 50.

Illinois. — *Kerr v. Smiley*, 77 Ill. App. 88.

Indiana. — *Indiana, etc., R. Co. v. Ditto*, 158 Ind. 669; *Fulton County v. Gibson*, 158 Ind. 471; *Royse v. Bourne*, 149 Ind. 187; *Peele v. Provident Fund Soc.*, 147 Ind. 543; *Michigan City v. Leeds*, 24 Ind. App. 271; *U. S. Capsule Co. v. Isaacs*, 23 Ind. App. 533; *Wines v. State Bank*, 22 Ind. App. 114; *Shrimpton v. Keyes*, 17 Ind. App. 305.

Kansas. — *Smith v. Woods*, 9 Kan. App. 884, 59 Pac. Rep. 660; *Gilmore v. Butts*, 61 Kan. 315; *Olathe v. Folmer*, 9 Kan. App. 881, 57 Pac. Rep. 239; *Kansas Grain, etc., Co. v. Hartstein*, 6 Kan. App. 864; *Aultman, etc., Co. v. Frazier*, 5 Kan. App. 202.

Missouri. — *Hall v. Gallemore*, 138 Mo. 638.

Montana. — *Matusevitz v. Hughes*, 26 Mont. 212; *Warren v. Humble*, 26 Mont. 495; *Power v. Stocking*, 26 Mont. 478; *Beer v. Lieneman*, 26 Mont. 92; *Conklin v. Cullen*, 25 Mont. 30; *Cole v. Ryan*, 24 Mont. 122; *State v. Sheppard*, 23 Mont. 323; *Smith v. Denniff*, 23 Mont. 65; *Gregg v. Kommers*, 22 Mont. 511; *Beck v. O'Connor*, 21 Mont. 109; *Congdon v. Olds*, 18 Mont. 487.

Nebraska. — *Livingston v. Moore*, (Neb. 1902) 89 N. W. Rep. 289; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811.

New York. — *Stevens v. O'Neill*, 169 N. Y. 375.

North Carolina. — *McDougald v. Lumberton*, 129 N. Car. 200.

North Dakota. — *Oliver v. Wilson*, 8 N. Dak. 590.

Oklahoma. — *Barnes v. Lynch*, 9 Okla. 156; *Custer County v. Moon*, 8 Okla. 205.

Texas. — *Comanche v. Zettlemoyer*, (Tex. Civ. App. 1897) 40 S. W. Rep. 178; *Connor v. Sewell*, (Tex. Civ. App. 1896) 39 S. W. Rep. 128; *Meaton v. Davies*, (Tex. Civ. App. 1896) 36 S. W. Rep. 805; *Missouri, etc., R. Co. v. Wells*, 24 Tex. Civ. App. 304.

Washington. — *Murphy v. Currie*, 21 Wash. 232; *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165; *Perkins v. Mitchell, etc., Co.*, 15 Wash. 470.

Wisconsin. — *Gates v. Parmly*, 113 Wis. 147; *Conger v. Dingman*, 98 Wis. 417.

United States. — *National Cash-Register Co. v. Leland*, (C. C. A.) 94 Fed. Rep. 502.

References to the Record. — Where a case is disposed of upon demurrer to the complaint, the substance of which is contained in the brief, there need be no reference to the pages of the transcript. *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16.

Where a particular error assigned contains no reference to the testimony, a reference in the statement of the brief is sufficient. *Kellogg v. Scheuerman*, 18 Wash. 293.

Error touching on the incompetency

of a witness does not require a statement of the evidence in the brief. *Stephens v. Gardner Creamery Co.*, 9 Kan. App. 883, 57 Pac. Rep. 1058.

715. 2. Arizona. — *Utah Canal Enlargement, etc., Co. v. London Co.*, (Ariz. 1902) 60 Pac. Rep. 722; *Daggs v. Field*, (Ariz. 1898) 52 Pac. Rep. 773.

California. — *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654; *Kyle v. Craig*, 125 Cal. 107.

Colorado. — *Bitter v. Mouat Lumber, etc., Co.*, 27 Colo. 120.

Illinois. — *Firemen's Ins. Co. v. Appleton Paper, etc., Co.*, 161 Ill. 9; *Illinois Cent. R. Co. v. Heisner*, 93 Ill. App. 469; *Kerr v. Smiley*, 77 Ill. App. 88; *Chronister v. Anderson*, 73 Ill. App. 524; *Loucheim v. Seeley*, 151 Ind. 665.

Indiana. — *Riley v. State*, 149 Ind. 48.

Kansas. — *Mecartney v. Smith*, 10 Kan. App. 580, 62 Pac. Rep. 540; *Smith v. Perkins*, 10 Kan. App. 577, 63 Pac. Rep. 297; *Kansas Grain, etc., Co. v. Hartstein*, 6 Kan. App. 864; *Aultman, etc., Co. v. Frazier*, 5 Kan. App. 202; *Jensen v. Jordan*, 5 Kan. App. 73; *Busenbark v. Park*, 5 Kan. App. 17.

Missouri. — *David Adler, etc., Clothing Co. v. Corl*, 155 Mo. 149.

Montana. — *Power v. Stocking*, 26 Mont. 478; *Patterson v. Pfouts*, 25 Mont. 163; *Schatzlein Paint Co. v. Godin*, 24 Mont. 483; *Cole v. Ryan*, 24 Mont. 122; *Anderson v. Carlson*, 23 Mont. 43; *Gibson v. Hubbard*, 22 Mont. 517; *Beck v. O'Connor*, 21 Mont. 109.

Nebraska. — *Ætna Ins. Co. v. Simmons*, 49 Neb. 811.

North Dakota. — *Wilson v. Kartes*, (N. Dak. 1902) 88 N. W. Rep. 1023.

Oklahoma. — *Custer County v. Moon*, 8 Okla. 205; *Penny v. Fellner*, 6 Okla. 386.

Pennsylvania. — *Wills v. Hardcastle*, 19 Pa. Super. Ct. 525; *Manley v. Okell*, 19 Pa. Super. Ct. 240.

Texas. — *Luedde v. Hooper*, (Tex. Civ. App. 1902) 66 S. W. Rep. 802; *Wetz v. Wetz*, (Tex. Civ. App. 1902) 66 S. W. Rep. 869; *Mansfield v. Neese*, 21 Tex. Civ. App. 584.

Washington. — *Crowley v. McDonough*, (Wash. 1902) 70 Pac. Rep. 261; *Doran v. Brown*, 16 Wash. 703; *Goetzinger v. Rosenfeld*, 16 Wash. 392; *Perkins v. Mitchell, etc., Co.*, 15 Wash. 470.

Wisconsin. — *Weyerhaeuser v. Earley*,

716. See notes 1, 2.

717. See note 1.

Walver. — See note 2.

718. See note 1.

99 Wis. 445; Conger *v.* Dingman, 98 Wis. 417.

Wyoming. — Rock Springs First Nat. Bank *v.* Ludvigsen, 8 Wyo. 230.

United States. — Western Assur. Co. *v.* Polk, (C. C. A.) 104 Fed. Rep. 649; National Cash-Register Co. *v.* Leland, (C. C. A.) 94 Fed. Rep. 502.

715. 3. Aultman, etc., *Co. v.* Frazier, 5 Kan. App. 202; Busenbark *v.* Park, 5 Kan. App. 17; Missoula Mercantile Co. *v.* O'Donnell, 24 Mont. 65; Babcock *v.* Caldwell, 22 Mont. 460; Beck *v.* O'Connor, 21 Mont. 109; Wells *v.* Houston, (Tex. Civ. App. 1902) 69 S. W. Rep. 183; Bowman *v.* Hoffman, (Tex. Civ. App. 1902) 67 S. W. Rep. 152; Sanger *v.* Harris, (Tex. Civ. App. 1897) 42 S. W. Rep. 645; Galveston, etc., R. Co. *v.* Smith, 24 Tex. Civ. App. 127; International, etc., R. Co. *v.* True, 23 Tex. Civ. App. 523; New York Dry Goods Store *v.* Pabst Brewing Co., (C. C. A.) 112 Fed. Rep. 381.

716. 1. *District of Columbia.* — Bradshaw *v.* Stott, 4 App. Cas. (D. C.) 527.

Indian Territory. — McAlester Coal, etc., Co. *v.* Patterson, (Indian Ter. 1902) 69 S. W. Rep. 840.

Kansas. — Olathe *v.* Folmer, 9 Kan. App. 881, 57 Pac. Rep. 239; Aultman, etc., Co. *v.* Frazier, 5 Kan. App. 202; Busenbark *v.* Park, 5 Kan. App. 17.

Minnesota. — Gulterman *v.* Saterlie, 76 Minn. 19.

Montana. — Warren *v.* Humble, 26 Mont. 495; Rehberg *v.* Greiser, 24 Mont. 487; Schatzlein Paint Co. *v.* Godin, 24 Mont. 483; State *v.* Shephard, 23 Mont. 323; Anderson *v.* Carlson, 23 Mont. 43; Gibson *v.* Hubbard, 22 Mont. 517.

North Dakota. — Wilson *v.* Kartes, (N. Dak. 1902) 88 N. W. Rep. 1023.

Pennsylvania. — Wills *v.* Hardcastle, 19 Pa. Super. Ct. 525.

Texas. — Hollywood *v.* Wellhausen, (Tex. Civ. App. 1902) 68 S. W. Rep. 329; Bowman *v.* Hoffman, (Tex. Civ. App. 1902) 67 S. W. Rep. 152; Luedde *v.* Hooper, (Tex. Civ. App. 1902) 66 S. W. Rep. 802; Johnson *v.* Brown, (Tex. Civ. App. 1901) 65 S. W. Rep. 485; Gebhart *v.* Gebhart, (Tex. Civ. App. 1901) 61 S. W. Rep. 964; International,

etc., R. Co. *v.* Martinez, (Tex. Civ. App. 1900) 57 S. W. Rep. 689; Horseman *v.* Coleman County, (Tex. Civ. App. 1900) 57 S. W. Rep. 304; Hill *v.* Grant, (Tex. Civ. App. 1898) 44 S. W. Rep. 1016; Gambold *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1897) 40 S. W. Rep. 834; Cooper *v.* Hiner, 91 Tex. 658; Meridian First Nat. Bank *v.* Stephens, 19 Tex. Civ. App. 560; Calhoun *v.* Stark, 13 Tex. Civ. App. 60.

Washington. — Cathcart *v.* Bryant, 28 Wash. 31; Doran *v.* Brown, 16 Wash. 703.

Wisconsin. — Weyerhaeuser *v.* Earley, 99 Wis. 445; Conger *v.* Dingman, 98 Wis. 417.

Wyoming. — Rock Springs First Nat. Bank *v.* Ludvigsen, 8 Wyo. 230.

A Manifest Clerical Mistake in copying the instruction of the trial court will be corrected. Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 1.

2. Burnett *v.* Milnes, 148 Ind. 230; J. S. Mayfield Lumber Co. *v.* Carver, (Tex. Civ. App. 1901) 66 S. W. Rep. 216; Wetz *v.* Weitz, (Tex. Civ. App. 1902) 66 S. W. Rep. 869. Compare State *v.* Taylor, 56 S. Car. 360.

717. 1. Bartholomew *v.* Yankee, (Colo. 1902) 70 Pac. Rep. 405; Shinglemeyer *v.* Wright, 124 Mich. 230; Miller *v.* Itasca Cotton Seed Oil Co., (Tex. Civ. App. 1897) 41 S. W. Rep. 366; Cooper *v.* Hiner, 91 Tex. 658.

2. Utah Canal Enlargement, etc., Co. *v.* London Co., (Ariz. 1902) 60 Pac. Rep. 722; Napier *v.* Burkett, 113 Ga. 607; Lewis *v.* King, 180 Ill. 259; Dorn *v.* Ross, 77 Ill. App. 223; Chronister *v.* Anderson, 73 Ill. App. 524; Gates *v.* Baltimore, etc., R. Co., 154 Ind. 338; Pittsburgh, etc., R. Co. *v.* Hosea, 152 Ind. 412; Merrimon *v.* Lyman, 124 N. Car. 434; Penny *v.* Fellner, 6 Okla. 386.

718. 1. *Florida.* — Porter *v.* Par-slow, 39 Fla. 50.

Illinois. — Lewis *v.* King, 180 Ill. 259; Dorn *v.* Ross, 77 Ill. App. 223.

Indiana. — Riley *v.* State, 149 Ind. 48.

Kansas. — Jensen *v.* Jordan, 5 Kan. App. 73; Busenbark *v.* Park, 5 Kan. App. 17.

Minnesota. — Cutting *v.* Weber, 77 Minn. 53.

719. See note 1.

Names of Parties. — See note 2.

Signature of Counsel. — See note 3.

720. 2. Sufficiency of Discussion. — See note 1.

721. See note 1.

Montana. — *Gregg v. Kommers*, 22 Mont. 511.

Nebraska. — *Etna Ins. Co. v. Simmons*, 49 Neb. 811.

North Carolina. — *Merrimon v. Lyman*, 124 N. Car. 434.

Oklahoma. — *Penny v. Fellner*, 6 Okla. 386.

Texas. — *Wetz v. Wetz*, (Tex. Civ. App. 1902) 66 S. W. Rep. 869; *Supreme Tent of Knights, etc., v. Cox*, (Tex. Civ. App. 1901) 60 S. W. Rep. 971; *Gueguin v. McGown*, (Tex. Civ. App. 1899) 53 S. W. Rep. 585; *Missouri, etc., R. Co. v. Wells*, 24 Tex. Civ. App. 304; *Mayfield v. Robinson*, 22 Tex. Civ. App. 385; *Mansfield v. Neese*, 21 Tex. Civ. App. 584.

Washington. — *Murphy v. Currie*, 21 Wash. 232.

719. 1. *Standard Oil Co. v. Danville*, 199 Ill. 50; *Riley v. State*, 149 Ind. 48; *Burnett v. Milnes*, 148 Ind. 230; *Etna Ins. Co. v. Simmons*, 49 Neb. 811; *Building, etc., Assoc. v. Griffin*, 90 Tex. 480.

In Texas. — *Mara v. State*, 39 Tex. Crim. 183.

2. A statute providing a uniform designation of the parties to causes in the Supreme Court is not mandatory, and a failure to comply with it literally is not ground for dismissal. *Matter of Alfstad*, 27 Wash. 175.

3. A printed signature is good. *National Masonic Acc. Assoc. v. Seed*, 95 Ill. App. 43.

A brief signed by a party who is not licensed to practice in the Appellate Court will be stricken from the file. *Ellis v. Bingham County*, (Idaho 1900) 60 Pac. Rep. 79.

720. 1. A substantial compliance with the rules of court is sufficient. *Jensen v. Jordan*, 5 Kan. App. 73; *Power v. Stocking*, 26 Mont. 478; *Schatzlein Paint Co. v. Godin*, 24 Mont. 483; *Matter of Alfstad*, 27 Wash. 175; *Dunsmuir v. Port Angeles Gas, etc., Co.*, 24 Wash. 104.

721. 1. *California.* — *People v. Woon Tuck Wo*, 120 Cal. 294.

Colorado. — *Bartholomew v. Yankee*, (Colo. 1902) 70 Pac. Rep. 405.

Florida. — *Chamberlain v. Lesley*, 39

Fla. 452; *Porter v. Parslow*, 39 Fla. 50.

Georgia. — *Napier v. Burkett*, 113 Ga. 607.

Illinois. — *Chicago, etc., R. Co. v. American Strawboard Co.*, 190 Ill. 268; *Chicago v. Spoor*, 91 Ill. App. 472; *Dorn v. Van Vliссengen*, 77 Ill. App. 222; *Newell v. Reynolds*, 71 Ill. App. 405.

Indiana. — *Franklin v. Lee*, (Ind. App. 1901) 62 N. E. Rep. 78, *Consolidated Stone Co. v. Summit*, 152 Ind. 297; *Loucheim v. Seeley*, 151 Ind. 665; *Peele v. Provident Fund Soc.*, 147 Ind. 543; *Citizens' St. R. Co. v. Union Trust Co.*, 19 Ind. App. 402; *Shrimpton v. Keyes*, 17 Ind. App. 305; *Aultman, etc., Co. v. Frazier*, 5 Kan. App. 202.

Minnesota. — *Cutting v. Weber*, 77 Minn. 53.

Missouri. — *Hall v. Gallemore*, 138 Mo. 638; *Journeyman Tailors' Union v. Custom Journeymen Tailors' Union*, 76 Mo. App. 680.

Montana. — *Gregg v. Kommers*, 22 Mont. 511.

Nebraska. — *Etna Ins. Co. v. Simmons*, 49 Neb. 811.

Texas. — *Wells v. Houston*, (Tex. Civ. App. 1902) 69 S. W. Rep. 183; *Wetz v. Wetz*, (Tex. Civ. App. 1902) 66 S. W. Rep. 869; *Ackermann v. Schuetzen Verein*, (Tex. Civ. App. 1900) 60 S. W. Rep. 366; *St. Louis South Western R. Co. v. Maloney*, (Tex. Civ. App. 1896) 33 S. W. Rep. 767; *Cooper v. Hiner*, 91 Tex. 658; *Godair v. Tillar*, 19 Tex. Civ. App. 541.

Utah. — *Nephi First Nat. Bank v. Brown*, 20 Utah 85.

Washington. — *Inter State Sav., etc., Assoc. v. Benson*, 28 Wash. 578; *Murphy v. Currie*, 21 Wash. 232.

Illustrations. — A statement that the court refused to give requested charges, numbers 1 to 8, is too general. *Johnson v. Brown*, (Tex. Civ. App. 1901) 65 S. W. Rep. 485.

To state that the judgment is contrary to the law and the evidence is too general. *Wetz v. Wetz*, (Tex. Civ. App. 1902) 66 S. W. Rep. 869.

If in discussing the refusal of one

723. See note 1.

3. Disrespectful Language. — See notes 2, 3.

724. Striking off Files. — See notes 1, 2.

IV. FILING AND SERVING — 1. **Generally** — In Lower Court. — See note 4.

726. Effect of Filing. — See note 1.

2. Effect of Failure to File. — See note 2.

727. Dismissal or Affirmance. — See note 1.

instruction the whole argument upon the giving of another is involved, a failure to discuss the other is not a waiver of the exception. *Shade v. Sisson Mill, etc., Co.*, 115 Cal. 357.

723. 1. *Shrimpton v. Keyes*, 17 Ind. App. 305; *Cooper v. Hiner*, 91 Tex. 658; *Inter State Sav., etc., Assoc. v. Benson*, 28 Wash. 578.

2. *State v. Call*, 41 Fla. 450; *Taggart v. Bundick*, (Kan. 1896) 43 Pac. Rep. 243; *Anderson v. Cook*, 25 Mont. 330; *Gates v. Parmly*, 113 Wis. 147; *U. S. v. Peuschel*, 116 Fed. Rep. 649.

3. *Duncan v. Times Mirror Co.*, (Cal. 1898) 52 Pac. Rep. 651; *San Diego Water Co. v. San Diego*, 117 Cal. 556; *State v. Call*, 41 Fla. 450; *Rosenberg v. Stern*, 77 Ill. App. 248; *Schleissner v. Schleissner*, 72 N. Y. App. Div. 492; *Nepht Irrigation Co. v. Vickers*, 20 Utah 310; *Sawdey v. Spokane Falls, etc., R. Co.*, 27 Wash. 536.

724. 1. *Scott v. Brown*, 10 Kan. App. 581; *Sawdey v. Spokane Falls, etc., R. Co.*, 27 Wash. 536; *Anderson v. Northern Pac. R. Co.*, 19 Wash. 340.

It Must Be an Extreme Case to cause a brief to be stricken from the file for disrespectful language. *People v. Parks*, 26 Colo. 322.

2. *Schleissner v. Schleissner*, 72 N. Y. App. Div. 492.

4. Objection Waived. — An acknowledgment by the appellee that he has received a brief from the appellant is a waiver of his right to have the same filed in the court below. *Brown v. Reed*, (Tex. Civ. App. 1901) 62 S. W. Rep. 73.

726. 1. *Loucheim v. Seeley*, 151 Ind. 665.

2. *Jensen v. Jordan*, 5 Kan. App. 73; *Bowman v. Hoffman*, (Tex. Civ. App. 1902) 67 S. W. Rep. 152.

727. 1. *California*. — *Headstrom v. Hellieson*, 136 Cal. 498.

Colorado. — *Rarick v. Vandevier*, 27 Colo. 538.

Georgia. — *Irwin v. Williams*, 113

Ga. 187; *Irwin v. Atlanta, etc., R. Co.*, 113 Ga. 185.

Illinois. — *White v. Sisters of Charity*, 77 Ill. App. 279; *Hooper v. McCaffery*, 77 Ill. App. 278; *Haverlau v. Lake Shore, etc., R. Co.*, 73 Ill. App. 261.

Indiana. — *Manns Bros. Boot, etc., Co. v. Templeton*, 149 Ind. 706; *Leatherman v. Orange County*, 148 Ind. 282; *Citizens' St. R. Co. v. Union Trust Co.*, 19 Ind. App. 402; *Cline v. Gould*, 17 Ind. App. 647.

Missouri. — *Carter v. Dilley*, 167 Mo. 564.

Oklahoma. — *Foust v. Territory*, 10 Okla. 214; *Alva State Bank v. Renfrew*, 10 Okla. 25.

Texas. — *Bowman v. Hoffman*, (Tex. Civ. App. 1902) 67 S. W. Rep. 152; *Elkins v. Kempner*, (Tex. Civ. App. 1902) 66 S. W. Rep. 576; *Emerson v. A. F. Shapleigh Hardware Co.*, (Tex. Civ. App. 1902) 66 S. W. Rep. 570; *Hunt v. Glasscock*, (Tex. Civ. App. 1901) 65 S. W. Rep. 209; *Peck v. Cain*, (Tex. Civ. App. 1901) 63 S. W. Rep. 179; *Muck v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 811; *Frost v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 669; *Brooks v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 488; *Jones v. Erwin*, (Tex. Civ. App. 1898) 45 S. W. Rep. 39; *Cooper v. Hiner*, 91 Tex. 658.

Washington. — *Matter of Sullivan*, 25 Wash. 430; *National Christian Assoc. v. Simpson*, 21 Wash. 16.

Wyoming. — *Robertson v. Shorow*, (Wyo. 1902) 69 Pac. Rep. 1.

Noncompliance with Order. — Under an order that a party shall file his brief five days before the case is to be heard, a noncompliance will not be ground for a dismissal of the writ of error, but it would be a contempt. *Roberts v. Roberts*, 115 Ga. 259.

Sufficiency of Brief Not Considered. — A motion to dismiss will be denied for failure of the appellant to file his brief in time, if a document purporting to be such has been filed within the time limited. *Gregory v. Diggs*, 108 Cal.

728. See note 1.

729. Failure of Appellee to File. — See note 1.

730. When Neither Party Files. — See note 2.

731. 3. Effect of Failure to File Within Time. — See note 1.

733. See note 1.

123. Compare *Loucheim v. Seeley*, 151 Ind. 665.

Where No Delay or Injury Is Occasioned the appeal will not be dismissed. *Barbour v. Flick*, 121 Cal. 425. See also *San Antonio, etc., R. Co. v. Holden*, 93 Tex. 211; *Gulf, etc., R. Co. v. Mitchell*, 21 Tex. Civ. App. 463; *Gay v. New Whatcom*, 26 Wash. 389.

Filing After Motion to Dismiss. — Under rule 5 (64 Pac. Rep. viii) an appellant may file his brief, after an abortive motion to dismiss for want of filing, and before notice of a subsequent motion. *Swortfuguer v. White*, 137 Cal. 391.

728. 1. *Colorado*. — *Bitter v. Mouat Lumber, etc., Co.*, 27 Colo. 120.

Iowa. — *Backus v. Lawbaugh*, (Iowa 1902) 89 N. W. Rep. 26; *Harrington v. Hubinger*, 112 Iowa 90.

Kansas. — *Kansas Grain, etc., Co. v. Hartstein*, 6 Kan. App. 864.

Nebraska. — *Edney v. Baum*, 59 Neb. 147.

Oklahoma. — *Wilderson v. Worley*, 11 Okla. 132; *White v. Territory*, 11 Okla. 172; *Paden v. Worrell*, 4 Okla. 92.

Oregon. — *State v. Horn*, 39 Oregon 152.

Texas. — *Ball v. Dignowity*, (Tex. Civ. App. 1902) 68 S. W. Rep. 300.

See *Ribordy v. Murray*, 70 Ill. App. 527.

729. 1. *California*. — *Hale, etc., Silver Min. Co. v. Fox*, 120 Cal. 261.

Illinois. — *Glos v. Hollowell*, 190 Ill. 65; *Rehkopf v. McCambridge*, 63 Ill. App. 160; *Speck v. Verble*, 95 Ill. App. 245; *Austin v. Paisley*, 95 Ill. App. 244; *People v. Orrand*, 88 Ill. App. 646; *Levi v. Brown*, 84 Ill. App. 147; *Wm. Nevius Banking Co. v. Brunges*, 72 Ill. App. 596; *Manning v. Jarnagan*, 71 Ill. App. 406; *Kurtz v. Kurtz*, 71 Ill. App. 71; *Jackson v. Mt. Morris*, 70 Ill. App. 613; *Hamilton v. Andrews*, 68 Ill. App. 393.

Indiana. — *People's Nat. Bank v. State*, (Ind. 1902) 65 N. E. Rep. 6; *Berkshire v. Caley*, 157 Ind. 1.

Kansas. — *Naylor v. Beery*, 7 Kan. App. 815.

Minnesota. — *Smith v. Ricker*, 84 Minn. 210.

Texas. — *Cooper v. Hiner*, 91 Tex. 658.

What Questions Considered. — In such a case only such questions as are essential to determine the appeal will be considered. *Richardson v. Probst*, 103 Iowa 241.

730. 2. *Mitchell v. State*, 42 Fla. 603; *Brower v. Fass*, 60 Neb. 6; *Ballew v. Schlosser*, 5 Okla. 146; *Oklahoma v. Brady*, 4 Okla. 514; *Avant v. Cowley*, (Tex. Civ. App. 1898) 47 S. W. Rep. 1036; *Unsworth v. Straughan*, (Tex. Civ. App. 1897) 43 S. W. Rep. 290.

731. 1. *Lakemeyer's Estate*, 133 Cal. XIX, 65 Pac. Rep. 475; *Farleigh v. Kelly*, 24 Mont. 369; *Lynch v. Munson*, (Tex. Civ. App. 1901) 61 S. W. Rep. 140.

733. 1. *Lawyers too Busy*. — *Am-brose v. Gwinnup*, 16 Wash. 333.

Prior Disregard of Rules. — Because the rules have been disregarded in the past furnishes no excuse. *Rehberg v. Greiser*, 24 Mont. 487.

Inability to Pay Expense of Printing. — An excuse that the appellant was without money or means to print his brief is not sufficient where an order was obtained from the court below authorizing the printing of the brief at the expense of the county. *State v. Rowe*, 36 Oregon 79.

Sickness. — Sickness of counsel is a good excuse. *Wagner v. Portland*, 40 Oregon 389. Compare *Cline v. Gould*, 17 Ind. App. 647.

Miscellaneous Excuses. — A dispute between counsel in regard to the printing is no excuse. *Reynolds v. Jackson County*, 33 Oregon 422.

It is no excuse that the appellee has extended the time for the appellant. *Carlson v. Van De Vanter*, 19 Wash. 32.

See *Garnsey v. County Ct.*, 33 Oregon 201, in which case it was held a good excuse that the same questions were involved in another case pending decision.

It is no excuse that a motion is pending to dismiss the appeal. *Headstrom v. Hellieson*, 136 Cal. 498.

It is a sufficient excuse that the appellant's counsel had removed from the

734. V. ADDITIONAL AND REPLY BRIEFS. — See notes 1, 2.

state, and that the appellant was in jail at the time the brief should have been filed. *State v. Williams*, 18 Wash. 47.

It is no excuse that the appellant's attorney relied upon the verbal promise of the defendant's attorney in the trial court that the matter of time would be waived, the defendant's attorney not being an attorney of the Appellate Court, and it appearing that a different attorney represented the defendant in the Appellate Court. *Crowley v. McDonough*, (Wash. 1902) 70 Pac. Rep. 261.

734. 1. Request for Time to File Additional Briefs must be seasonably made. *Rownd v. State*, 152 Ind. 39.

In *Georgia* a supplemental brief filed without permission will not be considered. *Napier v. Burkett*, 113 Ga. 607.

Delay in Filing. — Supplemental briefs will not be considered where they are filed after the case has been submitted upon original briefs and taken into consideration. *Adams, Petitioner*, 165 Mass. 497.

2. California. — *Kahn v. Wilson*, 120 Cal. 643.

Illinois. — *Cheney v. Cross*, 181 Ill. 31; *West Chicago Park Com'rs v. Chicago*, 170 Ill. 618; *Indiana Millers' Mut. F. Ins. Co. v. People*, 170 Ill. 474; *Schumacher v. Bell*, 164 Ill. 181; *Chicago, etc., R. Co. v. Murowski*, 78 Ill. App. 661; *Big Grove v. Fox*, 89 Ill. App. 84.

Indiana. — *Indiana Power Co. v. St. Joseph, etc., Co.*, (Ind. 1902) 64 N. E. Rep. 468; *Malott v. State*, 158 Ind. 678; *Gates v. Baltimore, etc., R. Co.*, 154 Ind. 338.

Missouri. — *Cross v. Atchinson, etc.*, R. Co., 141 Mo. 132.

Nebraska. — *State v. Omaha Nat. Bank*, 59 Neb. 483.

Washington. — *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16.

Omission Cured by Reply Brief. — Where a brief does not contain, in accordance with the rule, findings of fact and conclusions of law, a reply brief containing these requirements will cure the omission. *Young v. Borzone*, 26 Wash. 4.

BURGLARY.

739. II. INDICTMENT GENERALLY — 2. How Laid under Statutes. — See note 3.

740. Statutory Ingredients Should Be Alleged. — See note 1.

741. III. AVERMENT OF TIME — 1. In General — Averment Essential. — See note 1.

742. 2. Nighttime — a. AT COMMON LAW — Proof. — See note 2.

b. UNDER STATUTES. — See note 5.

Where Several Degrees. — See note 6.

743. See note 1.

739. 3. See *People v. Shaver*, 107 Mich. 562.

The Designation of the Crime in the Caption as "Burglary," without charging that it was committed at night, is immaterial if the body of the indictment avers a breaking and entry with intent to steal, as provided by Code Iowa (1873), § 3894. (Code Iowa 1897, § 4791). *State v. Gillett*, 92 Iowa 527.

740. 1. Charge in Words of Statute. — *Leisenberg v. State*, 60 Neb. 628.

741. 1. Cool v. Com., 94 Va. 799.

Date Subsequent to Presentment. — An indictment which shows that the offense was committed subsequent to its presentment is bad. The time mentioned should be a date anterior, but not so remote that the prosecution will be barred by limitation. *Hall v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 996; *McJunkins v. State*, 37 Tex. Crim. 117.

Series of Connected Acts. — Where the crime consisted of a series of connected acts, it is necessary, instead of repeating the time and place originally alleged, to use the phrase "then and there," but where the act was a breaking, the use of the conjunction "and," coupling the intent with the breaking, is sufficient and extends the original allegation of time and place to the succeeding averments in the indictment. *Smith v. State*, 36 Tex. Crim. 442.

742. 2. People v. Smith, 136 Cal. 207.

5. In re McVey, 50 Neb. 481 [*citing obiter* 3 ENCYC. OF PL. AND PR. 741]; *State v. La Croix*, 8 S. Dak. 369.

6. Schwabacher v. People, 165 Ill.

618; *State v. Neddo*, 92 Me. 71; *In re McVey*, 50 Neb. 481.

743. 1. California. — *People v. Smith*, 136 Cal. 207.

Illinois. — Under Crim. Code Ill., § 36, as amended in 1885 (Starr & Curt. Annot. Stat. Ill. 1896, c. 38, par. 70), where the indictment is silent as to whether the burglary was committed in the daytime or nighttime, there is no variance, although the proof is that the burglary was committed at night. *Schwabacher v. People*, 165 Ill. 618.

Pennsylvania. — In *Com. v. Carson*, 166 Pa. St. 179, it was held that an indictment under Act Pa. April 22, 1863, § 2, P. L. 531 (Bright. Purd. Dig. Laws Pa. 1894, p. 482, § 64), for entering a dwelling house with felonious intent, is good, whether it charges that the crime was committed in the nighttime or daytime.

Texas. — It is sufficient to charge that the accused "unlawfully, by force, threats, and fraud, did break and enter a house there situated and occupied by B." *Shaffer v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1072. See also *Combs v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 585; *Wilks v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 902.

Both Nighttime and Daytime Breaking. — In an indictment containing two counts, the first charging burglary in the nighttime and the second charging the same offense in the daytime, a motion to require the state to elect was properly overruled, it being proper to meet any phase of the testimony which might be developed. *Willis v. State*,

743. 3. Daytime. — See note 2.

744. 4. Hour. — See note 3.

745. IV. AVERMENT OF PLACE — 1. Minor Locality — *a*. AVERMENT IN GENERAL — In This Country. — See note 2.

746. *b*. PROOF. — See note 1.

d. CAPTION. — See note 3.

747. 2. Building — *a*. IN GENERAL — Dwelling House. — See note 1.

Other than Dwelling House. — See note 2.

748. *b*. UNDER STATUTES — (1) *In General*. — See note 1.

(2) *Statutory Word*. — See note 2.

(Tex. Crim. 1900) 55 S. W. Rep. 829; Benton *v. Com.*, 91 Va. 782.

743. 2. State *v. Neddo*, 92 Me. 71.

744. 3. Hour of Night Not Essential. — Leisenberg *v. State*, 60 Neb. 628.

745. 2. See People *v. Geiger*, 116 Cal. 440; Hale *v. Com.*, 98 Ky. 353.

County Where Property Is Taken. — Under Pen. Code Cal., § 786, the crime of burglary can be tried in any county into which the property burglariously taken has been brought, provided the facts are properly set out and the asportation of the stolen property into that county has been properly alleged. People *v. Jochinsky*, 106 Cal. 638.

746. 1. State *v. Kelley*, 66 N. H. 577.

3. See Reed *v. State*, 66 Ark. 110; State *v. Burdett*, 145 Mo. 674.

747. 1. "Dwelling." — In Parker *v. State*, 114 Ala. 690, the use of the word "dwell-house" instead of "dwelling house" was held to be a fatal defect.

Number of Stories. — Objection to an indictment alleging the breaking of a two-story building, when the proof develops that it had three stories, is technical and without merit. State *v. Porter*, 97 Iowa 450.

Private Residence. — An indictment is not subject to quashal because it fails to charge the burglarized house as a private residence unless the house was, in fact, a private residence within the terms of the statute, in which case the proof would have to sustain the charge as laid. Shaffer *v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1072.

2. The Breaking of a Crib or Smokehouse will not support an indictment charging the breaking of a dwelling house. Draughn *v. State*, 76 Miss. 574.

Warehouse. — The qualifying word "granary" before the word "warehouse," used either as a noun or merely as an adjective, does not vitiate

an otherwise perfect charge of burglary under the Missouri statute. Treated as a noun it must be rejected as surplusage, but used as an adjective it may remain, as being descriptive of the warehouse. State *v. Watson*, 141 Mo. 338.

The Statutory Words "Shop," "Store," Etc., must be alleged. State *v. Dale*, 141 Mo. 284; State *v. Schuchmann*, 133 Mo. 111.

749. 1. Within Curtilage of Dwelling House. — In State *v. Burdett*, 145 Mo. 674, an indictment which charged that a smokehouse burglarized was "within the curtilage of the dwelling house," but not a part thereof, was held to be sufficient under the Missouri statute.

An indictment under the Alabama statute charged the accused with breaking and entering a smokehouse in which "meat and flour, things of value, were kept for use, sale, or deposit," etc., with intent to steal the property of Y., the owner thereof, but failed to allege that the smokehouse was within the curtilage of the dwelling house. It was held that a demurrer could not be sustained. Pressley *v. State*, 111 Ala. 34. See also State *v. Johnson*, 45 S. Car. 483.

Duplicity. — An indictment charging a felonious breaking and entering into a dwelling house used and occupied as a warehouse, where goods, wares, and merchandise are kept for sale and deposit, is bad for duplicity, as under Rev. Stat. Mo. (1889), §§ 3521, 3526 (Rev. Stat. Mo. 1899, §§ 1881, 1886), breaking a dwelling house and breaking a warehouse are separate offenses. State *v. Huffman*, 136 Mo. 58.

The Use of the Word "Box-Car." instead of "rail-car," the term used in the statute is immaterial. State *v. Green*, 15 Mont. 424.

3. Basement. — Cellar. — An allegation that the defendant entered a "basement

749. (3) *Statutory Description* — (a) *In General*. — See note 1.

750. (b) *Persons in House*. — See note 1.

751. (c) *Goods in House*. — See note 1.

753. *V. AVERMENT OF BREAKING AND ENTERING* — 1. *Burglariously and Feloniously* — "Burglariously." — See note 3.

"Feloniously." — See note 4.

room" with intent to commit arson is supported by evidence that the place where the crime was attempted was a room in the "basement" where merchandise was kept, though designated by some witnesses as a "cellar" and by others as a "basement," the word "cellar" not being particularized by the statute. *People v. Goldsworthy*, 130 Cal. 600.

Storehouse — *Gin House*. — Where the accused was indicted for breaking and entering the "storehouse" of one "Mrs. P.," proof that the building broken and entered was the "gin house" of the same person, but separate and apart from the storehouse, was held to be a fatal variance. *Givens v. State*, 40 Fla. 200.

"**Planing Mill**" — "**Building**." — An indictment alleging that the defendant, with intent to commit an offense, did "break and enter the certain planing mill of one J., * * * in which said mill there was * * * kept for use and deposit by the same J. goods, wares, and valuable things," sufficiently shows that defendant broke into a "building" within Code Iowa, § 4791, prohibiting one from entering a building with such intent, in view of section 5289, subdivision 5, requiring facts constituting an offense to be stated in ordinary language, so that persons of common understanding may understand them. *State v. Haney*, 110 Iowa 26.

Corncrib. — "A corncrib," used for storing corn after it is husked, is a "warehouse" and "storehouse," within the meaning of Crim. Code Neb., § 48, in an indictment thereunder charging the accused with breaking and entering a "warehouse" and "storehouse." *Metz v. State*, 46 Neb. 547.

Under the *Texas* statute a corncrib, used solely for the purpose of storing feed or other stuff for stock, is a house within the contemplation of the statute. *Barber v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 515. See also *Benton v. Com.*, 91 Va. 782.

749. 1. *State v. Dale*, 141 Mo. 284.

Storehouse. — An indictment under Rev. Stat. Fla., § 2435, which expressly charges that the building entered was a "storehouse," sufficiently identifies it as not being a dwelling house. *Rimes v. State*, 36 Fla. 90.

750. 1. **Breaking Dwelling House**. — Under the *Maine* statute relating to breaking and entering a dwelling house or other building or place therein designated, with felonious intent, the punishment is graded according to whether or not any person is lawfully in said dwelling house, etc., and is put in fear. If it is intended to charge the lesser offense, it is sufficient to charge the facts which constitute that crime, omitting the circumstances which, by the statute, would aggravate the offense and increase the punishment. *State v. Neddo*, 92 Me. 71.

In *Texas* it is necessary to allege the occupancy "by" some one of the house broken into. Words which are necessary to allege such occupancy are essential in the description of the offense, and the omission of the word "by" preceding the name of the occupant in an indictment alleging it was "occupied S.," instead of "by S.," is fatal. *Scroggins v. State*, 36 Tex. Crim. 117.

751. 1. **Goods in House Other than Dwelling House**. — In *Maine*, if the breaking and entry were made into a building other than a dwelling house, it is necessary to allege that articles of value were therein kept; but where a dwelling house has been broken into such allegation is unnecessary. *State v. Neddo*, 92 Me. 71.

753. 3. *State v. Cottrell*, 45 W. Va. 837. But see *Lyons v. People*, 68 Ill. 271.

4. **Maliciously**. — The substitution of the word "feloniously" for the word "maliciously," in an indictment under Act Pa. April 22, 1863, § 2, P. L. 531 (Bright. Purd Dig. Laws Pa. 1894, p. 482, § 64), which prescribes a penalty for breaking and entering a dwelling house in the daytime, and also for wilfully and maliciously entering with felonious intent "either by day or by

754. 2. Breaking and Entering — *b.* BREAKING. — See note 2.

755. *c.* ENTERING. — See note 1.

3. Statutory Descriptions — *b.* WANT OF CONSENT. — See note 3.

757. VI. AVERMENT OF OWNERSHIP OF BUILDING — 1. In General — General Rule. — See note 2.

Under Statutes. — See note 3.

758. Proof. — See note 3.

759. 2. How Alleged — *b.* CORPORATION. — See note 1.

night," with or without breaking, is not fatal to the count in which it appears, as the former word includes the latter, but it is better to use the language of the statute. *Com. v. Carson*, 166 Pa. St. 179.

754. 3. Allegation of Force. — A charge that the entry was made by force, with intent, etc., is sufficient, if the indictment contains the other essential elements of the offense. *Jones v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 491.

The allegation "did by force break and enter" the house alleged to have been burglarized sufficiently avers the breaking, whether it took place at night or in the daytime. *Rodriguez v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 406.

755. 1. Unlawful Entry Sufficient. — Under the statutes of *Oregon* the wrongful entry of a dwelling house, with intent to commit a crime therein, constitutes burglary, and though the indictment may or may not charge an actual breaking, it is sufficient to show that the entry was unlawful. *State v. Huntley*, 25 Oregon 349.

3. Consent of Owners. — In an indictment for burglarizing a storehouse, the property of the firm of K. & L., an allegation that it was committed "without the consent of the said K. and without the consent of the said L., or either of them," was held sufficiently to negative the consent of the parties alleged to be the owners. *Smith v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 521.

757. 2. State v. Simas, 25 Nev. 432, citing 3 ENCYC. OF PL. AND PR. 757, 761.

Ownership Without Occupancy. — An indictment alleging ownership, but not the occupancy or control of the owner, is sufficient. *Wilson v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 290; *Price v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 83.

3. Burglary from Railroad Car. — It is necessary to allege the ownership of a railroad car burglariously broken and entered. Failure to do so renders the indictment fatally defective. *State v. Davis*, 138 Mo. 107. See also *People v. Webber*, (Cal. 1902) 70 Pac. Rep. 1089.

A charge of breaking and entering a certain railroad car marked "C. of Ga. 201," the indictment alleging that the car broken was, at the time, in the custody and control of another railroad company named in the indictment, was held, in *Gilbert v. State*, (Ga. 1902) 43 S. E. Rep. 47, to be a sufficient averment of ownership in the company in whose custody the car was at the time of the breaking and entry.

758. 3. Mississippi. — In *James v. State*, 77 Miss. 370, citing 3 ENCYC. OF PL. AND PR. 758, it was held that it is necessary to allege the ownership of the building burglarized, and to prove it as laid.

759. 1. State v. Smith, 104 La. 464.

Where Name Imports Corporation. — In *Mattox v. State*, 115 Ga. 212, citing 3 ENCYC. OF PL. AND PR. 759, it was held that when a name is set forth in an indictment which imports a corporation rather than an individual or a partnership, the presumption will follow that it was the name of a corporation, and this presumption will prevail until the contrary is shown by proof that no such corporation existed.

In *State v. Jellinek*, 95 Iowa 420, the indictment charged the breaking of a building "known as the Grange Store," giving the names of the parties owning it. On proof that it was owned by a corporation it was held that no prejudice resulted to the defendant from a failure to aver the name of the corporation.

Leased Property. — In *Com. v. Ballard*, (Ky. 1897) 38 S. W. Rep. 678, the accused was charged with breaking

- 759.** *d. PERSONS — In General.* — See note 3.
761. *Partners.* — See note 1.
762. *3. In Whom Alleged — a. IN GENERAL.* — See note 3.
763. *Mere Possession.* — See note 1.
764. *b. LANDLORD AND TENANT — (1) In General.* — See note 2.

and entering the warehouse of the Paducah Ice Company, and the proof was that the apartment so broken in the warehouse was leased from the ice company by a brewing company. It was held that the ownership was sufficiently laid.

759. 3. Christian Name. — Under Code Iowa (1897), § 5286, while an indictment for burglary must allege the owner of the building, in the absence of any prejudice of the accused, an erroneous allegation as to the owner's Christian name is immaterial. *State v. Wrand*, 108 Iowa 73.

A Clerical Error in the substitution of the family name of the owner of the building entered for that of the accused, in connection with his given name, is not such an error as will render the indictment fatally defective. *Ford v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 761.

761. 1. Corporation, Association, Copartnership. — It is not necessary to allege that the company is either a corporation, an association, or a copartnership. *State v. Simas*, 25 Nev. 432, *citing* 3 ENCYC. OF PL. AND PR. 757, 761; *State v. Golden*, 86 Minn. 206. See also *State v. Watson*, 102 Iowa 651. But see *State v. Jones*, 168 Mo. 398.

762. 3. Party in Occupancy, Possession, and Control. — *State v. Simas*, 25 Nev. 432 [*citing* 3 ENCYC. OF PL. AND PR. 762]; *Humphrey v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 489; *McAnally v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 832; *Ricks v. State*, 41 Tex. Crim. 676.

Occupancy. — Proof of occupancy will support a charge of ownership. Under Code Iowa (1873), § 4302 (Code Iowa 1897, § 5286, an erroneous allegation of ownership is not fatal if the crime is described in other respects with sufficient certainty. *State v. Watson*, 102 Iowa 651.

In *State v. Porter*, 97 Iowa 450, it was held not to be a fatal variance, under Code Iowa (1873), § 4302 (Code Iowa 1897, § 5286), that the proof showed that an office or room alleged

to be in the possession of S. was rented by a corporation of which S. was president, and was occupied by him and in his possession as such officer. It is proper to allege ownership in one having visible occupancy and control of the premises. *Hahn v. State*, 60 Neb. 487.

Proof Showing Separate Character of Compartments under a continuous roof, and exclusive occupation and possession by P., a tenant in possession of the premises entered, will support an indictment charging the accused with feloniously breaking and entering the poultry house of P. *State v. Buechler*, 57 Ohio St. 95.

Real-estate Agents. — Where an indictment alleged that a house was kept and controlled by W., and the evidence was that W. was an agent for the owner of the house with authority to rent the property, it was held that the ownership was properly laid in W. *Alvia v. State*, (Tex. Crim. 1901) 50 S. W. Rep. 551.

Special Ownership. — A sheriff holding a house under attachment is a special owner, and an indictment which alleges ownership in him by name without describing him as sheriff, or setting out the facts constituting him the owner of the property, is sufficient. *Linhart v. State*, 33 Tex. Crim. 504.

763. 1. Possession or Control. — Proof of special or temporary ownership, possession, or control, such as a lessee would have over a room rented as an office, in which a burglary had been committed, is sufficient to sustain an allegation in the indictment that such lessee was the owner. *Leslie v. State*, 35 Fla. 171; *State v. Lee*, 95 Iowa 427.

In Texas. — Under Pen. Code Tex., art. 843, the ownership of a structure is properly laid in an occupant if it constitutes his domicile, where he sleeps and lives, and if he has the exclusive possession, care, and control thereof. *Favro v. State*, 39 Tex. Crim. 452.

764. 2. Brown v. State, (Miss. 1903) 33 So. Rep. 170.

767. d. MASTER AND SERVANT — (1) In Master. — See note 1.

769. f. JOINT OWNERS. — See note 1.

g. HUSBAND AND WIFE — In Husband. — See note 2.

771. VII. AVERMENT OF INTENT — 1. In General — a. AVERMENT ESSENTIAL. — See note 1.

Actual Averment Sufficient. — See note 3.

Either Form Sufficient. — See note 5.

767. 1. Ownership in Master. — In *Daggett v. State*, 39 Tex. Crim. 6, the indictment alleged the ownership of the burglarized house of the property stolen therefrom to be in D. The proof showed the house to be a chicken house on a ranch owned by D., distant eight or ten miles from his residence, and in possession of one J., who received a stated monthly payment for the care of the fowls, and whose wife was to share in the increase of the poultry. The possession of J. being a mere custody, as that of a servant, the allegation of ownership in D. in the indictment was held to be correct, both as to the house and fowls, as the wife of J. was to share only in the increase. See also *Runnels v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 470.

769. 1. Ownership in All or Either. — Where property is owned in common or jointly by two or more, ownership may be laid in all or in either, under Code Crim. Pro. Tex., art. 445. *Cogshall v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1011; *Farris v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 140.

Joint Ownership of Goods in Several — Fee in Building in Another. — Joint ownership of property in two or more may be alleged in one or all, and an indictment for burglary charging ownership of the house and goods in one is sufficient when the proof of joint ownership of the goods and occupancy of the house is shown, notwithstanding that the ultimate title or fee in the house was in another. *Tidwell v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 1015.

3. Legal Title in Wife. — *Richardson v. State*, 115 Ala. 113, citing *Young v. State*, 100 Ala. 126, as being the same in principle.

In *Vermont* the decisions at the common law are not applicable to the present state of the rights and property of a married woman. A dwelling house owned by her as her own property, and occupied by her with her hus-

band, may properly be described as her dwelling house in an information for burglary. *State v. Peach*, 70 Vt. 283.

771. 1. Intent. — Charging burglary with intent to steal is sufficient, without charging actual theft after the breaking and entering. *Clark v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 68. See also *Brown v. State*, 72 Miss. 990.

An indictment under Stat. Ky. (1894), § 1164, is not defective because it fails to allege that there were any goods, wares, and merchandise in a storehouse at the time it was broken. It is sufficient if it is alleged that the storehouse was feloniously broken and entered with intent to steal goods of value therefrom. *Hale v. Com.*, 98 Ky. 353.

Intent to Commit Larceny. — It is sufficient to charge the breaking and entering of a dwelling house in the nighttime with intent to commit larceny, as larceny is a felony at common law. *People v. Shaver*, 107 Mich. 562; *State v. Ellsworth*, 130 N. Car. 690.

Possession of Burglars' Tools. — In an information under Comp. Laws Mich. (1897), § 11589, for feloniously and knowingly having possession of burglars' tools or implements with intent to use and employ them in committing a burglary, it is not necessary to allege that the intention was to use such tools or implements in the county where the prosecution is instituted. *People v. Jones*, 124 Mich. 177. See also *Scott v. State*, 91 Wis. 552.

3. State v. Neddo, 92 Me. 71. See also *Hays v. Com.*, (Ky. 1896) 33 S. W. Rep. 1104; *McRae v. Com.*, (Ky. 1899) 49 S. W. Rep. 22; *State v. Taylor*, 136 Mo. 66.

5. Duplicitly. — A charge of breaking and entering with intent to commit an assault and commission of assault is not bad for duplicity, under Code Iowa (1873), § 3891 (Code Iowa 1897, § 4787). At most the averment as to the commission of the offense is surplusage. *State v. Phipps*, 95 Iowa 487.

772. b. FELONY MUST BE AVERRED AS INTENDED. — See note 1.

c. DESCRIPTION — (1) Word "Felony," or Name of Particular Felony, Sufficient. — See note 2.

773. (2) Further Description Necessary. — See note 1.

774. Must Be Specified. — See note 1.

775. 2: Intent to Commit Arson. — See note 3.

776. b. PROPERTY NEED NOT BE SPECIFIED. — See note 1.

777. c. DESCRIPTION OF PROPERTY UNNECESSARY. — See note 1.

e. AVERMENT OF VALUE OF PROPERTY. — See notes 3, 4.

778. f. AVERMENT OF OWNERSHIP OF PRORERTY. — See note 1.

772. 1. Intent to Commit Petit Larceny. — See *Reed v. State*, 66 Ark. 110.

2. State v. Powell, 61 Kan. 81.

Intent to Steal a Specific Article in a house, it is alleged, must be proved as laid. *Rush v. State*, 114 Ga. 113.

773. 1. "Felony" Insufficient. — *Barnhart v. State*, 154 Ind. 177.

Adultery. — An averment that the accused burglariously entered a dwelling house with intent to commit "a public offense, to wit, the crime of adultery," is sufficient without charging that he was a married man or that the intent was to have sexual intercourse with a married woman. *State v. Mecum*, 95 Iowa 433.

774. 1. Crime to Grand Jury Unknown. — An indictment charging the felonious breaking and entering of a dwelling house with intent to commit some crime to the grand jury unknown is fatally defective in that it does not allege the particular felony the accused intended to commit. *State v. Buchanan*, 75 Miss. 349.

775. 3. Compare People v. Goldsworthy, 130 Cal. 600.

776. 1. Windows and Doors of House. — In *Texas* a charge of burglariously breaking and entering with intent to steal personal property in the house is supported by evidence that the accused removed the doors and windows thereof, as in that state the severance converts the article into a chattel, and, no matter how instantaneous its removal may be, the taking is theft. The common-law rule that the severance must be prior to the asportation does not obtain. *Alvia v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 551; *Farris v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 140.

777. 1. In Burglary and Larceny. —

In an indictment containing two counts, one for burglary and one for larceny, the accused being convicted on the first count, a motion to quash the counts jointly and severally, because of the failure in the count for burglary to describe the goods intended to be stolen as the same goods charged in the second count to have been stolen, was properly overruled. *Reed v. State*, 147 Ind. 41.

3. Tarver v. State, 95 Ga. 222, holding that an indictment for burglary need not allege value, but may prove value as part of the description of goods which had been in the house and were found with the accused.

Value of Goods Stolen Need Not Be Stated. — *State v. Yandle*, 166 Mo. 589; *State v. Weber*, 156 Mo. 257.

4. Alabama. — By *Crim. Code Ala.* (1896), § 5049, the stealing of "any personal property of any value" from a dwelling house, storehouse, etc., is made grand larceny, but in a charge of both burglary and larceny it must be alleged and proved that the property stolen was of some value. *Rose v. State*, 117 Ala. 77. See also under the *Kentucky* statute, *Polin v. Com.*, (Ky. 1897) 40 S. W. Rep. 927; *Arthur v. Com.*, 99 Ky. 35; and see *Bergeron v. State*, 53 Neb. 752.

778. 1. Ownership in Another than Accused. — In *Barnhart v. State*, 154 Ind. 177, the charge of feloniously breaking and entering in the nighttime the barn of F., with intent then and there burglariously to take, steal, and carry away meat of the value of three dollars, was held to be insufficient without the further allegation that the

778. - *Proof.* — See note 2.

779. *Agents.* — See note 1.

Husband and Wife. — See note 2.

780. *g.* AVERMENT THAT PROPERTY WAS IN HOUSE. — See note 5.

781. *h.* SPECIAL STATUTORY REQUIREMENTS. — See note 1.

i. PROOF OF LARCENY. — See note 2.

meat was the property of another than the accused.

House-breaking, Ownership of Property Taken. — In an indictment for house-breaking, under the *Kentucky* statute, the name of the owner of the property taken from the burglarized house need not be stated, nor that it was taken without his consent, nor that the intention of the accused was to convert it to his own use. *Scott v. Com.*, (Ky. 1902) 70 S. W. Rep. 281.

778. 2. In *Lega v. State*, 36 Tex. Crim. 38, it was held that an indictment charging burglary with intent to steal the property of E., who was in possession and control of the house and property, was not erroneous notwithstanding proof that the ownership was in another person. E. having the management, control, and possession of the house and property was the special owner thereof, and it was unnecessary to prove the ownership or want of consent of the real owner, though such proof gave to the defendant no ground of complaint.

779. 1. Railroad Company. — An indictment charging the property stolen to be the property of a certain railroad company was held to be sufficient when the evidence revealed the fact that it was rightfully in the custody of the railroad company as a common carrier, though, in fact, it belonged to a shipper. *State v. Long*, 5 Ohio Dec. 617.

Evidence of rightful possession of property is sufficient proof of ownership alleged in an indictment. *State v. Burns*, 109 Iowa 436.

Janitor of School Building. — Ownership was properly laid in the janitor of a school building in an indictment for burglary with intent to steal, although the real ownership of the books, etc., was in the pupils. *Lamater v. State*, 38 Tex. Crim. 249.

2. There is no variance between *allegata* and *probata* where ownership is laid in the husband and title is in the wife. *Kidd v. State*, 101 Ga. 528; *State v. Peach*, 70 Vt. 285.

780. 5. Averment of Property in Building Unnecessary. — In an indictment under the *Florida* statute, charging the crime of breaking and entering a building in the nighttime with intent to commit a misdemeanor, it is neither necessary to describe the goods nor to aver that they were actually in the building at the time of the breaking and entry. *Charles v. State*, 36 Fla. 691. See also *Hale v. Com.*, 98 Ky. 353; *State v. Golden*, 86 Minn. 206; *Bergeron v. State*, 53 Neb. 752.

An indictment for burglary alleging the name of the owner of both the building and the property "then and there in said building found," and that the breaking and entry was with intent to steal, creates the inference that the goods were kept there "for use, sale, or deposit," and the indictment is good under Code Iowa (1897), § 4791, without the allegation that the goods were kept there for that purpose. *State v. Burns*, 109 Iowa 436.

Contra. — Under Gen. Stat. Kan. (1901), § 2059, the breaking and entering of a building, although it is used as a chicken house, would not constitute burglary unless at the time it was broken it contained goods, wares, or merchandise, or other thing of value, and an indictment, to be sufficient, must so charge. *State v. Poole*, 65 Kan. 713.

781. 1. Want of Consent of Each Owner — When Several. — An indictment which alleges that the accused took property from the possession of joint owners of a house with intent to take such property from the possession of such joint owners or either of them without their consent is insufficient to charge burglary without consent of either of the owners, as the word "their" refers to the owners collectively. The want of consent of each of them must be distinctly averred. *Young v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 890.

2. Proof of Larceny to Show Entry. — While larceny is not an essential ingredient of burglary, as an unlawful

- 782.** VIII. JOINDER OF CRIMES — 1. In General. — See note 2.
783. 2. Burglary and Accessory. — See note 1.
 4. Burglary and Assault. — See note 3.
784. 6. Burglary and Larceny — *a.* IN GENERAL — Joinder Permissible. — See note 2.
785. Conviction for Both Offenses. — See note 1.
 Where Former Judgment a Bar. — See note 4.
787. *b.* BURGLARY AND LARCENY IN SAME COUNT — (I) Joinder Permissible. — See note 3.
789. (2) Conviction for Either Offense. — See note 1.
 For Larceny. — See note 2.

entry with intent to commit any crime constitutes burglary and the intent is presumed from the entry, in an information which charges burglary with the intent to commit larceny, evidence to show larceny is not prejudicial to the accused, and is competent to show that an entry was made, and the circumstances attending the entry. *State v. Burton*, 27 Wash. 528.

782. 2. Burglary and Larceny in Same Count. — *Love v. People*, 160 Ill. 501.

North Carolina. — Two counts in the bill of indictment, one charging the breaking and entry with felonious intent to commit larceny, the other charging a felonious intent to commit the crime of murder, are, in fact, two counts for burglary, and while not the form in common use in North Carolina, it is the one approved by most of the standard writers on criminal law. *State v. Johnston*, 119 N. Car. 883.

With Intent to Kill. — Under *Wolfe's Rev. Laws La.*, § 854, entering a house without breaking, with intent to kill, and maliciously stabbing a person therein, may be joined in the same indictment. *State v. Scott*, 48 La. Ann. 293.

783. 1. Guilty Knowledge of Accessory. — A joint indictment against an accessory after the fact with the principal felon which sufficiently charges the principal with the felonious breaking and entering of a dwelling house, and avers that the accessory knew the accused "to be such principal felon and to have committed the crime aforesaid," sufficiently avers a guilty knowledge of the crime charged in the former part of the indictment. To avoid repetition, one count or allegation may refer to a preceding count or allegation. *State v. Neddo*, 92 Me. 71.

3. Iowa. — *State v. Phipps*, 95 Iowa 487.

784. 2. Burglary of and larceny from a storehouse may be joined in the same indictment. The state need not elect. *Rose v. State*, 117 Ala. 77.

A motion to quash an indictment charging burglary and larceny was properly overruled because it failed to allege that the building entered was such that its entry would constitute the crime of burglary, where it appeared that the indictment was good for larceny. *Gillock v. People*, 171 Ill. 307.

The Defendant May Be Indicted for Burglary and Larceny in some states and may be convicted of either one or both offenses. *State v. Nagel*, 136 Mo. 45; *Lawhead v. State*, 46 Neb. 607. See also *State v. Woods*, 137 Mo. 6; *Cunningham v. State*, 56 Neb. 691, following *Lawhead v. State*, 46 Neb. 607.

785. 1. *State v. Sprague*, 149 Mo. 409.

4. Effect of Acquittal for Burglary in Indictment for Burglary and Larceny. — The charge in a single count that the accused broke and entered the dwelling house of R. with intent to steal, and feloniously did take, steal, and carry away certain described property, without averring the owner thereof, charges the crime of burglary only, and a finding of grand larceny amounts to an acquittal of the charge of burglary, but does not bar a subsequent indictment for the larceny. *Bowen v. State*, 106 Ala. 178.

787. 3. *Virginia.* — *Benton v. Com.*, 91 Va. 782. See also *Cunningham v. State*, 56 Neb. 691.

789. 1. *State v. Burdett*, 145 Mo. 674.

2. For Larceny and Burglary in Same Count. — It is well settled that burglary with the intent to commit larceny and the larceny itself may be charged not only in the same indictment but in the same count. But it has never been

793. c. BURGLARY AND LARCENY IN DIFFERENT COUNTS— (1) *Joinder Permissible*. — See note 2.**794.** (2) *Burglary and Grand Larceny*. — See note 1.(5) *Election Between Counts*. — See note 4.**795.** (6) *Conviction for Either Offense*. — See note 1.(7) *Conviction for Both Offenses*. — See note 2.**798. IX. CONVICTION FOR PART OF OFFENSE — 4. Housebreaking.** — See note 3.**799. X. MINOR OFFENSES — 1. Accessory.** — See note 1.**800. 3. Conspiracy.** — See note 1.

held that an acquittal of the charge of burglary will vitiate a verdict of guilty upon the charge of larceny. *Ackerman v. State*, 7 Wyo. 504.

793. 2. Burglary, Larceny, and Receiving Stolen Property. — Under Code Crim. Pro. N. Y., § 279, burglary, larceny, and receiving stolen property, knowing it to have been stolen, may be joined by separate counts where the same transaction underlies the several counts. *People v. Wilson*, 151 N. Y. 403.

Counts Retained for Purpose of Reference. — See *People v. McLaughlin*, 150 N. Y. 365.

794. 1. *State v. Huey*, 48 La. Ann. 1382.

4. *People v. Wilson*, 151 N. Y. 403.

795. 1. Misjoinder of Counts. — In case of a misjoinder of counts and a conviction upon one count only, there is no error in such misjoinder. *Reed v. State*, 147 Ind. 41.

2. Under the *Missouri* statutes if both burglary and larceny are committed at the same time the value of the property stolen is immaterial, and the accused may be prosecuted for both offenses in one indictment and punished for both, or he may be convicted of grand larceny if no burglary was committed in connection therewith,

if the value of the property stolen was thirty dollars or more. *State v. Sprague*, 149 Mo. 409.

798. 3. The jury having returned a verdict of guilty on a bad count charging burglary, the accused cannot be sentenced for housebreaking, although that crime was properly laid in a good count in the indictment. *State v. Cottrell*, 45 W. Va. 837.

799. 1. Harboring, Etc., Principal Felon. — An indictment which charges that the accused "did harbor, conceal, maintain, and assist" the principal felon, with intent that he, the principal felon, might escape detection, arrest, trial, and punishment, the crime with which the principal felon was charged, being fully set forth in a former part of the indictment, avers with sufficient exactness that the accused intended that the principal felon should escape the punishment of the crime therein set forth. *State v. Neddo*, 92 Me. 71.

It is not requisite that the indictment should particularize the means whereby the accessory assisted the principal felon to commit the felony. *State v. Neddo*, 92 Me. 71.

800. 1. Conspiracy. — As to acts of conspiracy initiatory of and merged in the crime of larceny, see *People v. Wicks*, 11 N. Y. App. Div. 539.

CALENDARS AND TRIAL DOCKETS.

802. II. POWERS OF COURT OVER — 1. Generally. — See notes 2, 3, 4, 5.

803. III. PREPARATION OF CALENDAR — 2. Arrangement and Order. — See note 1.

Effect of Amendment. — See note 3.

804. 3. Preference. — See note 2.

802. 2. Cochrane v. Parker, 12 Colo. App. 169; *Schuman v. Brooklyn Heights R. Co.*, (Supm. Ct. Tr. T.) 32 Civ. Pro. (N. Y.) 25; *Brady v. Kinetoscope Exhibiting Co.*, 19 N. Y. App. Div. 226. See also *Merchants' Nat. Bank v. Greenhood*, 16 Mont. 395.

3. Short Cause Cases in Illinois may be tried on other days than the one provided by statute, where the size of the calendar demands more time. *Dickinson v. Bull*, 72 Ill. App. 75.

4. Strickland Wine Co. v. Hayes, 94 Ill. App. 476; *Willard v. Saunders*, 83 Ill. App. 375; *Curran v. Belding Mfg. Co.*, 59 Ill. App. 76; *Schuman v. Brooklyn Heights R. Co.*, (Supm. Ct. Tr. T.) 32 Civ. Pro. (N. Y.) 25.

5. Griesheimer v. Meyers, 89 Ill. App. 665. See also *Strickland Wine Co. v. Hayes*, 94 Ill. App. 476.

803. 1. In Delaware any case coming at issue prior to the twenty days before convening of court required for publication of the trial list may be added thereto after its publication. *Wilcox v. Wilmington City R. Co.*, (Del. 1898) 41 Atl. Rep. 975.

In Iowa on the first day of the term or as soon thereafter as practicable the court may make an assignment of the trial causes and fix the day on which each case will be tried; but the making of such an assignment is discretionary with the court. *Slocum v. Brown*, 105 Iowa 209.

South Carolina. — For list of trial calendars and arrangement of cases thereon, see *Melchers v. Moore*, 62 S. Car. 386; *Jones v. Garlington*, 44 S. Car. 533.

Remanded Cause. — In *Illinois* a cause remanded on appeal cannot be re-docketed in the court below except on ten days' notice to the adverse party. *Taylor v. Brougham*, 63 Ill. App. 283.

3. Notice. — In *New York* after filing an amended pleading a new notice of trial must be served. *Wright v. Zimmerman*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 407; *Coler v. Lamb*, 19 N. Y. App. Div. 236; *Yates v. McAdam*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 295; *Fisher v. Gunn*, (N. Y. Super. Ct. Spec. T.) 12 Misc. (N. Y.) 207; *Keilty v. Traynor*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 351. See also *Haskin v. Murray*, 29 N. Y. App. Div. 370.

But see *Evans v. Olmstead*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 692, citing Code Civ. Pro., § 723, as amended by Laws of 1900, c. 591, which provides that the court may direct that the case retain its place upon the calendar without the service of a new notice of trial.

Amended Pleading. — The date of the new issue formed by the service of an amended pleading determines the position upon the calendar. *Ziegler v. Trenkman*, 31 N. Y. App. Div. 305.

If the Amendment Is Withdrawn the case may remain upon the docket. *Wright v. Zimmerman*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 407.

804. 2. New York. — *Actions for Libel* are entitled to preference. See *Eising v. Young*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 12; *Morse v. Press Pub. Co.*, 71 N. Y. App. Div. 351; *Morrison v. Smith*, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 32.

In Actions Against a Sheriff the right to preference is personal to the officer. *Walker v. Tamsen*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 734.

The Death of a Party to a Pending Action, unless he be the sole plaintiff or defendant, does not entitle the personal representative to a preference. *Colton v. New York El. R. Co.*, 151 N. Y. 266.

Administrator Sole Plaintiff or De-

804. Cases Omitted by Parties. — See note 3.

805. Waiver of Preference. — See note 2.

fendant. — The right to preference may be claimed by either party to the action. *Schwartz v. Wolfrath*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 406.

Where an Infant Is Sole Plaintiff the case is entitled to preference. *Lesser v. Dry Dock, etc., R. Co.*, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 388.

Executor Sole Plaintiff. — The right to preference does not apply where the executor is joined as a party in his individual capacity. *Ahern v. Ahern*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 421.

Actions by Receiver Appointed by Court. — The right to preference does not include a receiver appointed in supplementary proceedings. *Daly v. Wood* (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 105.

Cases Where the City of New York Is a Party are entitled to preference. *Sheerin v. New York*, 74 N. Y. App. Div. 308.

Where Defendant Is Imprisoned. — The right to preference does not apply where the defendant has given bail and been discharged. *Boeger v. Hoffman*, 58 N. Y. App. Div. 540.

Where Property of the Defendant Is Held under Attachment the case is entitled to preference. *Knox v. Dubroff*, 17 N. Y. App. Div. 290.

Actions by a Creditor of a Deceased Insolvent, suing as sole plaintiff for the benefit of himself and other creditors interested in the estate, are entitled to preference. *Rattle v. Mutual L. Ins. Co.*, 67 N. Y. App. Div. 12.

Louisiana. — The summary action to eject a lessee is entitled to preference. *Ricou v. Hart*, 47 La. Ann. 1370.

Motion — When Made — In New York. — A motion for a preference must be made at the opening of the term for which the case is noticed for trial. *Haskin v. Murray*, 29 N. Y. App. Div. 370; *Marks v. Murphy*, 27 N. Y. App. Div. 160; *Walker v. Tamsen*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 734.

On What Calendar Preferred. — Except under special circumstances a case should be preferred only over cases noticed for the same term. *Eising v. Young*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 12; *Davis v. Westervelt*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 13; *Morse v. Press Pub. Co.*, 71 N. Y. App. Div. 351, *per* Ingraham, J.; *Schuman v.*

Brooklyn Heights R. Co., (Supm. Ct. Tr. T.) 32 Civ. Pro. (N. Y.) 25.

Where a good and sufficient cause is shown a case will be preferred over cases noticed for prior terms. *Dooley v. Paget*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 44.

The Remedy to Vacate an Order for a Preference is by an appeal. *Haskin v. Murray*, 29 N. Y. App. Div. 370.

804. 3. Failure of Clerk to Docket Case. — In *South Carolina* a case cannot be entered upon the docket of a term where the clerk has failed to enter the same "at least fourteen days before court." *Steffens v. Bulwinkle*, 48 S. Car. 357.

Not Necessarily on the Calendar. — A case is not properly on the trial list after a continuance from the preceding term unless it has been reentered for trial since the date of its continuance. *Wagner v. Hildebrand*, 17 Pa. Co. Ct. 436.

805. 2. Emerick v. Metropolitan St. R. Co., (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 45; *Hardy v. Knickerbocker Trust Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 503; *Marks v. Murphy*, 27 N. Y. App. Div. 160.

Notice of Motion for Preference must be filed with notice of trial or the right to preference will be deemed waived. *Williamson v. Standard Structural Co.*, 48 N. Y. App. Div. 186; *Hardy v. Knickerbocker Trust Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 503; *Eckhard v. Jones*, 45 N. Y. App. Div. 562; *Ritchie v. Seaboard Nat. Bank*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 146. See also *Haskin v. Murray*, 29 N. Y. App. Div. 370; *Porath v. O'Shaughnessy*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 252.

The rule is sufficiently complied with if the notice is filed within the time in which notice of trial can be given. *Rudolph v. Third Ave. R. Co.*, 54 N. Y. App. Div. 194; *Gilbert v. Finch*, 46 N. Y. App. Div. 75. See also *American Nat. Bank v. Yule Mach. Co.*, 58 N. Y. App. Div. 320.

Where Addressed to the Discretion of the Court, a technical defect in the service of notice which has not prejudiced the adverse party will be disregarded. *Coffin v. McLaughlin*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 107; *Germania L. Ins. Co. v. Powell*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 424.

805. 4. Short Cause Calendar. — See note 3.

5. Motion Concerning, to Whom Made. — See note 4.

806. VI. BRINGING FORWARD AND TRANSFERRING ON SAME CALENDAR — 1. Generally. — See note 6.

808. VII. TRANSFER TO ANOTHER CALENDAR — 1. Generally. — See note 6.

Failure to Notice a Case for Trial at the term succeeding joinder of issue does not waive the right to preference. *Lesser v. Dry Dock, etc., R. Co., (N. Y. City Ct. Gen. T.)* 33 Misc. (N. Y.) 388; *Blumenthal v. Schweinburg*, 51 N. Y. App. Div. 378; *Levy v. Hanne-man*, 47 N. Y. App. Div. 32; *Bailey v. Miles*, 46 N. Y. App. Div. 607.

Remedy for Refusal of Preference. — *Compare Schwartz v. Wolfrath, (N. Y. City Ct. Gen. T.)* 24 Misc. (N. Y.) 406, holding that an appeal will lie.

806. 3. Short Cause Calendar. — In *Illinois* no case shall be noticed for trial upon the short cause calendar before it is at issue. *McRae v. Houdeshell*, 88 Ill. App. 428; *Dyniewicz v. Benziger*, 87 Ill. App. 590.

The right to place a case on the short cause calendar depends upon the filing of the affidavit required by Rev. Stat. Ill., c. 110, § 97. *Parsley v. Halloran*, 87 Ill. App. 581; *Donnerstag v. Loewenthal*, 77 Ill. App. 159.

It is not necessary to serve a copy of the affidavit with the notice to the adverse party's attorney. *Stockham v. Simmons*, 67 Ill. App. 83.

Effect of Continuance. — A case which is passed or continued upon the short cause calendar loses its place thereon. *Angus v. Chicago Trust, etc., Bank*, 170 Ill. 208; *Gudgeon v. Casey*, 62 Ill. App. 599; *Parsley v. Halloran*, 87 Ill. App. 581.

Failure to Complete Trial — Costs. — The failure of a plaintiff to complete a trial upon the short cause calendar within the time limit is not ground for awarding costs against him, no such condition having been imposed in placing the cause upon the calendar. *Barry v. Winkle, (Supm. Ct. App. T.)* 36 Misc. (N. Y.) 171, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 209.

4. Appeals from Orders Denying Motion. — An order denying a motion to place a cause upon the short cause calendar is appealable. *Herzfeld v. Strauss*, 24 N. Y. App. Div. 95.

806. 6. Illinois. — Cases are to be tried or otherwise disposed of in the order in which they are placed upon the docket unless the court for good

and sufficient cause shall otherwise direct. *Staunton Coal Co. v. Menk*, 197 Ill. 369.

For good and sufficient cause a case may be advanced and tried out of its regular order on the calendar. *In re Wincox*, 186 Ill. 445; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9.

Good and Sufficient Cause. — What is a good and sufficient cause for the trial of a case out of its regular order rests in the discretion of the trial court. *In re Wincox*, 186 Ill. 445; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9; *Curran v. Belding Mfg. Co.*, 59 Ill. App. 76; *Willard v. Saunders*, 83 Ill. App. 375; *Staunton Coal Co. v. Menk*, 197 Ill. 369.

Appeal from Justice. — An appeal from a justice is not at issue and cannot be placed upon the short cause calendar until the appeal is perfected as required by statute. *Vallens v. Hopkins*, 157 Ill. 267, *reversing* 51 Ill. App. 337.

Short Cause Calendar. — It is within the discretion of the trial court to stop or to continue with the trial of a case on the short cause calendar which occupies more than the allotted time. *Strickland Wine Co. v. Hayes*, 94 Ill. App. 476; *Griesheimer v. Meyers*, 89 Ill. App. 665.

Nebraska. — Causes are to be tried in the order in which they are entered on the trial docket unless the court shall otherwise direct or the parties consent to the postponement of the trial. See *Osgood v. Grant*, 44 Neb. 350.

808. 6. Sparks v. Childers, 2 Indian Ter. 187.

Kentucky. — See *Merriwether v. Bell*, (Ky. 1900) 58 S. W. Rep. 987; *Wallace v. Friend*, (Ky. 1899) 49 S. W. Rep. 181; *Baxter v. Knox*, (Ky. 1895) 31 S. W. Rep. 284, stating the provision of Civ. Code Ky., § 12.

Whether in an equitable action an issue shall be transferred to the ordinary docket rests in the discretion of the trial court. *Brann v. Brann*, (Ky. 1898) 44 S. W. Rep. 424.

Issues in cases cognizable solely in equity will not be transferred to the

809. 2. Notice of Motion. — See note 1.

3. Waiver. — See note 2.

VIII. ABANDONMENT OF CAUSE ON. — See note 4.

IX. STRIKING FROM THE CALENDAR — 1. Generally. —

See notes 5, 6.

810. 2. Motion, When Made. — See note 3.

3. Waiver. — See note 4.

4. Remedy for Refusal. — See note 5.

ordinary docket. *Mercer County v. Harrodsburg*, (Ky. 1902) 66 S. W. Rep. 10.

Where the Only Issue Is the Title to Land the case should be transferred to the ordinary docket. *Kentucky Land, etc., Co. v. Reynolds*, (Ky. 1901) 60 S. W. Rep. 635; *Pryor v. Warford*, (Ky. 1900) 54 S. W. Rep. 838.

North Carolina. — In special proceedings before a clerk of the court where the answer raises an issue of fact the case should be transferred to the civil issue docket. *Boles v. Caudle*, 126 N. Car. 352.

South Carolina. — It is not necessary to transfer a case to the default calendar after sustaining a demurrer to the answer. *Jones v. Garlington*, 44 S. Car. 533.

Transfer from Law to Equity Docket. — Where a case upon the law docket presents only equitable issues it should be transferred to the equity docket. *Castle v. Hillman*, 70 Ark. 157; *Grasmier v. Wolf*, (Iowa 1902) 90 N. W. Rep. 813; *Croft v. Colfax Electric Light, etc., Co.*, 113 Iowa 455.

The court may of its own motion transfer a case to the equity docket where the petition does not state a cause of action. *Johnston v. Robuck*, 104 Iowa 523.

It is error to transfer to the equity docket purely legal issues entitled to trial by jury. *Watson v. Bartholomew*, 106 Iowa 576; *Klinker v. Schmidt*, 106 Iowa 70; *Kelly v. Andrews*, 94 Iowa 484; *Rubel v. Avritt*, (Ky. 1898) 47 S. W. Rep. 460.

The Remedy for Refusal to Transfer a case to the proper docket is mandamus. See *Knight v. Farrell*, 113 Ala. 258.

809. 1. Disregarding a Notice of Motion waives the right of a party to object that a case is transferred and judgment taken against him. *Oliver v. Gerstle*, 58 Ill. App. 615.

2. Sparks v. Childers, 2 Indian Ter. 187; *Sanders v. Hartge*, 17 Ind. App. 243; *Duis v. Fisher*, (Ky. 1901) 65 S.

W. Rep. 337; *Campbell v. Jackson*, (Ky. 1900) 55 S. W. Rep. 548; *Pettit v. Marble*, (Ky. 1896) 35 S. W. Rep. 906; *Com. v. Tate*, (Ky. 1895) 33 S. W. Rep. 405. See also *Ogden v. Ogden*, 60 Ark. 70; *Crissman v. McDuff*, 114 Iowa 83; *Kelly v. Mitchell*, 98 Ky. 218. Compare *Johnston v. Robuck*, 104 Iowa 523, *per Ladd, J.*

4. See *Ex p. State*, 115 Ala. 133.

5. Pritchard v. Nederland L. Ins. Co., 38 N. Y. App. Div. 109.

6. Evans v. Olmstead, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 692; *Marden v. Marden*, 28 N. Y. App. Div. 301; *Coler v. Lamb*, 19 N. Y. App. Div. 236; *Yates v. McAdam*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 295; *Fisher v. Gunn*, (N. Y. Super. Ct. Spec. T.) 12 Misc. (N. Y.) 207; *Keilty v. Traynor*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 351.

Failure to Serve Process upon one of several defendants who are severally liable is no ground for striking the cause from the calendar. *Rappaport v. Werner*, 34 N. Y. App. Div. 525.

810. 3. Belinski v. Brand, 76 Ill. App. 404; *Wheatley v. Chicago Trust, etc., Bank*, 64 Ill. App. 612; *Stewart v. Carbray*, 59 Ill. App. 397; *Levey v. Tribune Assoc.*, (Supm. Ct. Tr. T.) 22 Misc. (N. Y.) 245; *Mangone v. Metropolitan St. R. Co.*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 565; *Stanfield v. Stanfield*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 409. See also *Acers v. Scheurer*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 359. Compare *Poindexter v. Carlton*, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 202.

The motion should be made at the first opportunity. *Highley v. Metzger*, 86 Ill. App. 573.

4. The Service of an Answer to an amended complaint does not waive the right to object that the case was improperly retained in its place on the calendar after an amendment. *Neville v. Butler*, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 203.

5. Compare *Krowles v. Lichtenstein*, 31 N. Y. App. Div. 496.

CARRIERS.

815. II. ACTIONS FOR REFUSAL TO CARRY—1. Nature and Form of Action—Mandamus.—See note 2.

816. 3. Declaration or Complaint—Generally.—See notes 1, 3.

818. III. ACTIONS FOR LOSS OR INJURY—1. Nature and Form of Action—b. ACTION EITHER EX DELICTO OR EX CONTRACTU AT COMMON LAW.—See note 4.

821. d. ADVANTAGES PECULIAR TO EACH FORM OF ACTION—(3) Actions *ex Contractu*—Action Possesses None of the Advantages of Action in Tort.—See note 1.

e. DISTINCTION BETWEEN DECLARATIONS IN CASE AND IN ASSUMPSIT—General Doctrine Stated.—See note 5.

822. Averments of Negligence.—See note 3.

824. f. EFFECT OF SPECIAL CONTRACT.—See note 1.

815. 2. To Compel Restoration of Continuous Train Service.—Mandamus will not lie to compel a carrier to restore a continuous train service to a specified station; but abuse of discretion in the operation of a railroad may be remedied by the board of railroad commissioners, and mandamus will lie to enforce the determination of the board. *People v. Brooklyn Heights R. Co.*, 172 N. Y. 90.

816. 1. If an Action Is Founded on a Written Contract such contract must be set out in the complaint. *Currell v. Hannibal, etc., R. Co.*, (Kan. App. 1902) 71 S. W. Rep. 113.

3. Wilder v. St. Johnsbury, etc., R. Co., 66 Vt. 636.

818. 4. Waters v. Mobile, etc., R. Co., 74 Miss. 534; *Denman v. Chicago, etc., R. Co.*, 52 Neb. 140; *Central Trust Co. v. East Tennessee, etc., R. Co.*, 70 Fed. Rep. 764.

In Georgia the question whether the petition is in assumpsit or on a contract or on the case for wrongful conversion is not material. *Southern R. Co. v. Atlanta Nat. Bank, (C. C. A.)* 112 Fed. Rep. 861.

Election of Remedy.—While the plaintiff can elect to bring an action either *ex delicto* or *ex contractu* at common law, having made his election to sue upon the common-law liability he must recover in that form of action or not at all. *Normile v. Oregon R., etc., Co.*,

41 Oregon 177, citing 3 ENCYC. OF PL. AND PR. 818. See also *Pennsylvania R. Co. v. Walker*, (Ind. App. 1902) 64 N. E. Rep. 473.

821. 1. Louisville, etc., R. Co. v. Brinkerhoff, 119 Ala. 528.

5. Illustration of Action in Tort.—Where the averments of the complaint are that the defendant, a common carrier, was engaged in the business of transporting cattle and had established receiving pens for them along its road, and with its knowledge and consent and direction the plaintiff had driven his cattle into such pens, and the defendant had so negligently constructed its pens that the cattle escaped and were lost and damaged, the action is one in tort. *Missouri, etc., R. Co. v. Byrne*, 3 Indian Ter. 740.

822. 3. Louisville, etc., R. Co. v. Wathen, (Ky. 1899) 49 S. W. Rep. 185.

Misjoinder of Causes of Action.—In *Alabama* a complaint which contains a count in case which is *ex delicto* and another count in assumpsit is subject to demurrer for misjoinder of causes of action. *Evans v. Southern R. Co.*, 133 Ala. 482.

824. 1. In Southern Pac. R. Co. v. Arnett, (C. C. A.) 111 Fed. Rep. 849, it was held that where the negligence alleged is a sufficient basis of an action a special contract with the carrier need not be alleged.

825. 2. Parties Plaintiff—*b.* CONSIGNOR—(1) *Where Title Does Not Pass*—Generally.—See note 1.

826. Conditional Sale.—See note 1.

Rescission of Contract of Sale.—See note 3.

(2) *Where Consignor Makes Contract of Shipment*.—See note 4.

828. See note 1.

829. *c.* CONSIGNEE—(1) *General Presumption as to Ownership*.—See note 3.

830. See note 2.

(2) *Presumption Arising from Bill of Lading*.—See note 3.

833. *d.* WHERE SHIPPER IS BOTH CONSIGNOR AND CONSIGNEE.—See note 2.

834. *e.* PARTY HAVING SPECIAL PROPERTY—*Factor*.—See note 1.

835. *Effect of Recovery*.—See note 3.

f. UNDISCLOSED PRINCIPAL.—See note 4.

836. *g.* INDORSEE OR ASSIGNEE OF BILL OF LADING—*At Common Law*.—See note 1.

825. 1. Louisville, etc., R. Co. v. Ft. Wayne Electric Co., (Ky. 1900) 55 S. W. Rep. 918.

826. 1. *A Person Who Consigns Goods* with directions to the consignee to sell them and return the proceeds less the freight is an owner, and may sue a common carrier for failure to deliver. Louisville, etc., R. Co. v. Allgood, 113 Ala. 163.

3. Savannah, etc., R. Co. v. Commercial Guano Co., 103 Ga. 590; Hance v. Wabash, etc., R. Co., 62 Mo. App. 60; Levy v. Weis, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 361.

4. Carter v. Southern R. Co., 111 Ga. 38, citing 3 ENCYC. OF PL. AND PR. 826. See also the following cases:

Arkansas.—Cantwell v. Pacific Express Co., 58 Ark. 487.

Missouri.—Davis v. Jacksonville Southeastern Line, 126 Mo. 69.

Ohio.—American Roofing Co. v. Memphis, etc., Packet Co., 8 Ohio Dec. 490.

Texas.—Parks v. Gulf, etc., R. Co., (Tex. Civ. App. 1895) 30 S. W. Rep. 708; Galveston, etc., R. Co. v. Barnett, (Tex. Civ. App. 1894) 26 S. W. Rep. 782.

828. 1. *The Consignor Has a Special Property* in the goods which gives him the right to sue a carrier for non-delivery even though he is not the

owner. Carter v. Southern R. Co., 111 Ga. 42.

829. 3. Butler v. Pittsburgh, etc., R. Co., 18 Ind. App. 656, quoting 3 ENCYC. OF PL. AND PR. 829.

Exception to General Rule.—The general rule that the consignee is entitled to sue for loss of or injury to goods shipped does not prevail where the goods have been wrongfully ordered and the consignee refuses to receive them. Butler v. Pittsburgh, etc., R. Co., 18 Ind. App. 656.

830. 2. Cleveland, etc., R. Co. v. Moline Plow Co., 13 Ind. App. 225.

3. Butler v. Pittsburgh, etc., R. Co., 18 Ind. App. 656, quoting 3 ENCYC. OF PL. AND PR. 830.

833. 2. Louisville, etc., R. Co. v. Wathen, (Ky. 1899) 49 S. W. Rep. 185.

834. 1. *Where a Shipper Is Owner and Consignee* of part of the goods and agent for the owners of another part of the goods lost or damaged, he may sue for himself as owner and bring separate actions for his principals. Waters v. Mobile, etc., R. Co., 74 Miss. 534.

835. 3. Carter v. Southern R. Co., 111 Ga. 38.

4. Butler v. Western Union Tel. Co., 62 S. Car. 222, quoting 3 ENCYC. OF PL. AND PR. 835.

836. 1. Pullman First Nat. Bank v. Northern Pac. R. Co., 28 Wash. 439.

842. 4. Declaration, Complaint, Petition, or Libel — a. ALLEGATIONS — (1) *Capacity to Sue.* — See note 2.

(2) *Defendant Common Carrier.* — See note 4.

844. (4) Delivery to Carrier. — See note 1.

845. (7) Consideration for Carriage — Actions ex contractu. — See note 2.

846. (8) Description of Property. — See note 3.

847. (9) Description of Termini. — See note 2.

(10) *Description of Injury.* — See note 3.

848. (11) Negligence of Carrier. — See note 3.

How Plead. — See note 5.

842. 2. U. S. Mail Line Co. v. Carrollton Furniture Mfg. Co., 101 Ky. 658 [citing 3 ENCYC. OF PL. AND PR. 841]; *Butler v. Pittsburgh, etc., R. Co.,* 18 Ind. App. 656.

A General Allegation of ownership is sufficient. *Texas Cent. R. Co. v. Dorsey,* (Tex. Civ. App. 1902) 70 S. W. Rep. 575.

Finding of Court May Cure Defective Complaint. — In an action against a common carrier for damage to goods consigned to it, a failure to allege that the plaintiff was the owner is remedied by a finding of the court to that effect. *U. S. Mail Line Co. v. Carrollton Furniture Mfg. Co.,* 101 Ky. 658.

4. Louisville, etc., R. Co. v. Gerson, 102 Ala. 409.

844. 1. Effect of Allegation of Delivery. — An allegation of delivery of the goods to a common carrier and of damage to them makes a *prima facie* case against the defendant. *Burke v. U. S. Express Co.,* 87 Ill. App. 505; *Merchants' Dispatch Transp. Co. v. Hoskins,* (Ky. 1897) 44 S. W. Rep. 362. See also *Chicago, etc., R. Co. v. Grimes,* 71 Ill. App. 397; *Baltimore, etc., R. Co. v. Ragsdale,* 14 Ind. App. 406; *Lustig v. International Nav. Co.,* (N. Y. City Ct. Gen. T.) 38 Misc. (N. Y.) 802; *Galveston, etc., R. Co. v. Williams,* (Tex. Civ. App. 1894) 25 S. W. Rep. 311.

Inferential Allegation. — The delivery of the goods to the defendant may be alleged inferentially. *Lang v. Brady,* 73 Conn. 707.

845. 2. Thompson v. San Antonio, etc., R. Co., 11 Tex. Civ. App. 145.

Tender of Freight. — It is unnecessary to allege that the plaintiff tendered the amount of freight due, where other allegations show that the injury to the goods exceeded the amount of the freight charges. *Miami Powder Co.*

v. Port Royal, etc., R. Co., 47 S. Car. 324.

846. 3. Atchison, etc., R. Co. v. Goetz, etc., Mfg. Co., 51 Ill. App. 151; *Hill v. Georgia, etc., R. Co.,* 43 S. Car. 461.

847. 2. Ausk v. Great Northern R. Co., 10 N. Dak. 215 [quoting with approval 3 ENCYC. OF PL. AND PR. 847]; *Louisville, etc., R. Co. v. Wathen,* (Ky. 1899) 49 S. W. Rep. 185.

Immaterial Variance. — A petition to recover damages for violation of a contract to carry safely alleged that the shipment was from K. to I., when in fact the contract read from K. to St. L. The evidence showed that the alleged injuries occurred between K. and St. L. It was held that the variance was immaterial. *Cash v. Wabash R. Co.,* 81 Mo. App. 109.

3. Missouri Pac. R. Co. v. Fagan, (Tex. Civ. App. 1895) 29 S. W. Rep. 1110.

Allegations in General Terms that the goods were destroyed by a common carrier and were of the value of so many dollars sufficiently describe the value and injury of the goods. *Missouri, etc., R. Co. v. Davidson,* (Tex. Civ. App. 1901) 60 S. W. Rep. 278.

848. 3. Unnecessary Allegations. — In an action for breach of duty imposed by law independently of contract, allegations of particular acts of negligence are unnecessary. *Lang v. Brady,* 73 Conn. 707; *Burke v. U. S. Express Co.,* 87 Ill. App. 505.

5. Lachner Bros. v. Adams Express Co., 72 Mo. App. 13; *Cole v. Rankin,* (Tenn. Ch. 1896) 42 S. W. Rep. 72.

Failure to Allege Facts. — A general averment that the defendant was negligent, without setting out the negligent acts or omissions, is sufficient unless the pleading is attacked by a motion to strike out. *Union Pac. R. Co. v. Vincent,* 58 Neb. 171.

849. (12) *Statement of Contract or Duty — Actions ex Delicto.* — See note 1.

850. See note 1.

(13) *Statement of Contract — Actions ex Contractu — Generally.* — See note 3.

851. See note 1.

852. *Conditions Limiting Liability.* — See note 2.

853. (15) *Description of Relation Inter Se — Actions Against Connecting Carriers.* — See note 4.

854. See notes 1, 2.

Gross Negligence. — An allegation that the defendants "wrongfully and negligently failed to deliver" to the plaintiff certain cigars received by them for carriage is not a sufficient allegation of "gross negligence." *Michalitschke v. Wells*, 118 Cal. 683.

849. 1. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158; *Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 406; *Cleveland, etc., R. Co. v. Moline Plow Co.*, 13 Ind. App. 225.

850. 1. *Central R., etc., Co. v. Cooper*, 95 Ga. 406.

Effect of Alleging Contract. — Where a declaration alleges a contract of shipment containing a clause limiting the liability and avers negligence in the loss of the articles shipped, and the answer alleges that the goods were lost while the carrier was exercising due care, no issue except that as to negligence is presented on the pleadings. *Wells v. Bell*, 65 Ohio St. 408.

3. Inconsistent Allegations. — A demurrer will be sustained to a declaration which alleges an agreement that the goods consigned should be delivered in accordance with the directions of the consignor and not to the consignee, and further alleges that such agreement was subject to the conditions of a written bill of lading which directed the delivery of the goods to the consignee. *Thomas v. Pennsylvania R. Co.*, (Del. 1900) 50 Atl. Rep. 235.

Description of Goods. — Where the pleading shows that the goods damaged were of one kind of material, and the bill of lading describes another though similar material, the variance is not fatal, if the defendants can show that the goods damaged are identical with the goods described in the bill of lading. *Atchison, etc., R. Co. v. Goetz, etc., Mfg. Co.*, 51 Ill. App. 151. See also *Hill v. Georgia, etc., R. Co.*, 43 S. Car. 461.

Where there Is a Special Contract, as, for instance, a contract to notify the consignee of the arrival of the goods, it should be pleaded. *Gulf, etc., R. Co. v. Darby*, (Tex. Civ. App. 1902) 67 S. W. Rep. 129.

851. 1. When Objection Should Be Taken. — In order that the defendant may take advantage of a variance between the proof and the averment, objections to such variance should be made in the trial court. *Chicago, etc., R. Co. v. Grimes*, 71 Ill. App. 397.

852. 2. Kansas City, etc., R. Co. v. Pace, 69 Ark. 256.

853. 4. Ausk v. Great Northern R. Co., 10 N. Dak. 215 [quoting 3 ENCYC. OF PL. AND PR. 853]; *Lake Erie, etc., R. Co. v. Condon*, 10 Ind. App. 536.

Delivery "to Be Forwarded." — An allegation that the plaintiff delivered the goods to a common carrier to be shipped to a certain point and therefrom "to be forwarded" is a sufficient averment on which to base such common carrier's liability for the act of a connecting carrier. *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69.

854. 1. Ausk v. Great Northern R. Co., 10 N. Dak. 215, quoting 3 ENCYC. OF PL. AND PR. 853. See also *Ft. Worth, etc., R. Co. v. McNulty*, 7 Tex. Civ. App. 321.

2. Gulf, etc., R. Co. v. Edloff, 89 Tex. 454.

Averments Held to Be Sufficient. — In *Moses v. Union Pac. R. Co.*, (Tex. Civ. App. 1897) 41 S. W. Rep. 154, both initial and connecting carriers were joined as parties defendant. It was alleged that the defendants were engaged in business as copartners and operated a line of railroad as one road and one system, that they had one agent who acted for both of the defendants, "that defendants did not safely carry and deliver said goods in pursuance of their said agreement, but so negligently and carelessly conducted

854. (16) *In Special Proceedings Given by Statute.* — See note 3.

855. 5. *Plea or Answer* — *a.* GENERAL ISSUE — *Actions ex Delicto.* — See note 2.

856. *b.* SPECIAL PLEA. — See note 2.

When Special Plea Used. — See note 3.

858. *c.* GENERAL DENIAL. — See note 4.

860. 6. *Replication or Reply.* — See note 1.

themselves and misbehaved in regard to their duties as common carriers of goods for hire that said goods were wholly lost to the plaintiff, to his damage," etc. It was held that the petition was sufficient.

Action Against One Connecting Carrier. — Allegations showing a loss or expense incurred upon the line of a connecting carrier through a negligent failure on the part of the initial carrier to make connection therewith state a good cause of action against the initial carrier. *San Antonio, etc., R. Co. v. Woodley*, 20 Tex. Civ. App. 216. *Compare Texas, etc., R. Co. v. Llano Live Stock Co.*, (Tex. Civ. App. 1896) 33 S. W. Rep. 748.

854. 3. *Louisville, etc., R. Co. v. Ft. Wayne Electric Co.*, (Ky. 1900) 55 S. W. Rep. 918. See also *Cave v. Carolina Midland R. Co.*, 53 S. Car. 496.

855. 2. *Under a General Denial* the defendant can prove the value of the goods damaged. *Galliers v. Chicago, etc., R. Co.*, 116 Iowa 319.

Under a general denial a common carrier may show that the delay complained of occurred on a connecting line, and that no liability attaches to the defendant. *Cleveland, etc., R. Co. v. Heath*, 22 Ind. App. 47.

Answer Averring Necessary Allegations of Complaint. — Where a complaint fails to aver that the carrier was a corporation or that the plaintiff was the owner of the goods injured, and omits other necessary averments, the right to complain of these omissions is waived by an answer positively alleging ownership of goods by the plaintiff and the incorporation of the defendant. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158.

856. 2. *Michalitschke v. Wells*, 118 Cal. 683.

Contract Limiting Liability. — When the answer sets out a special contract averring that the amount claimed is less than the alleged damage to the goods, it is insufficient unless it also

contains an allegation that the goods had no value whatsoever. *Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 406. See also *Anderson v. Lake Shore, etc., R. Co.*, 26 Ind. App. 196.

3. *Kansas City, etc., R. Co. v. Pace*, 69 Ark. 256; *Missouri Pac. R. Co. v. Wichita Wholesale Grocery Co.*, 55 Kan 525.

Limitation of Liability. — A stipulation between the shipper and the carrier which limits the liability to a specified sum is new matter within Code Civ. Pro. Cal., § 437, and must be specially pleaded. *Michalitschke v. Wells*, 118 Cal 683.

Time-limit Contract Must Be Reasonable. — In *Texas, etc., R. Co. v. Reeves*, 90 Tex. 499, it was held that a special plea relying on a stipulation made between the shipper and the carrier that suit must be brought within a certain time in case of loss of goods must allege facts showing such stipulation to be reasonable.

What Must Be Alleged When Joint Liability Is Pleaded. — Where a petition alleges a joint liability against connecting carriers and is a *bona fide* pleading, and one of the carriers pleads privilege on the ground of want of jurisdiction and venue, the answer should also deny the joint liability, alleging that the carrier is not liable and not a proper party, and should also set up that the averments of joint liability were pleaded in order to confer jurisdiction. *Gulf, etc., R. Co. v. Short*, (Tex. Civ. App. 1899) 51 S. W. Rep. 261.

858. 4. *Failure to Plead Matters in Avoidance.* — Limitations in a special contract with a common carrier are waived by failure to plead them. *Kansas City, etc., R. Co. v. Pace*, 69 Ark. 256.

860. 1. *Iowa* — *Matters Deemed to Be Denied.* — In Iowa, when a common carrier sets up a special contract limiting its liability, and the plaintiff in his replication fails specifically to deny the allegations of the answer, it will be

860. IV. ACTIONS FOR DELAY—*Allegations*—*Duty to Carry in Reasonable Time.*—See note 2.

861. Failure to Carry in Reasonable Time.—See note 1.

Special Damages.—See note 2.

862. V. ACTIONS FOR NEGLIGENCE OR MISFEASANCE IN DELIVERY—1. *Form of Action*—*Trover.*—See notes 1, 3.

Assumpsit.—See note 4.

863. 2. Parties.—See note 1.

867. VI. ACTIONS BASED ON ILLEGAL CHARGES—2. *Actions to Recover Penalty*—*b. NATURE AND FORM OF ACTION.*—See note 1.

869. 3. Mandamus or Injunction.—See note 4.

870. VII. ACTIONS BY CARRIER FOR NONPAYMENT OF FREIGHT—1. *Action to Recover Freight*—*a. FORM OF ACTION.*—See note 1.

deemed to be denied. *Nichols v. Chicago G. W. R. Co.*, 94 Iowa 202.

Admissible Replication.—A replication which alleges injury to cattle by reason of the manner in which they were handled is admissible when the answer sets out that they were in poor condition when shipped. *Missouri, etc., R. Co. v. Chittum*, (Tex. Civ. App. 1897) 40 S. W. Rep. 23.

Proof under General Denial.—Under a general denial ownership of the goods may be proved. *Cleveland, etc., R. Co. v. Moline Clow Co.*, 13 Ind. App. 225.

860. 2. Special Demurrer.—In an action for delay in the transportation of goods, advantage of failure to allege what was a reasonable time cannot be taken by a general demurrer. *Palmer v. Atchison, etc., R. Co.*, 101 Cal. 187. See also *Union Pac. R. Co. v. Vincent*, 58 Neb. 171.

861. 1. Unreasonable Delay.—In *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69, it was held that a statement of the date of consignment and of the date of delivery constituted a sufficient allegation of unreasonable delay.

2. Texas, etc., R. Co. v. Bigham, (Tex. Civ. App. 1902) 67 S. W. Rep. 522, in which case it was held that where goods are delivered in a depreciated condition attributable to causes for which the carrier is responsible, the damages are general and need not be specially pleaded in order to prove them; so an allegation in an action for delay of goods stating the difference between the price of goods when shipped and the price when received is sufficient.

869. 1. Demand in Action for Conversion.—Where a carrier delivers goods to the consignee after a notice from the consignor not to do so, in an action by the consignor against the carrier for conversion it is unnecessary to allege a demand for the goods by the plaintiff. *Lester v. Delaware, etc., R. Co.*, 92 Hun (N. Y.) 342. See also *Chicago, etc., R. Co. v. Fifth Nat. Bank*, 26 Ind. App. 600.

3. Theory of Case.—An action against a common carrier to recover damages for its negligence in delivering goods after a proper and timely notice from the shipper to stop them *in transitu* is founded upon the tortious act of the defendant, and not upon the contract of carriage under which the goods had been shipped. *Rosenthal v. Weir*, 170 N. Y. 148.

4. But see *Rosenthal v. Weir*, 170 N. Y. 148.

863. 1. The Holder of a Bill of Lading may maintain an action for misdelivery. *Southern R. Co. v. Atlanta Nat. Bank*, (C. C. A.) 119 Fed. Rep. 861.

867. 1. Southern R. Co. v. Wilcox, 99 Va. 394.

869. 4. Injunction.—*Southern Pac. R. Co. v. Colorado Fuel, etc., Co.*, (C. C. A.) 101 Fed. Rep. 779; *Allen v. Oregon R., etc., Co.*, (C. C. A.) 98 Fed. Rep. 16, in each of which cases it was held that injunction was not a proper remedy under the circumstances.

870. 1. When Carriers May Sue for Damages.—The carrier may also sue in its own name to recover damages to property delivered to it to be carried. *The Beaconsfield*, 158 U. S. 303.

CARRYING WEAPONS.

874. I. JURISDICTION. — See note 1.

875. II. INDICTMENT — 1. **Requisites and Sufficiency Generally.** — See notes 1, 2.

877. III. INSTRUCTIONS TO JURY. — See notes 1, 2.

874. 1. In South Carolina, under Laws 1897, 22 Stat. 423, § 2, magistrates have concurrent jurisdiction with the session's court of the offense of carrying concealed weapons, where the charge is not coupled with a count charging assault and battery with intent to kill or some other higher offense specified in the statute. *State v. McClenton*, 59 S. Car. 226.

875. 1. That Pistol Was Loaded. — An indictment for carrying a pistol, founded on Annot. Code Miss., § 1026, need not allege that the pistol was loaded. *State v. Bollis*, 73 Miss. 57.

Alternative Charge. — An information charging that the defendant unlawfully carried "on or about" his person a pistol, is bad in charging in the alternative one of two different ways of committing the offense. *Canterbery v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 522.

2. Sufficient Indictments. — A complaint charging that the defendant carried concealed about his "person" a "pestol" against the peace of the state, etc., is sufficient, since, on reading the complaint, it is impossible to doubt the words intended. *Hampton v. State*, 133 Ala. 180.

A charge that defendant "on or about the 15th day of December, 1891, * * * did then and there unlawfully carry about his person a pistol," is sufficient both as to time and essential elements of the offense. *Powell v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 286.

An information charging that the defendant "did then and there go into a ball-room and social party, and then and there unlawfully, have and carried about his person, a pistol," while insufficient to charge the carrying of a

pistol into a social gathering, charges the lesser offense. *Lomax v. State*, 38 Tex. Crim. 318.

Pleading and Proof. — A charge that defendant carried "brass knuckles" is sustained by proof that he carried knuckles composed of metal. *Louis v. State*, 36 Tex. Crim. 52.

877. 1. As to Concealment. — In a prosecution for carrying a pistol concealed, where the evidence showed that it was worn under an overcoat, but did not show whether the overcoat was opened or buttoned, the jury should have been instructed that the burden was on the defendant to rebut the presumption of concealment, and whether that presumption had been rebutted should have been left to them under proper instructions. *State v. Lilly*, 116 N. Car. 1049.

Carrying Weapon to Sell It. — Where it appeared that at the time the defendant was seen carrying the pistol he was not then *en route* from the place where he expected to sell his pistol to his home, but was going in exactly the opposite direction, a charge "that, in going to, and returning from, the place where he intended to sell the pistol, the defendant should have taken the most direct route" is not prejudicial. *Zollicoffer v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 992.

2. In Cornwell v. State, 68 Ark. 447, it is held that the court erred in giving the following instructions: "that if a man carry a pistol loaded in his pocket, not on his own premises, he is guilty of carrying a weapon," and "if you believe beyond a doubt that it was carried in a way that it could be used as a weapon as charged in the indictment, you will convict the defendant," and in refusing to instruct that "if the jury believe from the evidence that the de-

878. IV. JUDGMENT — PUNISHMENT. — See note 1.

fendant carried the pistol for the sole purpose of killing hogs, and not for use against any individual, they will acquit him."

Several Grades of Offense. — Where the indictment fails to charge the carrying of a weapon into a social gathering, but charges the lesser and included offense of carrying a weapon, an instruction which permits a conviction of the higher offense constitutes reversible error. *Lomax v. State*, 38 Tex. Crim. 318.

Instruction Not Warranted by Evidence. — Where the evidence wholly fails to show that the pistol carried could have been seen by a person standing behind the defendant by an inspection of his person for that purpose or by ordinary observation, an instruction based upon such fact is

properly refused. *Driggers v. State*, 123 Ala. 46.

878. 1. Cumulative and Excessive Sentence — Statute. — Where, in a prosecution for carrying a concealed weapon, the evidence shows circumstances of great aggravation, including a murderous assault, a judgment that the defendant "be confined in the common jail of W. County for the term of two years, and assigned to work on the public roads of F. County, the terms of this sentence to begin at the expiration" of another sentence, is not excessive and not bad because cumulative, or because it sentenced the accused to work on the roads in another county, a sentence in another county being authorized by the Laws of N. Car. (1899), c. 581, § 9. *State v. Hamby*, 126 N. Car. 1066.

CASE MADE ON APPEAL.

883. II. PURPOSE AND NECESSITY — 4. Remedy Exclusive. — See note 2.

885. Stipulation. — See note 1.

5. Effect of Omission. — See note 2.

III. CONTENTS AND SUFFICIENCY — 2. Error Must Be Shown. — See note 5.

887. See note 1.

3. Unnecessary Matters. — See note 4.

4. Exceptions. — See note 5.

888. 5. Pleadings, Orders, Etc. — See note 1.

883. 2. New York. — Exceptions based on the action of the court in refusing to dismiss a complaint and allowing an amendment thereto upon the trial cannot be considered in the absence of a "case." *Schoonmaker v. Hilliard*, 55 N. Y. App. Div. 140.

Conclusions of Law. — *Delaney v. Valentine*, 11 N. Y. App. Div. 316.

Oklahoma. — *In Criminal Cases* either a case made or a certified transcript of the record may be attached to the petition in error. *Lee v. U. S.*, 7 Okla. 558.

885. 1. Watson v. Duncan, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 447.

2. Barrus v. Wilmington, etc., R. Co., 121 N. Car. 504; *Hicks v. Westbrook*, 121 N. Car. 131; *Smith v. Smith*, 119 N. Car. 314; *Roberts v. Partridge*, 118 N. Car. 355.

5. Parsons Water Co. v. Hill, 3 Kan. App. 333; *Davis v. Ringer*, 1 Kan. App. 32; *Zucker v. Blumenthal*, (Supm. Ct. Tr. T.) 58 N. Y. Supp. 318; *Washita County v. Hubble*, 8 Okla. 169; *Thomson v. Brown*, 56 S. Car. 304; *Bowen v. Stribling*, 47 S. Car. 61; *In re Perry*, 42 S. Car. 183; *Moore v. Perry*, 42 S. Car. 369.

887. 1. Parsons Water Co. v. Hill, 3 Kan. App. 333; *Washita County v. Hubble*, 8 Okla. 169.

4. Wierichs v. Innis, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 462 [*citing* 3 ENCYC. OF PL. AND PR. 887], *affirmed* 56 N. Y. App. Div. 625; *Hammond v. Rathbone*, 113 Mich. 499; *Donai v. Luitjens*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 221; *Sickles v. Kling*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 165.

Evidence. — Only so much of the evidence should be stated as materially affects the points to be presented. *Continental Ins. Co. v. Pratt*, 8 Kan. App. 424; *Watson v. Duncan*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 447; *Firth v. Rehfeldt*, (Supm. Ct. Spec. T.) 47 N. Y. Supp. 474; *McFadyen v. Masters*, 8 Okla. 174.

The case made must not include anything which was not a part of the record of the proceedings from which the appeal is taken. *Territory v. Cooper*, 11 Okla. 699.

Transcript of Record. — The case made need not contain a certified transcript of the record. *Atchison, etc., R. Co. v. Snedeger*, 5 Kan. App. 700.

Matters Occurring Subsequent to the Service of a case made cannot be included therein. *Atchison, etc., R. Co. v. Ditmars*, (Kan. App. 1895) 42 Pac. Rep. 933.

Repeating the Title of the Cause at the head of each paper is useless and should not be allowed. *Sickles v. Kling*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 165.

A Bill of Particulars is not a part of the pleading, and unless introduced in evidence should not be included in the case on appeal. *Spies v. Michelsen*, (Supm. Ct. Tr. T.) 15 Misc. (N. Y.) 414.

5. Zucker v. Blumenthal, (Supm. Ct. Tr. T.) 58 N. Y. Supp. 318.

888. 1. Chain v. Brooks, 9 Kan. App. 123; *Gardenhire v. Burdick*, 7 Okla. 212.

Judgment. — The case made must definitely show that a judgment or final order was rendered by the trial

888. 6. Evidence. — See note 2.

All Evidence. — See note 3.

889. See note 1.

890. See notes 1, 2.

How Stated. — See note 3.

891. V. SETTLEMENT AND SERVICE—1. Generally.—See note 5.

court. *Custer County v. Moon*, 8 Okla. 205.

The Judge's Statement of Facts, in an opinion denying a motion for a new trial, may be included to show the view of the facts upon which his conclusions of law were based. *McManus v. Western Assur. Co.*, 40 N. Y. App. Div. 86.

888. 2. Rejected Evidence which could not aid the Appellate Court, the only question for review being the action of the trial court in sustaining a demurrer, need not be included. *Noble v. Frack*, 5 Kan. App. 786.

The evidence need not be set out in terms; it is sufficient if there is a clear statement of its effect. *Hubbard v. Chapman*, 28 N. Y. App. Div. 577.

Exhibits introduced in evidence, or copies thereof, should be attached to and made a part of the case. *State v. Otis*, 71 Minn. 511.

3. New Trial. — A retrial of the entire case cannot be had unless all the evidence is included. *Farmers', etc., Nat. Bank v. Davis*, 8 N. Dak. 83.

In North Dakota. — It is only in cases tried by the court without a jury that the case on appeal should contain all the evidence; in actions tried by a jury only the substance of the evidence need be stated. *Northern Pac. R. Co. v. Lake*, 10 N. Dak. 541.

889. 1. Hedges v. Polhemus, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 309; *Farmers', etc., Nat. Bank v. Davis*, 8 N. Dak. 83.

New York. — On an appeal from the decision of a referee on issues of fact the case must contain a statement that all the evidence is included. *Fred Oppermann, Jr. Brewing Co. v. Pearson*, 67 N. Y. App. Div. 98.

The requirement for a certificate that all the evidence is included in cases where the facts are to be reviewed applies only to cases tried by a judge or referee, and not to cases tried before a jury. *Gibson v. Metropolitan St. R. Co.*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 301.

890. 1. Hannon v. Holmes, 5 Kan. App. 220; *Bell v. Bell*, 60 Kan. 857, 56

Pac. Rep. 471; *Horner v. Barney*, 9 Kan. App. 882, 57 Pac. Rep. 1048.

In Oklahoma the requirement is the same. *D. County v. Wright*, 8 Okla. 190; *Washita County v. Hubble*, 8 Okla. 169.

2. Bell v. Bell, 60 Kan. 857, 56 Pac. Rep. 471; *Hannon v. Holmes*, 5 Kan. App. 220.

In Oklahoma the rule is the same. *D. County v. Wright*, 8 Okla. 190, *Washita County v. Hubble*, 8 Okla. 169.

3. Hammond v. Rathbone, 113 Mich. 499; *Donai v. Lutjens*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 221.

Where the exact words of the stenographic report in the form of questions and answers more fully present the situation the evidence may be so stated. *State v. Otis*, 71 Minn. 511.

891. 5. Kauter v. Entz, 8 Kan. App. 788; *Manley v. Park*, 61 Kan. 857, 58 Pac. Rep. 961; *Trader's Nat. Bank v. Rogers*, 60 Kan. 855, 55 Pac. Rep. 463; *Kincaid Bank v. Bronson*, 8 Kan. App. 858, 54 Pac. Rep. 504; *Union Park Land Co. v. Muret*, 57 Kan. 192; *Hughes v. Miller*, 56 Kan. 183; *Barrus v. Wilmington, etc., R. Co.*, 121 N. Car. 504; *Hicks v. Westbrook*, 121 N. Car. 131; *McNeill v. Raleigh, etc., R. Co.*, 117 N. Car. 642.

Effect of Failure. — *Barrus v. Wilmington, etc., R. Co.*, 121 N. Car. 504; *Hicks v. Westbrook*, 121 N. Car. 131; *McNeill v. Raleigh, etc., R. Co.*, 117 N. Car. 642.

The failure to serve the case on time is not cured by the trial judge subsequently settling the same. *Barrus v. Wilmington, etc., R. Co.*, 121 N. Car. 504. See also *McNeill v. Raleigh, etc., R. Co.*, 117 N. Car. 642.

In Kansas and Oklahoma where the case is not served in time the petition in error will be dismissed. See *Manley v. Park*, 61 Kan. 857, 58 Pac. Rep. 961; *Hughes v. Miller*, 56 Kan. 183; *Day County v. Hubble*, 8 Okla. 209.

In Minnesota a proposed case must be served within twenty days after trial, unless the time is extended by a stipulation or order of court. *State v. Powers*, 69 Minn. 429.

892. *Waiver.* — See note 1.

Service. — See note 2.

893. *3. When Extension Authorized.* — See note 3.

Computation of Time. — In *Kansas* the time for making a case made dates from the entry of the judgment, *Kearny County v. Rush*, 58 Kan. 816, 50 Pac. Rep. 874.

Striking from Files. — Where it affirmatively appears that the case on appeal was not served in time it may be stricken from the files. *Hicks v. Westbrook*, 121 N. Car. 131.

Who Must Be Served. — Service must be made upon all the parties who would be affected by a modification or reversal of the judgment appealed from. *Lapham v. Bailey*, 61 Kan. 861, 60 Pac. Rep. 743; *Concordia First Nat. Bank v. Pulsifer*, 7 Kan. App. 813, 53 Pac. Rep. 771; *Hughes v. Miller*, 56 Kan. 183; *Sheridan v. Snyder*, 4 Kan. App. 214.

The rule does not include persons named in a pleading as parties, but who have never become such by service of process or appearance. *Logan County v. Harvey*, 5 Okla. 468.

Where the interests of several parties are identical and they are represented by the same counsel, service of the case on one will suffice for all. See *Shober v. Wheeler*, 119 N. Car. 471.

892. 1. *Willis v. Atlantic, etc., R. Co.*, 119 N. Car. 718.

2. *Smith v. Smith*, 119 N. Car. 314; *Smith v. Smith*, 119 N. Car. 311; *Roberts v. Partridge*, 118 N. Car. 355, *McNeill v. Raleigh, etc., R. Co.*, 117 N. Car. 642.

In *North Carolina* the case must be served by the sheriff unless service be accepted in writing and made a part of the record. *Herbin v. Wagoner*, 118 N. Car. 656.

Finding of Service. — Where it affirmatively appears in the record that a case was not served within the time limited, a certificate of the judge that it was "duly served in due time" is insufficient. *Day County v. Hubble*, 8 Okla. 209.

893. 3. *Schweitzer v. Wichita*, 8 Kan. App. 859, 54 Pac. Rep. 321.

When Order Must Be Made. — *Abel v. Blair*, 3 Okla. 399.

New York. — In *New York* the court from whose judgment the appeal is taken may extend the time prescribed

by the rules for serving a case, or permit a party to serve a case after his time has expired. *Odell v. McGrath*, 16 N. Y. App. Div. 103.

Time Limited by Prior Order. — If the time limited by an order of the court for serving a case has expired, the court cannot thereafter make another order granting a further extension. *Wadsworth v. Beardsley*, 64 Kan. 885, 67 Pac. Rep. 457; *Brown v. Crabtree*, (Kan. 1897) 47 Pac. Rep. 525; *Garden City v. Merchants', etc., Nat. Bank*, 8 Kan. App. 785; *Noyes v. Tootle*, 8 Okla. 505; *Polson v. Purcell*, 4 Okla. 93; *U. S. v. Choctaw, etc., R. Co.*, 3 Okla. 404; *Abel v. Blair*, 3 Okla. 399.

Effect of Stay. — A stay of proceedings granted at the time of the decision of the cause enlarges the time for preparing and serving the case so as to include the whole period covered by the stay. *State v. Searle*, 81 Minn. 467.

Stipulation of Counsel. — The statutory period for serving a case made cannot be extended by stipulation of counsel without an order of court. *Horne v. Christy*, 4 Okla. 553.

Form of Order — Making and Serving. — An order extending the time to "make" a case does not impliedly extend the time to "serve" the same. *Chicago, etc., R. Co. v. Guild*, 8 Kan. App. 368.

Notice of an Application to extend the time for making and serving a case made need not be given to the adverse party. *Clark v. Ford*, 7 Kan. App. 332.

Computing Time. — An order extending the time to make and serve a case "until" a certain day includes the day named. *Consolidated Kansas City Smelting, etc., Co. v. Peterson*, 8 Kan. App. 316. Compare *Garden City v. Merchants', etc., Nat. Bank*, 8 Kan. App. 785, construing an order extending the time "to" a certain day, and holding that "to," being used in the sense of "until," does not include the day named.

Sundays. — Where the last day of the period within which an extension may be granted falls on Sunday the order may be made on the day following. *Scruton v. Hall*, 6 Kan. App. 714.

894. 4. Proposal of Amendments by Appellee. — See note 1.

Time. — See note 4.

895. 5. Settlement — *a.* GENERALLY. — See notes 1, 2.**896. Where Parties Disagree.** — See note 1.**898. *b.* TIME TO SETTLE.** — See note 1.

894. 1. The Record Must Show that the appellee made or waived the suggestion of amendment. *Atchison, etc., R. Co. v. Ditmars*, (Kan. App. 1895) 42 Pac. Rep. 933.

4. Shortening Time. — A judge may make an order at chambers shortening the time of a prior order which inadvertently allowed a period extending beyond the time for taking an appeal. *Files v. Baldwin*, 9 Kan. App. 425.

895. 1. Kincaid Bank v. Bronson, 8 Kan. App. 858, 54 Pac. Rep. 504.

In North Carolina where the case is served but not presented to the judge for settlement the court may take the appellant's statement as modified by the appellee's exceptions as the case on appeal, or remand the case for settlement, or disregard the case and affirm the judgment if no error appears on the face of the record proper. *Stevens v. Smathers*, 123 N. Car. 497, *per Clark, J.*, in which case the case was remanded for settlement.

2. Additional Amendments. — The judge cannot at the instance of one party in settling a case add any further amendments than those previously proposed and accepted without due notice to the other party. *Watkins v. La Mar*, 10 Kan. App. 226.

In North Dakota — **Settlement by Supreme Court.** — The Supreme Court has authority to settle a case where the trial judge has refused to settle the same "in accordance with the facts;" but this authority will not be exercised unless such refusal is clearly proved. *Taylor v. Miller*, 10 N. Dak. 361.

896. 1. Notice of Settlement, unless waived by the adverse party, must be given. *Rhoades v. Rhoades*, 6 Kan. App. 739.

No Notice. — *Christie v. Carter*, 56 Kan. 166; *Sheridan v. Snyder*, 4 Kan. App. 214; *Missouri, etc., R. Co. v. Greenwood*, 1 Kan. App. 330.

Where no notice is given of settlement and the record does not show that the parties or their counsel were present, or what disposition was made of the amendments suggested by them, the case is not properly settled. *Ne-*

braska L. & T. Co. v. Jones, (Kan. App. 1898) 55 Pac. Rep. 1097.

Where Notice Immaterial. — Where the certificate of the judge states that no amendments were suggested and that the parties appeared and consented to the settlement of the case, it is immaterial that the record fails to show notice of the time and place of settlement. *Attica State Bank v. Benson*, 8 Kan. App. 566.

Where the defendant in error suggests amendments waiving notice of settlement in case they are accepted, and it appears that they were accepted and incorporated into the case made, a failure to give notice is immaterial. *Symms Grocer Co. v. Burnham*, 5 Okla. 222.

Where after the time for suggesting amendments has expired counsel stipulate in writing that the case as made may be submitted for settlement and that notice thereof is waived, the case may be settled and signed without the presence of the parties so stipulating or notice having been given. *Phillips v. Love*, 57 Kan. 828, *reversing* 4 Kan. App. 443.

What Record Should Show. — *Douglas v. Stewart*, 8 Kan. App. 856; *Atchinson, etc., R. Co. v. Ditmars*, (Kan. App. 1895) 42 Pac. Rep. 933; *Missouri, etc., R. Co. v. Greenwood*, 1 Kan. App. 330.

Waiver of Notice of the time of settlement may be shown by evidence outside the record. *McDonald v. Swisher*, 57 Kan. 205.

The Presence of an Attorney at the time of settlement of a case may be shown by evidence *aliunde*. *Clafin Bank v. Rowlinson*, 2 Kan. App. 82.

898. 1. Rhoades v. Rhoades, 6 Kan. App. 739; *Phelps, etc., Windmill Co. v. Deming*, 6 Kan. App. 502; *McDonald v. Beatty*, 9 N. Dak. 293; *Blanchard v. U. S.*, 6 Okla. 587; *Sigman v. Poole*, 5 Okla. 677.

Premature Settlement. — The judge has no authority to settle a case without allowing the statutory period for suggesting amendments. *Mauch Chunk First Nat. Bank v. Valley State Bank*, 61 Kan. 858, 59 Pac. Rep. 335.

899. *c.* ORDER EXTENDING TIME. — See note 1.

900. VI. AUTHENTICATION — 1. Signature by Trial Judge. — See note 4.

901. 2. Signature by Successor. — See note 1.

902. 4. Certificate. — See note 2.

Where no amendments are suggested and the correctness of the case made is not disputed, the fact that it was settled before the time limited for suggesting amendments had expired is not ground for dismissal. *Haseltine v. Gilliland*, 2 Kan. App. 456.

Extending Time. — The court cannot extend the time for settlement against the objection of the adverse party except for good cause shown. *McDonald v. Beatty*, 9 N. Dak. 293.

Minnesota. — The case must be settled within fifteen days after the expiration of the time allowed for amendment. *State v. Searle*, 81 Minn. 467.

By Ex-judge. — *New York L. Ins. Co. v. Duncan*, 63 Kan. 880, 64 Pac. Rep. 1036; *Missouri Pac. R. Co. v. Preston*, (Kan. 1901) 63 Pac. Rep. 444; *Columbia Mfg. Co. v. Stoddard Mfg. Co.*, 61 Kan. 640 [reversing 8 Kan. App. 690]; *Farmers Alliance Ins. Co. v. Nichols*, 6 Kan. App. 923, 50 Pac. Rep. 940; *Waterfield v. Hutchinson Nat. Bank*, 6 Kan. App. 743.

The cases of *Stoddard Mfg. Co. v. Columbia Mfg. Co.*, 8 Kan. App. 690, and *National Mortg., etc., Co. v. St. John, etc., Co.*, 8 Kan. App. 554, construing this statute, hold that the judge may also settle and sign a case if his term of office expires during a period definitely fixed for making and serving the same; but the former case has been expressly and the latter impliedly overruled in *Columbia Mfg. Co. v. Stoddard Mfg. Co.*, 61 Kan. 640, *supra*.

In *Oklahoma* if the term of the judge expires during a period definitely fixed for making and serving a case he may settle and sign the same, although the time for settling and signing was not definitely fixed. *Barnes v. Lynch*, 9 Okla. 11.

899. 1. By Stipulation — *Kansas*. — *Phelps, etc., Windmill Co. v. Deming*, 6 Kan. App. 502.

Judicial Order. — *Blanchard v. U. S.*, 6 Okla. 587.

A *Judge pro Tem.* cannot extend the time for making and serving a case after the expiration of his term of office. *Atchison, etc., R. Co. v. Leeman*, 5 Kan. App. 804.

Oklahoma. — After the time limited by a prior order has expired the court cannot make another order granting a further extension of time for settling a case. *Day County v. Hubble*, 8 Okla. 209; *Blanchard v. U. S.*, 6 Okla. 587; *Sigman v. Poole*, 5 Okla. 677.

900. 4. Carr v. Butler, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 657; *Vandenberg v. Mathews*, 52 N. Y. App. Div. 616; *Rothschild v. Rio Grande Western R. Co.*, 9 N. Y. App. Div. 406.

Effect of Signature. — The signature of the judge cannot cure a defect in the case made; it must stand on its own merits. *Wilson v. Willey*, 1 Kan. App. 427.

901. 1. Contra. — In *Kansas*, where the trial judge dies, or his term expires before settlement, his successor has no authority to settle and sign the case. *Parrault v. Marsant*, 9 Kan. App. 419; *Gertz v. Beck*, 7 Kan. App. 654.

902. 2. Hedges v. Polhemus, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 309.

The certificate of the judge must show affirmatively that he has settled the case. *Mudge v. Kansas Nat. Bank*, 56 Kan. 353; *Atchison, etc., R. Co. v. Benthien*, 7 Kan. App. 637; *Reed v. Fisher*, 7 Kan. App. 813, 54 Pac. Rep. 802; *Mutual Ben. L. Ins. Co. v. Sackett*, (Kan. App. 1896) 43 Pac. Rep. 816.

A statement in the judge's certificate that a case was settled and signed "upon due notice" is sufficiently *prima facie* to show that notice was given. *Westchester F. Ins. Co. v. Coverdale*, 9 Kan. App. 651.

The statements of the judge's certificate are merely to show that the case was properly settled; all other statements in or following the certificate will be regarded as surplusage. *Winfield v. Peeden*, 8 Kan. App. 671.

The certificate of the judge need not make any reference to what evidence is included. *Atchison, etc., R. Co. v. Snedeger*, 5 Kan. App. 700.

Duty of Judge. — In settling a case, whether amendments have been suggested or not, it is the duty of the judge to examine the case and see that it speaks the truth, and his certificate

- 902.** 5. Attestation of Clerk. — See note 3.
VII. REMEDY FOR REFUSAL TO ACT. — See note 5.
903. **VIII. RESETTLEMENT BY TRIAL JUDGE.** — See note 2.
 Decision on Motion Appealable. — See note 3.
IX. PRINTING CASE. — See note 5.
904. **X. FILING.** — See note 1.
 Where Filed. — See note 2.
905. **XII. AMENDMENT AND CORRECTION — 1. By Trial Judge.**
 — See notes 2, 3.
906. **2. By Appellate Court.** — See note 1.
3. Proceedings to Bring up More Perfect Case. — See note 4.

must show that this has been done. *Mutual Ben. L. Ins. Co. v. Sackett*, 5 Kan. App. 660.

Impeachment. — The certificate of the trial judge is conclusive where it is not shown to be intentionally false, fraudulently prepared, or that there was want of jurisdiction. *Noyes v. Tootle*, 8 Okla. 505.

902. 3. *Kincaid Bank v. Bronson*, 8 Kan. App. 858, 54 Pac. Rep. 504.

5. *Kaeppler v. Pollock*, 8 N. Dak. 59.

903. 2. *Sternfels v. Metropolitan St. R. Co.*, 69 N. Y. App. Div. 609; *Deveney v. Head*, 64 N. Y. App. Div. 615; *Csatlos v. Metropolitan St. R. Co.*, 63 N. Y. App. Div. 271.

3. *Csatlos v. Metropolitan St. R. Co.*, 63 N. Y. App. Div. 271; *Zimmer v. Metropolitan St. R. Co.*, 28 N. Y. App. Div. 504. See also *Foster v. Standard Nat. Bank*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 8.

5. **The Case Must Be Printed as Settled**, without alteration or omission. *McCready v. Lindenborn*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 606.

904. 1. *Carr v. Butler*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 657; *Vandenbergh v. Mathews*, 52 N. Y. App. Div. 616; *Rothschild v. Rio Grande Western R. Co.*, 9 N. Y. App. Div. 406.

2. *Kincaid Bank v. Bronson*, 8 Kan. App. 858, 54 Pac. Rep. 504.

905. 2. *Davis v. Ringer*, 1 Kan. App. 32.

Everything intended to be incorporated into the case made must precede the signature of the judge. *Hutchinson First Nat. Bank v. Kansas Grain Co.*, 60 Kan. 30; *Kelley v. Stevens*, 57 Kan. 506.

3. *Atchison, etc., R. Co. v. Anderson*, 5 Kan. App. 707.

Where the trial judge ascertains that the case made does not correctly state

the occurrences upon the trial he may, upon notice to the parties or their attorneys, make the necessary corrections. *McManus v. Western Assur. Co.*, 40 N. Y. App. Div. 86.

In Oklahoma the case made as settled and signed by the trial judge and attested by the clerk of his court cannot thereafter be amended, even upon notice to the adverse party. *Grand Lodge v. Furman*, 6 Okla. 649.

Alteration by Counsel. — After the case is settled by the judge it becomes a judicial record, and counsel have no right to alter it in any particular. *McCready v. Lindenborn*, (Supm. Ct. Tr. T.) 24 Misc. (N. Y.) 606.

906. 1. *Cloud County v. Citizens' Nat. Bank*, 6 Kan. App. 330; *Atchison, etc., R. Co. v. Anderson*, 5 Kan. App. 707, *per Schoonover, J.*; *Davis v. Ringer*, 1 Kan. App. 32; *Noyes v. Tootle*, 8 Okla. 505; *Gardenhire v. Burdick*, 7 Okla. 212.

4. **Remitting for Resettlement.** — In remitting a case for resettlement the Appellate Court cannot direct the manner in which it shall be settled. *Kammermann v. Eisner, etc., Co.*, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 405, *per Schuchman, J.*; *Mason v. Tietig*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 557. See also *Zimmer v. Metropolitan St. R. Co.*, 28 N. Y. App. Div. 504.

When Motion Granted. — When the case does not correctly state the facts as they occurred on the trial, or anything material to a proper hearing in the Appellate Court has been omitted, the case will be remitted for resettlement. *Cooley v. New York, etc., Bridge*, 36 N. Y. App. Div. 520; *Jaeger v. Koenig*, (N. Y. City Ct. Gen. T.) 28 Misc. (N. Y.) 436; *Kammermann v. Eisner, etc., Co.*, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 405; *Foster v.*

909. XIII. CONSTRUCTION OF CASE — 2. Conflict with Record.
— See note 3.

Standard Nat. Bank, (Supm. Ct. App. *v. Turl*, (C. Pl. Gen. T.) 14 Misc. (N. T.) 21 Misc. (N. Y.) 8. Y.) 637. *Compare* *Hix v. Edison Electric Light Co.*, 12 N. Y. App. Div. 627.
Time for Motion. — A motion is too late after the case has been argued and decided in the Appellate Court. **909. 3. Day County v. Hubble**, 8 Kettle Okla. 209.

CEMETERIES AND BURIALS.

910. I. LAYING OUT AND ENLARGEMENT OF CEMETERIES —
Petition. — See note 1.

911. II. ACTIONS CONCERNING CEMETERIES — 1. Ejectment and
Trespass. — See notes 1, 2, 3.

2. Damages to Graves and Monuments. — See notes 6, 7.

III. ACTIONS CONCERNING BODY — 1. At Law. — See
 notes 8, 9.

912. See note 1.

2. Proceedings in Equity. — See note 2.

IV. INDICTMENTS — 1. Generally. — See note 3.

910. 1. Compare *In re Highland Cemetery Co.*, 4 Pa. Dist. 653, holding that an application for a charter for a cemetery corporation need not specifically locate the ground intended to be used, and that if after incorporation the location conflicts with statutory regulations injunction would be the proper remedy.

In *New Jersey* the application for the location or enlargement of a cemetery must be accompanied by a descriptive map of the premises proposed to be occupied. See *Burdette v. Fairview*, 66 N. J. L. 523.

911. 1. Trustees. — See *Packard v. Old Colony R. Co.*, 168 Mass. 92, which was a petition for assessment of damages against a railroad company for the occupation of cemetery property.

2. Description of Property. — A complaint in an action of trespass is sufficient if it describes the *locus in quo* so that the defendant is not misled. *Bessemer Land, etc., Co. v. Jenkins*, 111 Ala. 135.

3. *Bonham v. Loeb*, 107 Ala. 604; *Packard v. Old Colony R. Co.*, 168 Mass. 92.

6. *Jacobus v. Children of Israel*, 107 Ga. 518.

7. *Jacobus v. Children of Israel*, 107 Ga. 518.

8. Replevin for a Dead Body does not lie after burial. *Buchanan v. Buchanan*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 261.

9. An Action for Damages may be maintained by the next of kin against cemetery authorities for refusing to receive a body entitled to interment. *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884.

912. 1. *Palenzke v. Bruning*, 98 Ill. App. 644; *Burney v. Children's Hospital*, 169 Mass. 57; *Doxator v. Chicago, etc., R. Co.*, 120 Mich. 596, *per Montgomery, J.*; *Foley v. Phelps*, 1 N. Y. App. Div. 551. See also *Beam v. Cleveland, etc., R. Co.*, 97 Ill. App. 24, in which case it was held that the next of kin could recoup for injury to a corpse in an action by a common carrier for the cost of its transportation.

2. *Buchanan v. Buchanan*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 261, holding that all controversies arising after burial concerning the possession or disposition of bodies should be brought in equity.

3. See *People v. Baumgartner*, 135 Cal. 72; *State v. Schaffer*, 95 Iowa 379; *State v. Fox*, 148 Mo. 517, 136 Mo. 139; *Wehle v. U. S. Mutual Acc. Assoc.*, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 36; *State v. McLean*, 121 N. Car. 589, which cases were decided under statutes.

An Attempt to Dispose of a Dead Body for gain and profit is a misdemeanor at common law and indictable without statutory authority. *Thompson v. State*, 105 Tenn. 177.

CERTIFICATE OF DOUBT OR PROBABLE CAUSE.

914. II. CERTIFICATE IN GENERAL — 1. Who May Grant. —
See note 2.

915. 3. When It Will Be Granted. — See note 2.

916. 4. When It Will Be Denied. — See note 1.

917. III. CERTIFICATE ON APPEAL — In Capital Cases. — See note 1.

In Other Cases. — See note 2.

914. 2. In California the certificate may be granted by the trial judge, or by a justice of the Supreme Court in case the trial judge shall refuse or neglect to pass upon the application, *People v. Clark*, 125 Cal. 251; *People v. Durrant*, 119 Cal. 54, 201.

In New York the application should ordinarily be made to a justice of the Supreme Court in the district where the action is pending. *People v. Hall*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 479, *per Titus, J.*

Absence of Trial Judge. — In *People v. Clark*, 125 Cal. 251, where, on account of the absence of the trial judge on vacation an application for the certificate was made to the Supreme Court, the court declined to grant the certificate, but made an order staying proceedings until the return of the trial judge, or until some other judge of the same court appointed in his place could pass on the application.

Appeals from Orders after Judgment. — Pen. Code Cal., § 1243, authorizing a certificate of probable cause to be signed by a single judge or justice of the Supreme Court, applies only to appeals from judgments; in cases of appeals from orders after judgment the application should be made to the Appellate Court. *People v. Ross*, 135 Cal. 59, *per Beatty, J.*

915. 2. Positive Conclusion Unnecessary. — *People v. Bushnell*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 452; *People v. Hall*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 479; *People v. Valentine*, (Supm.

Ct. Spec. T.) 19 Misc. (N. Y.) 555; *People v. Stephenson*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 141.

916. 1. When Refusal Warranted. — The application should not be denied unless the judge is satisfied that the error complained of could not in any way have prejudiced the defendant. *People v. Valentine*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 555, *per Truax, J.*

Where the rights of the defendant appear to have been carefully protected and no error was committed on the trial, the application will be denied. *People v. Moore*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 168.

Harmless Error. — The certificate will not be granted on account of a technical error which could not possibly have prejudiced the defendant's case. *People v. Doody*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 463.

After Order for New Trial. — Where on defendant's own motion a new trial was ordered, he is not thereafter entitled to a certificate of probable cause on the theory that the court should have gone further and ordered his acquittal. *People v. Shields*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 256.

The Remedy for a Refusal of the certificate is not by appeal, but by renewing the application before a justice or justices of the Supreme Court. *People v. Durrant*, 119 Cal. 201, *per Beatty, J.*

917. 1. Contra. — See *People v. Durrant*, 119 Cal. 201, *per Beatty, J.*

2. See *People v. Clark*, 125 Cal. 251.

CERTIFIED CASES.

932. I. IN FEDERAL COURTS — 1. History of Statutes — Circuit Courts of Appeals Act. — See note 3.

938. 2. Under Acts of 1802 and 1872 — j. FORM OF CERTIFICATE — Nature of Question. — See note 3.

940. 3. Under Circuit Courts of Appeals Act — b. QUESTIONS CERTIFIED BY CIRCUIT COURT OF APPEALS. — See note 2.

941. Form of Certificate. — See note 3.

943. II. CERTIFICATE OF IMPORTANCE — 1. Introductory. — See note 1.

932. 3. Criminal Cases. — The judiciary act of March 3, 1891, repeals Rev. Stat. U. S., §§ 651, 697, providing for a review in the Supreme Court of criminal cases on a certificate of division of opinion. *U. S. v. Hewecker*, 164 U. S. 46; *U. S. v. Rider*, 163 U. S. 132.

938. 3. Contra under Act March 3, 1891. — *U. S. v. Hewecker*, 164 U. S. 46; *U. S. v. Rider*, 163 U. S. 132.

940. 3. Certification Discretionary. — The certification of questions of law by the Circuit Court of Appeals to the Supreme Court for instruction is a discretionary matter with the court, to be exercised upon its own motion, and cannot be demanded as a matter of right by a party to the action. *Andrews v. National Foundry, etc., Works*, (C. C. A.) 77 Fed. Rep. 774; *Louisville, etc., R. Co. v. Pope*, (C. C. A.) 74 Fed. Rep. 1.

Certifying Whole Case. — The Supreme Court will not answer a question certified which in effect seeks a decision of the whole case. *Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, 171 U. S. 55; *U. S. v. Union Pac. R. Co.*, 168 U. S. 505; *Warner v. New Orleans*, 167 U. S. 467; *Cross v. Evans*, 167 U. S. 60; *Graver v. Fautrot*, 162 U. S. 435.

941. 3. Graver v. Fautrot. 162 U. S. 435.

The certificate should be framed so as to present only the specific question upon which the certifying court is in doubt. *Sigafus v. Porter*, (C. C. A.) 85 Fed. Rep. 689.

The Certificate Must Present Only Issues of Law, which must be clearly and

distinctly stated so that they may be determined without reference to other issues of law involved, and they must not be so framed as practically to bring up the whole case for review. *U. S. v. Union Pac. R. Co.*, 168 U. S. 505; *McHenry v. Alford*, 168 U. S. 651; *Warner v. New Orleans*, 167 U. S. 467; *Cross v. Evans*, 167 U. S. 60; *Graver v. Fautrot*, 162 U. S. 435.

Statement of Facts. — The rule that the certificate "shall contain a proper statement of the facts on which such question or proposition of law arises," refers only to the fundamental and not to evidential facts. *Sigafus v. Porter*, (C. C. A.) 85 Fed. Rep. 689.

943. 1. Indiana. — Where a question of law is presented to the Appellate Court upon which that court is of the opinion that a rule previously announced by the Supreme Court should be changed, it may certify the case to the Supreme Court for its opinion recommending the change. See *Western Union Tel. Co. v. Ferguson*, 26 Ind. App. 213.

Division. — Where the justices of the Appellate Court qualified to sit upon the hearing of a question presented to them are equally divided, the question will be certified to the Supreme Court. *Hudson v. Wood*, (Ind. App. 1899) 52 N. E. Rep. 612.

Iowa. — *Johnson v. Marshall*, (Iowa 1899) 80 N. W. Rep. 395. See also *Johnson v. Singleton*, (Iowa 1899) 80 N. W. Rep. 394; *Connor v. Bennke*, 100 Iowa 748; *Smith v. Smith*, 99 Iowa 747; *Powers v. Illinois Cent. R. Co.*, 97 Iowa 736; *Tucker v. Anderson*, 97

945. 2. Questions of Fact. — See notes 1, 2.

3. Abstract Questions. — See note 3.

Iowa 452; *Estey v. Yetmeir*, 96 Iowa 733.

Louisiana. — See *Pugh v. St. Louis, etc.*, R. Co., 50 La. Ann. 1378, *citing* Const. La. (1898), art. 101.

New Jersey. — In New Jersey a Circuit Court may certify questions of law to the Supreme Court for an advisory opinion. See *Holler v. Ross*, 67 N. J. L. 60; *Shepard, etc.*, *Lumber Co. v. Burroughs*, 62 N. J. L. 469; *Murray v. Paterson R. Co.*, 61 N. J. L. 301.

New York. — Under Code Civ. Pro. N. Y., §§ 190, 191, appeals may, in certain cases, be taken to the Court of Appeals when the Appellate Division shall allow the same and certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals. See *Steinway v. Von Bernuth*, 167 N. Y. 498; *Porter v. International Bridge Co.*, 163 N. Y. 79; *Matter of Westerfield*, 163 N. Y. 209; *Commercial Bank v. Sherwood*, 162 N. Y. 310; *Devlin v. Hinman*, 161 N. Y. 115; *Reed v. McCord*, 160 N. Y. 330; *Matter of Robinson*, 160 N. Y. 448; *Hearst v. Shea*, 156 N. Y. 169; *Schenck v. Barnes*, 156 N. Y. 316; *Baxter v. McDonnell*, 154 N. Y. 432; *Grannan v. Westchester Racing Assoc.*, 153 N. Y. 449.

Rhode Island. — Under Gen. Laws R. I., c. 238, § 9, demurrers going to the substance of the cause may be certified from the Common Pleas Division to the Appellate Division, but demurrers relating only to formal defects cannot be so certified. *Miller v. Boyden*, 22 R. I. 441.

Texas. — Under Rev. Stat. Texas, §§ 1040, 1041, a certificate of dissent is authorized only where the case has been finally settled. *Johnson v. Portwood*, 89 Tex. 235.

A certificate of dissent cannot be demanded as a matter of right in cases where the jurisdiction of the Court of Appeals is final. *McCormick Harvesting Mach. Co. v. Timmons*, (Tex. Civ. App. 1897) 39 S. W. Rep. 384.

On a certificate of dissent the Supreme Court has no jurisdiction to decide any question except that upon which the judges of the Court of Appeals have disagreed. *Eustis v. Henrietta*, 90 Tex. 468; *Classen v. Elmen-dorf*, 90 Tex. 204.

Wisconsin. — Under Laws Wis. (1895),

c. 215, § 1, no appeal shall be taken to the Supreme Court from a judgment where the amount involved is less than \$100, unless the trial judge shall certify that the decision of the case necessarily involves a decision of some question of law of such doubt and difficulty as to necessitate a decision thereof by the Supreme Court. *State v. Kellogg*, 97 Wis. 532; *Burkhardt v. Elgee*, 93 Wis. 29. See also *Field v. Elroy*, 99 Wis. 412; *Dowling v. Lancashire Ins. Co.*, 97 Wis. 50; *Burkhardt v. Elgee*, 95 Wis. 375; *Independence Creamery Co. v. Lockway*, 94 Wis. 148; *Leppla v. Reed*, 94 Wis. 307.

945. 1. Pugh v. St. Louis, etc., R. Co., 50 La. Ann. 1378; *Holler v. Ross*, 67 N. J. L. 60; *Shepard, etc.*, *Lumber Co. v. Burroughs*, 62 N. J. L. 469; *Murray v. Paterson R. Co.*, 61 N. J. L. 301; *Matter of Westerfield*, 163 N. Y. 209; *Mann v. Dublin Cotton Oil Co.*, 92 Tex. 377.

Sufficiency of Evidence. — *Murray v. Paterson R. Co.*, 61 N. J. L. 301.

Excessive Damages. — Whether the damages assessed by a jury are excessive, is a question of fact and cannot be certified. *Murray v. Paterson R. Co.*, 61 N. J. L. 301.

3. Tucker v. Anderson, 97 Iowa 452; *Stern v. Sample*, 96 Iowa 341; *Brown v. Lloyd*, (Iowa 1897) 73 N. W. Rep. 604; *Bunn v. New York, etc., R. Co.*, 65 N. J. L. 372; *Evans v. Daniel*, 94 Tex. 281; *Mann v. Dublin Cotton-Oil Co.*, 91 Tex. 617, 92 Tex. 377; *Allen v. Tyson-Jones Buggy Co.*, 91 Tex. 22; *Cleveland v. Carr*, 90 Tex. 393; *Dowling v. Lancashire Ins. Co.*, 97 Wis. 50; *Burkhardt v. Elgee*, 95 Wis. 375; *Independence Creamery Co. v. Lockway*, 94 Wis. 148; *Leppla v. Reed*, 94 Wis. 307.

Reference to Brief. — The certificate must contain within itself the statement of facts upon which the question of law arose; it is not sufficient for it to refer to a brief in which the statement is contained. *Buie v. Chicago, etc., R. Co.*, 94 Tex. 566.

3. Brown v. Lloyd, (Iowa 1897) 73 N. W. Rep. 604; *Steinway v. Von Bernuth*, 167 N. Y. 498; *Matter of Robinson*, 160 N. Y. 448; *Schenck v. Barnes*, 156 N. Y. 316; *Hearst v. Shea*, 156 N. Y. 169; *Baxter v. McDonnell*, 154 N. Y. 432; *Grannan v. Westchester Racing Assoc.*, 153 N. Y. 449; *Evans v. Daniel*,

946. 4. Whole Case. — See note 1.

947. 6. Time to Procure Certificate. — See note 2.

948. 8. Form of Certificate. — See note 1.

950. III. EXCEPTIONS ORDERED HEARD AT GENERAL TERM — NEW YORK PRACTICE — 1. Introductory. — See note 3.

954. IV. TO SECURE UNIFORMITY OF DECISION. — See note 2.

955. When Duty of Court to Certify. — See note 2.

94 Tex. 281; Berlin Iron Bridge Co. v. San Antonio, 92 Tex. 388; Roy v. Whitaker, 92 Tex. 346; Mann v. Dublin Cotton-Oil Co., 91 Tex. 617; Cleveland v. Carr, 90 Tex. 393; Missouri, etc., R. Co. v. Belcher, 88 Tex. 549. See also Allen v. Tyson-Jones Buggy Co., 91 Tex. 22; State v. Hickok, 90 Wis. 161.

Texas. — Rev. Stat. Tex. (1895), art. 1043, requires the court to certify "the very question to be decided." Evans v. Daniel, 94 Tex. 281; Galveston, etc., R. Co. v. Zantlinger, 92 Tex. 365; Roy v. Whitaker, 92 Tex. 346; Mann v. Dublin Cotton Oil Co., 91 Tex. 617; Missouri, etc., R. Co. v. Belcher, 88 Tex. 549.

Relevancy of Questions. — The certificate must state that the questions certified are involved in the case. Brown v. Lloyd, (Iowa 1897) 73 N. W. Rep. 604; Connor v. Bennke, 100 Iowa 748; Smith v. Smith, 99 Iowa 747; Tucker v. Anderson, 97 Iowa 452; Estey v. Yetmeir, 96 Iowa 733.

946. 1. Mann v. Dublin Cotton-Oil Co., 91 Tex. 617; Bassett v. Sherrod, 89 Tex. 272.

Several Questions. — Wettermark v. Campbell, 93 Tex. 517.

947. 2. Illinois. — Kirkwood v. Steele, 168 Ill. 177; West Chicago Park Com'r's v. Kincade, 64 Ill. App. 113.

Iowa. — Powers v. Illinois Cent. R. Co., 97 Iowa 736.

New York. — In certifying cases from the Appellate Division to the Court of Appeals application should be made at the term at which the order or judgment appealed from was made or at the next succeeding term. Porter v. International Bridge Co., 163 N. Y. 79.

Texas. — A Certificate of Dissent in cases where the decision of the Court of Appeals is final will not be granted after a motion for rehearing has been acted upon. McCormick Harvesting Mach. Co. v. Timmons, (Tex. Civ. App. 1897) 39 S. W. Rep. 384.

948. 1. Johnson v. Singleton, (Iowa 1899) 80 N. W. Rep. 394; Sloss v.

Bailey, 104 Iowa 696; Ramsey Co. v. Robert P. Lewis Co., 77 Minn. 317.

The certificate must state the facts upon which the question of law arose so that the court may determine it from the statement alone without reference to the record. Dowling v. Lancashire Ins. Co., 97 Wis. 50; Burkhardt v. Elgee, 95 Wis. 375; Independence Creamery Co. v. Lockway, 94 Wis. 148; Leppa v. Reed, 94 Wis. 307.

New York. — A question certified from the Appellate Division to the Court of Appeals will not be considered when presented in terms admitting of one answer under one set of circumstances and a different answer under another. Schenck v. Barnes, 156 N. Y. 316; Hearst v. Shea, 156 N. Y. 169; Grannan v. Westchester Racing Assoc., 153 N. Y. 449.

Each question certified to the Court of Appeals by the Appellate Division should be separately stated, so that it can be answered yes or no. Devlin v. Hinman, 161 N. Y. 115.

Only the Question Certified will be considered. Grannan v. Westchester Racing Assoc., 153 N. Y. 449; Galveston, etc., R. Co. v. Jackson, 92 Tex. 638.

Where a case is certified under Code Civ. Pro. N. Y., § 191, it opens up the whole case for review so far as questions of law are presented by the record. Commercial Bank v. Sherwood, 162 N. Y. 310.

950. 3. See Battersby v. Collier, 34 N. Y. App. Div. 347; Sedgwick v. Macy, 24 N. Y. App. Div. 1.

954. 2. Seaboard Nat. Bank v. Woesten, 144 Mo. 407; Schafer v. St. Louis, etc., R. Co., 144 Mo. 170; Smith v. Missouri Pac. R. Co., 143 Mo. 33. See also State v. Rombauer, 140 Mo. 121.

955. 2. Smith v. Missouri Pac. R. Co., 143 Mo. 33.

It is only where there is a division of opinion in the Appellate Court that the case can be certified. Seaboard Nat. Bank v. Woesten, 144 Mo.

955. V. CERTIFYING CONSTITUTIONAL QUESTIONS. — See note 4.

407; *Schafer v. St. Louis, etc., R. Co.*, 144 Mo. 170.

The question whether there is a conflict must be determined by the Court of Appeals. *State v. Rombauer*, 140 Mo. 121.

Where the judges of the Appellate Court are unanimous in their decision, they cannot certify the case to the Supreme Court on the ground that the question is important and they are not fully satisfied with the decision of the Supreme Court upon the point involved. *Schafer v. St. Louis, etc., R. Co.*, 144 Mo. 170.

Where there is no division in the Appellate Court they cannot certify a case

for the purpose of having the Supreme Court determine for them what is the last controlling decision upon the question. *Seaboard Nat. Bank v. Woesten*, 144 Mo. 407.

A mere expression of doubt as to whether the decision of the Appellate Court is in harmony with a former opinion of the Supreme Court is not sufficient. *Smith v. Missouri Pac. R. Co.*, 143 Mo. 33.

955. 4. Kansas. — Cases involving the construction of the Constitution of the United States and acts of Congress may be certified to the Supreme Court. See *Chicago, etc., R. Co. v. Campbell*, 5 Kan. App. 423.

CERTIORARI.

8. **I. DEFINITION** — **Statutory Writ.** — See note 2.
 9. **Writs of Review.** — See note *a*.
 - II. NATURE OF REMEDY** — **Extraordinary Remedy.** — See note 4.
 10. See note 1.
 - III. OFFICE OF WRIT.** — See notes 4, 5, 6.
 11. **Tribunal and Proceedings Must Be Judicial.** — See notes 1, 2, 3.
 12. **Matters Dehors Record.** — See note 1.
 - IV. JURISDICTION TO ISSUE WRIT** — 1. **At Common Law.** — See note 3.
 13. See note 1.
 2. **United States Supreme Court.** — See note 3.
8. 2. See *People v. Feitner*, 81 N. Y. App. Div. 118, wherein the court stated that there were known to the law three writs of certiorari: first, the common-law writ; second, the statutory writ under the code; and third, a special statutory proceeding to review questions of taxation, which may be designated as a writ of review *de novo*.
9. *a. In Nevada and Washington* such writs have been denominated writs of review. *State v. Osburn*, 24 Nev. 187; *State v. Moore*, 23 Wash. 276.
4. *Portland v. Erickson*, 39 Oregon 1 [citing 4 ENCYC. OF PL. AND PR. 9]; *McAdam v. Block*, 63 N. J. L. 508; *McAloon v. License Com'rs*, 22 R. I. 191.
- In *West Virginia*, in civil cases where the writ is made a substitute for a writ of error, it does not lie unless the amount in controversy exceeds one hundred dollars. *Cushwa v. Lamar*, 45 W. Va. 326.
10. 1. Proceedings in the nature of certiorari regulated by the code are governed by the same principles which formerly controlled. *Ellis v. People*, 15 Colo. App. 341.
4. *Frasher v. Rader*, 124 Cal. 132; *Los Angeles v. Young*, 118 Cal. 295; *Quinchard v. Alameda*, 113 Cal. 664; *Sanner v. Union Drainage Dist.*, 175 Ill. 575; *State v. Dunn*, 86 Minn. 301; *State v. Madison County Ct.*, 136 Mo. 323; *State v. Williams*, 70 Mo. App. 238; *State v. Lauder*, (N. Dak. 1902) 90 N. W. Rep. 564.
5. *Smith v. District Ct.*, 24 Utah 164; *State v. Clifton*, 113 Wis. 107 [in each of which cases the court cited 4 ENCYC. OF PL. AND PR. 10]; *Frasher v. Rader*, 124 Cal. 132; *U. S. v. Mills*, 11 App. Cas. (D. C.) 500; *State v. Dunn*, 86 Minn. 301; *State v. Dobson*, 135 Mo. 1; *State v. Williams*, 70 Mo. App. 238.
6. *Frasher v. Rader*, 124 Cal. 132; *People v. Gary*, 196 Ill. 310; *People v. Lindblom*, 182 Ill. 241; *Sanner v. Union Drainage Dist.*, 175 Ill. 575; *State v. Moore*, 84 Mo. App. 11; *State v. Williams*, 70 Mo. App. 238; *People v. Wurster*, 149 N. Y. 549; *People v. Railroad Com'rs*, 4 N. Y. App. Div. 259; *Vanden Bos v. Douglas County*, 11 S. Dak. 190.
11. 1. *Frasher v. Rader*, 124 Cal. 132; *Quinchard v. Alameda*, 113 Cal. 664; *U. S. v. Mills*, 11 App. Cas. (D. C.) 500; *State v. Dunn*, 86 Minn. 301; *State v. Madison County Ct.*, 136 Mo. 323; *People v. Burt*, 170 N. Y. 620; *People v. Commissioners of Charities*, etc., 1 N. Y. App. Div. 3.
2. *People v. Burt*, 170 N. Y. 620; *People v. Commissioners of Charities*, etc., 1 N. Y. App. Div. 3.
3. *State v. Madison County Ct.*, 136 Mo. 323.
12. 1. *Sanner v. Union Drainage Dist.*, 175 Ill. 575; *Venable v. Police Com'rs*, 40 Oregon 458.
3. *State v. Johnson*, 103 Wis. 591.
13. 1. *People v. Feitner*, 81 N. Y. App. Div. 118.
3. *Rev. Stat. U. S.*, § 716, providing

- 14. 3. State Courts** — *a. GENERALLY.* — See note 2.
15. b. SUPREME COURTS. — See note 1.
22. c. HIGHER COURTS OF ORIGINAL JURISDICTION. — See note 1.
27. d. COUNTY AND PROBATE COURTS. — See note 1.
32. V. WHEN WRIT LIES — **1. Granting of Writ Discretionary** — *a. GENERALLY.* — See note 1.

that the Supreme Court and the Circuit and District Courts shall "have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law," authorizes the issue of writs of certiorari. *In re Tampa Suburban R. Co.*, 168 U. S. 583; *In re Chetwood*, 165 U. S. 443, in which latter case the court said that the writ has not been issued as freely by the Supreme Court as by the Court of Queen's Bench in England, and prior to the Act of March 3, 1891, c. 517, 26 U. S. Stat. at L. 826, the writ was ordinarily used as an auxiliary process merely, but that whenever the circumstances imperatively demand it the writ will be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice.

14. 2. See in support of the text *State v. Johnson*, 103 Wis. 591; *Nobles v. Piollet*, 16 Pa. Super. Ct. 386.

Pennsylvania. — *Const. Pa.* 1874 did not take away the power of the Supreme Court to remove causes from the Court of Oyer and Terminer or Quarter Sessions by certiorari. *Com. v. Smith*, 185 Pa. St. 553.

15. 1. Florida. — *Mernaugh v. Orlando*, 41 Fla. 438.

New Jersey. — *Smith v. Holshauer*, (N. J. 1902) 52 Atl. Rep. 308.

Wisconsin. — *State v. Johnson*, 103 Wis. 591.

22. 1. Alabama. — Under Code Ala. (1896), § 918, conferring on the Circuit Court "general superintendence over all inferior jurisdictions," probate courts are included, and the Supreme Court will not in the first instance grant the writ when it has not been sought from the Circuit Court. *Ex p. Roanoke*, 117 Ala. 547.

Georgia. — *Stewart v. State*, 98 Ga. 203.

Iowa. — Under McClain's Code Iowa, § 769 (Code Iowa 1897, § 260), giving to the Superior Court jurisdiction in all civil matters, that court has juris-

isdiction to entertain proceedings in certiorari. *College of Physicians, etc., v. Guilbert*, 100 Iowa 213.

27. 1. *Sowles v. Bailey*, 69 Vt. 277.

32. 1. *Highway Com'rs v. Barnes*, 195 Ill. 43; *People v. Campbell*, 22 N. Y. App. Div. 170; *State v. Moore*, 54 S. Car. 556, in each of which cases the court cited 4 ENCYC. OF PL. AND PR. 31, 32. See also the following cases:

Arizona. — *Territory v. Doan*, (Ariz. 1900) 60 Pac. Rep. 893.

Arkansas. — *Gates v. Hayes*, 69 Ark. 518.

California. — *Quinchard v. Alameda*, 113 Cal. 664.

Colorado. — *People v. District Ct.*, 28 Colo. 218.

Delaware. — *Newell v. Hampton*, 1 Marv. (Del.) 1.

Georgia. — *Holt v. State*, 102 Ga. 569.

Illinois. — *Union Drainage Dist. v. Volke*, 163 Ill. 243.

Louisiana. — *West v. DeMoss*, 50 La. Ann. 1349; *State v. King*, 47 La. Ann. 231.

Massachusetts. — *Ward v. Board of Aldermen*, 181 Mass. 432; *Beals v. James*, 173 Mass. 591.

Michigan. — *West v. Parkinson*, (Mich. 1902) 90 N. W. Rep. 27; *Meads v. Belt Copper Mines*, 125 Mich. 456; *McNaughton v. Evert*, 116 Mich. 141; *Brady v. Hayward*, 114 Mich. 326; *Baudistel v. Jackson*, 110 Mich. 357; *Wolpert v. Newcomb*, 106 Mich. 357.

Missouri. — *State v. Henderson*, 160 Mo. 190; *State v. Shelton*, 154 Mo. 670; *State v. Dobson*, 135 Mo. 1; *State v. Moore*, 84 Mo. App. 11.

Nevada. — *State v. Washoe County*, 23 Nev. 247.

New Jersey. — *Cavanagh v. Bayonne*, 63 N. J. L. 176.

New York. — *People v. Lord*, 157 N. Y. 408.

North Carolina. — *Bayer v. Raleigh, etc.*, Air Line R. Co., 125 N. Car. 17.

Pennsylvania. — *Wallace v. Jameson*, 179 Pa. St. 94.

- 34.** *b.* DISCRETION NOT ARBITRARY. — See note 1.
d. CAUSE MUST BE SHOWN. — See note 3.
e. MUST BE BENEFICIAL. — See note 4.
35. *f.* TECHNICAL AND FORMAL ERRORS NOT PREJUDICIAL. — See notes 1, 2.
36. *h.* PUBLIC DETRIMENT AND INCONVENIENCE. — See note 1.
37. *j.* LACHES AND LIMITATIONS. — See note 1.

Texas. — Fitzwilliams v. Davies, 18 Tex. Civ. App. 81.

Vermont. — Stevens v. Hill, (Vt. 1902) 52 Atl. Rep. 437; Sowles v. Bailey, 69 Vt. 277.

West Virginia. — Michaelson v. Cautley, 45 W. Va. 533.

United States. — *In re* Tampa Suburban R. Co., 166 U. S. 583.

Equitable Considerations. — State v. Lawler, 103 Wis. 460.

Exceptional Cases — Certiorari Granted of Right — *Delaware.* — It is only where the writ is given as a statutory remedy that it issues as a matter of course. Newell v. Hampton, 1 Marv. (Del.) 1.

34. 1. State v. Dotson, 135 Mo. 1 [citing 4 ENCYC. OF PL. AND PR. 33, 34]; Quinchard v. Alameda, 113 Cal. 664.

The writ will not issue to determine the constitutionality of a statute if the case is plainly directed to the primary question whether the complaint is within the statute, which is decisive, and the petitioner abandons the question of the sufficiency of the complaint for the purpose of raising the constitutional question. Such an attempt to compel the judicial decision of a question which is not essential for the vindication of rights should be discountenanced. Forgeron v. Board of Health, 64 N. J. L. 484.

3. State v. King, 49 La. Ann. 1527; Brady v. Hayward, 114 Mich. 326; State v. Dobson, 135 Mo. 1; Reed v. Sieckenius, (Tex. Civ. App. 1901) 65 S. W. Rep. 487; *In re* Tampa Suburban R. Co., 166 U. S. 583.

Where the Writ Is Applied for in Behalf of the State, the reasons for its allowance will be presumed to exist. State v. Dobson, 135 Mo. 1.

4. Ellis v. People, 15 Colo. App. 341; McPherson v. Stroup, 100 Ga. 228; Bosio v. Picton, 106 La. 248; State v. Third Judicial Dist. Ct., (Nev. 1903) 71 Pac. Rep. 664. See also U. S. v. Mills, 11 App. Cas. (D. C.) 500.

35. 1. McAloon v. License Com'rs, 22 R. I. 191, citing 4 ENCYC. OF PL. AND PR. 34. See also the following cases:

Arkansas. — Gates v. Hayes, 69 Ark. 518.

Colorado. — Ellis v. People, 15 Colo. App. 341.

Delaware. — Newell v. Hampton, 1 Marv. (Del.) 1.

Georgia. — McPherson v. Stroup, 100 Ga. 228.

Louisiana. — Bosio v. Picton, 106 La. 248; State v. King, 49 La. Ann. 1527; State v. King, 47 La. Ann. 231.

Massachusetts. — Beals v. James, 173 Mass. 591.

Michigan. — McNaughton v. Evert, 116 Mich. 141; Brady v. Hayward, 114 Mich. 326.

New Jersey. — Newark Ledger Pub. Co. v. Newark, 66 N. J. L. 184.

New York. — People v. Lantry, 44 N. Y. App. Div. 392.

Vermont. — Stevens v. Hill, (Vt. 1902) 52 Atl. Rep. 437.

Wisconsin. — State v. Circuit Ct., (Wis. 1903) 93 N. W. Rep. 16.

2. Newell v. Hampton, 1 Marv. (Del.) 1; McPherson v. Stroup, 100 Ga. 228; State v. King, 47 La. Ann. 1512; Brady v. Hayward, 114 Mich. 326; McAloon v. License Com'rs, 22 R. I. 191; Sowles v. Bailey, 69 Vt. 277.

Where the granting of the writ would blot out the whole record of insolvency proceedings covering a period of twelve years, wherein property has become settled and compromises have been made, it will be refused. Sowles v. Bailey, 69 Vt. 277.

36. 1. Brady v. Hayward, 114 Mich. 326; Baudistel v. Jackson, 110 Mich. 357; Cavanagh v. Bayonne, 63 N. J. L. 176; People v. Hoffman, 166 N. Y. 462.

37. 1. Baudistel v. Jackson, 110 Mich. 357; Bayer v. Raleigh, etc., Air Line R. Co., 125 N. Car. 17; Sowles v. Bailey, 69 Vt. 277.

37. k. CRIMINAL CASES. — See notes 2, 3.

2. Denial of Writ by Statute — *a.* WHEN WRIT IS CONSTITUTIONAL REMEDY. — See note 4.

38. 3. Proceedings of What Bodies or Persons — *a.* INFERIOR COURT, BODY, OR OFFICER. — See note 4.

39. See note 1.

40. c. PROBATE COURT. — See note 1.

d. COURTS-MARTIAL. — See notes 3, 4.

41. 4. Final Adjudications — *a.* AS COMMON-LAW WRIT — Before Judgment. — See notes 1, 3.

42. After Judgment. — See note 1.

b. AS MODIFIED WRIT — (1) *In Civil Cases* — In General. — See note 4.

45. See note 1.

37. 2. To Enable Party to Inspect Record. — In *Texas* the writ will not issue to compel the clerk of the Court of Criminal Appeals to return a transcript to the clerk of the trial court for the purpose of inspection of the record by counsel. *Nunn v. State*, 40 Tex. Crim. 435.

3. *State v. Dobson*, 135 Mo. 1, *citing* 4 ENCYC. OF PL. AND PR. 37, and declaring that the reason for the allowance of the writ will be presumed to exist.

The General Rule Is that the State Has No Right to Review a Criminal Prosecution in the absence of express authority, and hence the writ does not lie in behalf of the state. *Portland v. Erickson*, 39 Oregon 1.

4. In Georgia the writ is a constitutional remedy. *Archie v. State*, 99 Ga. 23.

38. 4. Kirkwood v. Washington County, 32 Oregon 568 [*citing* 4 ENCYC. OF PL. AND PR. 38]; *State v. Madison County Ct.*, 136 Mo. 323.

39. 1. Pine Bluff Water, etc., Co. v. Pine Bluff, 62 Ark. 106; *Frasher v. Rader*, 124 Cal. 132; *U. S. v. Mills*, 11 App. Cas. (D. C.) 500; *State v. Madison County Ct.*, 136 Mo. 323; *State v. Washoe County*, 23 Nev. 247.

Illustrations — *Board of Military Examiners.* — *People v. Hoffman*, 166 N. Y. 462; *People v. Phisterer*, 66 N. Y. App. Div. 52.

40. 1. State v. Probate Ct., 76 Minn. 132.

3. In New Jersey it would seem that the writ lies. See *Smith v. Wanser*, (N. J. 1902) 52 Atl. Rep. 309.

New York. — *People v. Hoffman*, 166 N. Y. 462 [*citing* 4 ENCYC. OF PL. AND

PR. 40]; *People v. Phisterer*, 66 N. Y. App. Div. 52.

4. Massachusetts. — See *Devlin v. Dalton*, 171 Mass. 338.

41. 1. Hendley v. Clark, 8 App. Cas. (D. C.) 165; *State v. Shelton*, 154 Mo. 670; *State v. Dobson*, 135 Mo. 1.

3. Hendley v. Clark, 8 App. Cas. (D. C.) 165; *State v. Shelton*, 154 Mo. 670.

42. 1. Hendley v. Clark, 8 App. Cas. (D. C.) 165; *State v. Shelton*, 154 Mo. 670.

4. Gauld v. San Francisco, 122 Cal. 18; *People v. District Ct.*, 28 Colo. 218; *Culver v. Travis*, 108 Mich. 640; *Crane v. Smith*, (Minn. 1898) 75 N. W. Rep. 700; *People v. Westchester County*, 57 N. Y. App. Div. 135; *Wallace v. Jameson*, 179 Pa. St. 94.

New York. — Code Civ. Pro. N. Y., § 2122, subdiv. 1, provides that the writ cannot be issued "to review a determination which does not finally determine the rights of the parties with respect to the matter to be reviewed." *People v. Woodruff*, 64 N. Y. App. Div. 239; *People v. Schoonover*, 43 N. Y. App. Div. 539; *People v. Railroad Com'rs*, 4 N. Y. App. Div. 259, holding that the action of the board of railroad commissioners in refusing to grant a certificate of convenience and necessity is not final, but that their action in granting such a certificate is final and reviewable on certiorari.

45. 1. People v. Garfield County Ct., 26 Colo. 478; *Hendley v. Clark*, 8 App. Cas. (D. C.) 165; *State v. Miller*, (La. 1903) 33 So. Rep. 739; *State v. St. Paul*, 104 La. 103; *Wallace v. Jameson*, 179 Pa. St. 94. See *Meads v. Belt Copper Mines*, 125 Mich. 456. But see *State v. District Ct.*, (Mont. 1903) 71

46. Substitute for Writ of Error. — See note 1.

5. Judgments Made Final by Statute. — See note 5.

47. See note 1.

6. Questions of Law, of Fact, and of Evidence. — See notes 2, 3.

48. **7.** Exceptions Waived and Objections Not Raised Below. — See note 2.

8. To Prevent Anticipated Wrong or Injury. — See note 3.

49. **9.** Void Proceedings. — See notes 1, 2.

Pac. Rep. 602, holding that where an order is made in excess of authority, and no appeal therefrom nor any other adequate remedy is provided, certiorari will lie.

46. **1.** *Com. v. Tragle*, 4 Pa. Super. Ct. 159.

5. *Pennsylvania*. — Act Pa. March 20, 1810, § 22, providing that the judgment of a justice of the peace in certain actions shall not be reviewable, was not changed by the Act of June 24, 1895, P. L. 212, and it applies to magistrates in Philadelphia, who are clothed with no other jurisdiction than those of an alderman who is virtually a justice. *Carroll v. Barnes, etc., Co.*, 11 Pa. Super. Ct. 590.

New York. — But a decision of an inferior tribunal which by statute is made final will be reviewable if it was made in bad faith or from improper motives and without evidence. *People v. Peck*, 73 N. Y. App. Div. 89.

A provision of a statute that the confirmation of an assessment "shall be final and conclusive" does not preclude a review to ascertain whether the inferior tribunal has kept within the power conferred upon it by law. *People v. Kingston*, 53 N. Y. App. Div. 58.

47. **1.** *Matter of Fitch*, 147 N. Y. 334.

2. *Behrens v. Highway Com'rs*, 169 Ill. 558; *O'Connor v. White*, 124 Mich. 22; *State v. District Ct.*, 83 Minn. 464; *Wait v. Krewson*, 59 N. J. L. 71; *O'Brien v. Pawtucket*, 20 R. I. 49; *Miller v. Summers*, 13 Pa. Super. Ct. 127.

3. *Colorado*. — *Ellis v. People*, 15 Colo. App. 341.

Illinois. — *Behrens v. Highway Com'rs*, 169 Ill. 558.

Louisiana. — *Henkle v. Bussey*, 50 La. Ann. 1135; *State v. Barksdale*, 50 La. Ann. 55; *Airey v. Pullman Palace Car Co.*, 50 La. Ann. 648.

Massachusetts. — *Devlin v. Dalton*, 171 Mass. 338.

Michigan. — *O'Connor v. White*, 124 Mich. 22.

Minnesota. — *State v. District Ct.*, 83 Minn. 464.

New Jersey. — *Brown v. Moore*, (N. J. 1899) 42 Atl. Rep. 1063; *Somers v. Wescoat*, 66 N. J. L. 551; *Wait v. Krewson*, 59 N. J. L. 71; *Shangnuole v. Ohl*, 58 N. J. L. 557.

Pennsylvania. — *Miller v. Summers*, 13 Pa. Super. Ct. 127.

Rhode Island. — *O'Brien v. Pawtucket*, 20 R. I. 49.

Statements Made by Judge in Return. — If questions of fact are to be brought before the court in respect to the happenings at the trial, there must be in the first instance a rule upon the judge below specifying upon what points he is required to certify the facts. Statements voluntarily made by the judge in his return are nullities. *Smart v. North Hudson County R. Co.*, 66 N. J. L. 156.

48. **2.** *Colomb v. Rolling*, 106 La. 37; *State v. Judges*, 50 La. Ann. 26; *State v. Gill*, 137 Mo. 627; *Shangnuole v. Ohl*, 58 N. J. L. 557; *State v. Burnell*, 102 Wis. 232.

In *Louisiana* the writ of review will be denied in the Supreme Court unless it appears that a rehearing of the cause was sought and denied in the Court of Appeals. *Huddleston v. Detroit Timber, etc., Co.*, 106 La. 594.

3. *Hamblet v. Asbury Park*, 61 N. J. L. 502.

Not Substitute for Bill Quia Timet. — *Quinchard v. Alameda*, 113 Cal. 664.

49. **1.** *Louisiana*. — *State v. St. Paul*, 104 La. 203; *State v. St. Paul*, 104 La. 103; *State v. Voorhies*, 50 La. Ann. 671; *State v. Barksdale*, 50 La. Ann. 55; *State v. Judge*, 48 La. Ann. 1380; *State v. Recorder*, 48 La. Ann. 1375; *State v. Martin*, 48 La. Ann. 1249; *State v. Ferguson*, 48 La. Ann. 787.

District of Columbia. — See *Bradshaw v. Earnshaw*, 11 App. Cas. (D. C.) 495.

Disqualification of Judge. — An appli-

50. See note 1.

10. Where Other Remedy Exists — a. GENERALLY. — See note 3.

51. b. REMEDY BY APPEAL — (1) Generally. — See note 1.

cation which attempts to show that the judge was not qualified as to citizenship to review the sentence given will not be considered. *State v. Recorder*, 48 La. Ann. 1375.

49. 2. New York. — A determination upon unsworn testimony is void and will be reviewed. *People v. York*, 73 N. Y. App. Div. 445.

Wisconsin. — *State v. Lawler*, 103 Wis. 460.

50. 1. Levadas v. Beach, (Ga. 1903) 43 S. E. Rep. 418; *Gouldsey v. Atlantic City*, 63 N. J. L. 537; *Cavanagh v. Bayonne*, 53 N. J. L. 176. See also *U. S. v. Mills*, 11 App. Cas. (D. C.) 500.

3. Arkansas. — *Gates v. Hayes*, 69 Ark. 518.

Colorado. — *People v. District Ct.*, 28 Colo. 218.

Delaware. — *Hartman v. Wilmington*, 1 Marv. (Del.) 215; *Newell v. Hampton*, 1 Marv. (Del.) 1.

Illinois. — *Harvey v. Dean*, 62 Ill. App. 41.

Louisiana. — *State v. St. Paul*, 104 La. 280; *State v. Mayer*, 52 La. Ann. 255; *State v. Judges*, 50 La. Ann. 26; *State v. Judge*, 48 La. Ann. 1380; *State v. Ferguson*, 48 La. Ann. 787; *State v. Allen*, 47 La. Ann. 1600.

Minnesota. — *Crane v. Smith*, (Minn. 1898) 75 N. W. Rep. 700.

Nevada. — *State v. Osburn*, 24 Nev. 187.

New Jersey. — *Lehmann v. Hudson County Republican Committee*, 62 N. J. L. 574.

New York. — *People v. Railroad Com'rs*, 4 N. Y. App. Div. 259.

Washington. — *State v. Superior Ct.*, 28 Wash. 584.

Wisconsin. — *State v. Oshkosh, etc.*, R. Co., 100 Wis. 538.

United States. — *In re Tampa Suburban R. Co.*, 168 U. S. 583.

Iowa Statute. — *Eels v. Bailee*, (Iowa 1902) 92 N. W. Rep. 668; *Independent Dist. v. Taylor*, 100 Iowa 617.

If there is an adequate remedy in equity the writ will not lie. *Independent Dist. v. Taylor*, 100 Iowa 617.

Where a motion is pending in the court below to set aside its judgment the writ will not issue, as it is presumed that all errors will be corrected by that

court and there will be no occasion to review its proceedings. *Lloyd v. Spurrier*, 103 Iowa 744.

Where a City Charter Gives the Right to Sue the City if the board of trustees rejects the claim, the writ will not lie, as a remedy by suit is provided. *People v. Schoonover*, 43 N. Y. App. Div. 539.

Remedy by Injunction. — In *New Jersey* the writ will not lie to set aside a resolution accepting the work of a contractor, as injunction is the proper remedy. *Reynolds v. West Hoboken*, 63 N. J. L. 497.

51. 1. State v. Moore, 54 S. Car. 556, citing 4 ENCYC. OF PL. AND PR. 51. See also the following cases:

Alabama. — *Ex p. Howard-Harrison Iron Co.*, 130 Ala. 185; *Lawler v. Lyness*, 112 Ala. 386.

Arizona. — *Territory v. Doan*, (Ariz. 1900) 60 Pac. Rep. 893.

Arkansas. — *Gates v. Hayes*, 69 Ark. 518; *Aven v. Wilson*, 61 Ark. 287.

California. — *Weldon v. Superior Ct.*, (Cal. 1903) 71 Pac. Rep. 502; *Elledge v. Superior Ct.*, 131 Cal. 279; *Southern California R. Co. v. Superior Ct.*, 127 Cal. 417; *Stoddard v. Superior Ct.*, 108 Cal. 303.

District of Columbia. — *Bradshaw v. Earnshaw*, 11 App. Cas. (D. C.) 495; *Hendley v. Clark*, 8 App. Cas. (D. C.) 165.

Georgia. — *Neal v. Fox*, 114 Ga. 164.

Illinois. — *White v. Wagar*, 185 Ill. 195; *Sanner v. Union Drainage Dist.*, 175 Ill. 575; *Okerlind v. Fyke*, 90 Ill. App. 192; *Harvey v. Dean*, 62 Ill. App. 41.

Iowa. — *Eels v. Bailee*, (Iowa 1902) 92 N. W. Rep. 668; *Oyster v. Bank*, 107 Iowa 39.

Louisiana. — *State v. Miller*, (La. 1903) 33 So. Rep. 739; *State v. St. Paul*, 104 La. 280; *State v. St. Paul*, 104 La. 103; *State v. King*, 52 La. Ann. 1548; *State v. St. Paul*, 52 La. Ann. 1039; *State v. Mayer*, 52 La. Ann. 255; *Airey v. Pullman Palace Car Co.*, 50 La. Ann. 648; *State v. King*, 49 La. Ann. 1527; *State v. Watkins*, 49 La. Ann. 1056; *State v. Perez*, 48 La. Ann. 1348; *State v. Martin*, 48 La. Ann. 1249; *State v. Ferguson*, 48 La. Ann. 787.

54. See note 1.**Appeal Pending.** — See note 2.**55.** (2) *Appeal Inadequate.* — See note 1.(3) *Concurrent Remedies.* — See note 2.*Michigan.* — *McNaughton v. Evert*, 116 Mich. 141.*Minnesota.* — *Crane v. Smith*, (Minn. 1898) 75 N. W. Rep. 700; *State v. Willrich*, 72 Minn. 165.*Missouri.* — *State v. Smith*, (Mo. 1903) 73 S. W. Rep. 211; *State v. Shelton*, 154 Mo. 670; *State v. Madison County Ct.*, 136 Mo. 323.*Montana.* — *State v. District Ct.*, 26 Mont. 378; *State v. Second Judicial Dist. Ct.*, 24 Mont. 494; *State v. Lenahan*, 17 Mont. 518.*Nevada.* — *State v. Osburn*, 24 Nev. 187.*New Jersey.* — *Layton v. Ocean Grove Camp Meeting Assoc.*, 59 N. J. L. 369.*New York.* — *People v. Railroad Com'rs*, 4 N. Y. App. Div. 259; *People v. New York Soc.*, etc., (Supm. Ct. Spec. T.) 29 Civ. Pro. (N. Y.) 191.*South Carolina.* — *State v. Gregory*, 58 S. Car. 114; *State v. Moore*, 54 S. Car. 556.*Texas.* — *Dimmit County v. Salmon*, (Tex. Civ. App. 1896) 35 S. W. Rep. 752.*Vermont.* — *Stevens v. Hill*, (Vt. 1902) 52 Atl. Rep. 437; *Sowles v. Bailey*, 69 Vt. 277.*Washington.* — *State v. Superior Ct.*, (Wash. 1902) 70 Pac. Rep. 256; *State v. Superior Ct.*, 28 Wash. 677; *State v. Superior Ct.*, 26 Wash. 278; *Parker v. Superior Ct.*, 25 Wash. 544.*Wisconsin.* — *State v. O'Neill*, 104 Wis. 227; *State v. Oshkosh*, etc., R. Co., 100 Wis. 538.

In Oregon it may issue when there is a right of appeal, but by Hill's Annot. Laws Oregon, § 585, it is expressly limited to cases where the inferior tribunal, in the exercise of judicial functions, appears to have exercised such functions erroneously or to have exceeded its jurisdiction to the injury of some substantial right of the petitioner, and not otherwise. *Garnsey v. County Ct.*, 33 Oregon 201.

54. 1. *State v. Guinotte*, 156 Mo. 513; *State v. Shelton*, 154 Mo. 670; *State v. O'Neill*, 104 Wis. 227.

Insufficient Excuse for Not Appealing. — The fact that if an appeal is taken a business will lose profits is not such a

circumstance as to warrant the issuing of the writ. *State v. Superior Ct.*, 28 Wash. 584.

Where the Petitioner Has Been Prevented from Taking an Appeal within the required time by the other party to the suit, he may have the writ. *Chapman v. Kane*, 97 Ill. App. 567.

2. *Airey v. Pullman Palace Car Co.*, 50 La. Ann. 648; *People v. Railroad Com'rs*, 54 N. Y. App. Div. 615. Compare *Los Angeles City Water Co. v. Superior Ct.*, 124 Cal. 385, in which case it was held that an order appointing a receiver made without jurisdiction may be annulled upon certiorari, notwithstanding the petitioner has appealed therefrom.

Election of Remedy. — The writ will not be granted where a party has elected to take an appeal when he had an option to take either an appeal or a certiorari. *Illingworth v. Rich*, 58 N. J. L. 507.

55. 1. *Alabama.* — *Lawler v. Lyness*, 112 Ala. 386.

Arizona. — *Territory v. Doan*, (Ariz. 1900) 60 Pac. Rep. 893.

Missouri. — *State v. Guinotte*, 156 Mo. 513; *State v. Shelton*, 154 Mo. 670.

Montana. — *State v. Second Judicial Dist. Ct.*, 24 Mont. 494.

Compare *Stoddard v. Superior Ct.*, 108 Cal. 303.

Applications of Rule. — Where the *status quo* of the parties on appeal would not be preserved, the appeal is not an adequate remedy. *State v. Superior Ct.*, 26 Wash. 278.

If by awaiting the result of an appeal the fruits of the litigation would be lost, the remedy by appeal is not adequate. *State v. Superior Ct.*, 26 Wash. 278.

The fact that the profits of a business will have to go to pay the expenses of a receivership if an appeal is taken is not sufficient to make an appeal inadequate, especially if the *corpus* of the property is not depreciated and if the *status quo* of the parties is not changed. *State v. Superior Ct.*, 28 Wash. 584.

2. *Michaelson v. Cautley*, 45 W. Va. 533.

New Jersey. — Where a party has the right to bring an appeal or certiorari,

- 58.** (4) *Substitute for Appeal* — (a) Generally. — See note 1.
 (b) By Statute. — See note 7.
- 59.** (5) *Appeal Lost* — (a) Generally. — See notes 1, 2.
- 61.** What Excuse Application Must Contain. — See note 1.
- 62.** (b) Where Petitioner Is Without Laches. — See note 1.
- 64.** (c) Where Petitioner Is Guilty of Laches. — See note 1.
- 65.** Neglect of Agent. — See note 1.
- 72.** (d) Failure to Perfect Appeal by Act of Third Party — Sufficiency of Excuse. — See note 1.
- c. REMEDY BY WRIT OF ERROR. — See note 2.
- 73.** 11. Where No Other Remedy Is Provided. — See note 4.

and he elects to bring an appeal and thereby has his case tried *de novo*, he cannot thereafter bring certiorari to the Supreme Court to review such determination. *Illingworth v. Rich*, 58 N. J. L. 507.

Pennsylvania. — Act Pa. May 9, 1899, directs that all appellate proceedings shall be called appeals. Under this statute it is necessary to examine the record of each case and determine whether it is in fact an appeal, a writ of error, or a writ of certiorari, and deal with it accordingly. *Com. v. Tragle*, 4 Pa. Super. Ct. 159.

58. 1. *Arizona.* — Territory v. Doan, (Ariz. 1900) 60 Pac. Rep. 893.

Arkansas. — Merchants', etc., Bank v. Fitzgerald, 61 Ark. 605.

District of Columbia. — Hendley v. Clark, 8 App. Cas. (D. C.) 165.

Louisiana. — State v. Rost, 52 La. Ann. 984.

Michigan. — John Hancock Mut. L. Ins. Co. v. Hill, 108 Mich. 129.

Missouri. — State v. Shelton, 154 Mo. 670; State v. Williams, 70 Mo. App. 238.

Montana. — State v. Second Judicial Dist. Ct., 22 Mont. 241.

Substitute for Motion to Dismiss Appeal. — State v. Ferguson, 48 La. Ann. 787.

In *New Jersey*, by statute, the writ is made a substitute for a writ of error. *Dowd v. Jones*, 59 N. J. L. 367.

In *Pennsylvania* an appeal taken from an order of court striking off the satisfaction of a judgment amounts to a common-law certiorari and must be treated as such. *Shoup v. Shoup*, (Pa. 1903) 54 Atl. Rep. 476.

7. *Merrell v. McHone*, 126 N. Car. 528; *Rothchild v. McNichol*, 121 N. Car. 284.

59. 1. *Bayer v. Raleigh, etc.*, Air Line R. Co., 125 N. Car. 17.

2. *Arkansas.* — Merchants', etc., Bank v. Fitzgerald, 61 Ark. 605.

Colorado. — *People v. District Ct.*, 28 Colo. 218.

Illinois. — *Chapman v. Kane*, 97 Ill. App. 567.

North Carolina. — *Bayer v. Raleigh, etc.*, Air Line R. Co., 125 N. Car. 17.

Appeal Abandoned. — The writ may be issued when the appeal has been abandoned. *State v. Pettigrew*, (La. 1902) 33 So. Rep. 110.

61. 1. *Colorado.* — A party may not disregard plain statutory remedies and then receive as a reward for his laches extraordinary relief by certiorari. *People v. District Ct.*, 28 Colo. 218.

Illinois. — If an unjust judgment has been rendered against a party, and he has not been negligent and has been prevented by the other party to the suit from appealing within the statutory time, the writ will issue. *Chapman v. Kane*, 97 Ill. App. 567. See also *Chicago World Book Co. v. Brewer*, 57 Ill. App. 526, wherein it was held that insufficient excuses were alleged.

62. 1. *Chapman v. Kane*, 97 Ill. App. 567.

64. 1. *Colorado.* — *People v. District Ct.*, 28 Colo. 218.

North Carolina. — *Bayer v. Raleigh, etc.*, Air Line R. Co., 125 N. Car. 17.

65. 1. *Ignorance or Inadvertence of Attorney.* — See *Bayer v. Raleigh, etc.*, Air Line R. Co., 125 N. Car. 17, in which case the writ was allowed because the appeal was not perfected on account of the neglect of counsel. Compare *Boyer v. Garner*, 116 N. Car. 125.

72. 1. *Bayer v. Raleigh, etc.*, Air Line R. Co., 125 N. Car. 17.

2. *Bradshaw v. Earnshaw*, 11 App. Cas. (D. C.) 495; *Harvey v. Dean*, 62 Ill. App. 41.

73. 4. *Arizona.* — Territory v. Doan, (Ariz. 1900) 60 Pac. Rep. 893.

California. — *Quinchard v. Alameda*,

75. 12. Judicial and Nonjudicial Acts — a. JUDICIAL ACTS. —
See note 1.

76. See note 2.

113 Cal. 664; *Frasher v. Rader*, 124 Cal. 132.

Colorado. — *Loloff v. Heath*, (Colo. 1903) 71 Pac. Rep. 1113.

Florida. — *Mernaugh v. Orlando*, 41 Fla. 433.

Georgia. — *Warren v. Oliver*, 111 Ga. 807; *Howell v. Allen*, 106 Ga. 16.

Illinois. — *Sanner v. Union Drainage Dist.*, 175 Ill. 575.

Minnesota. — *Crane v. Smith*, (Minn. 1898) 75 N. W. Rep. 700; *State v. Dunn*, 86 Minn. 301; *State v. District Ct.*, 83 Minn. 464; *State v. Probate Ct.*, 83 Minn. 58; *State v. Probate Ct.*, 76 Minn. 132; *State v. Willrich*, 72 Minn. 165.

Missouri. — *State v. Moehlenkamp*, 133 Mo. 134.

Montana. — *State v. District Ct.*, (Mont. 1903) 71 Pac. Rep. 602; *State v. Second Judicial Dist. Ct.*, 22 Mont. 241.

Pennsylvania. — *Com. v. Tragle*, 4 Pa. Super. Ct. 159.

Rhode Island. — *Sherry v. O'Brien*, 22 R. I. 319.

Tennessee. — *Hayden v. Memphis*, 100 Tenn. 582.

Utah. — *Hansen v. Anderson*, 21 Utah 286.

Wisconsin. — *State v. Circuit Ct.*, 108 Wis. 77.

Excess of Jurisdiction. — The writ will lie to review an amendatory order subsequent to final judgment, when the jurisdiction of the court to make the order is challenged and there is no other remedy. *People v. Arapahoe County*, 9 Colo. App. 41.

76. 1. *State v. Harrison*, 141 Mo. 12; *State v. Washoe County*, 23 Nev. 247, in each of which cases the court cited 4 ENCYC. OF PL. AND PR. 74 *et seq.* See also the following cases:

Arkansas. — *McConnell v. Arkansas Brick, etc., Co.*, 70 Ark. 568; *Pine Bluff Water, etc., Co. v. Pine Bluff*, 62 Ark. 196.

California. — *Brown v. San Francisco*, 124 Cal. 274; *Frasher v. Rader*, 124 Cal. 132; *Lorbeer v. Hutchinson*, 111 Cal. 272.

Colorado. — *Land Commissioners v. Carpenter*, 16 Colo. App. 436.

Idaho. — *Adleman v. Pierce*, (Idaho 1898) 55 Pac. Rep. 658.

Illinois. — *Harvey v. Dean*, 62 Ill. App. 41.

Massachusetts. — *Morse v. Norfolk County*, 170 Mass. 555.

Minnesota. — *State v. Dunn*, 86 Minn. 301.

Montana. — *State v. District Ct.*, (Mont. 1902) 70 Pac. Rep. 516.

Nevada. — *State v. Osburn*, 24 Nev. 187.

New York. — *People v. Burt*, 170 N. Y. 620; *People v. Railroad Com'rs*, 158 N. Y. 421; *People v. Queens County*, 153 N. Y. 370; *People v. Burt*, 65 N. Y. App. Div. 157; *People v. Simonson*, 66 N. Y. App. Div. 18; *People v. Gilfoyle*, 65 N. Y. App. Div. 498; *People v. Flood*, 64 N. Y. App. Div. 209; *People v. Conway*, 59 N. Y. App. Div. 329; *People v. Woodruff*, 54 N. Y. App. Div. 1; *People v. Shaw*, 34 N. Y. App. Div. 61; *People v. Railroad Com'rs*, 32 N. Y. App. Div. 179; *People v. Bush*, 22 N. Y. App. Div. 363; *People v. Austin*, 20 N. Y. App. Div. 1; *People v. Lauterbach*, 7 N. Y. App. Div. 293; *People v. Wright*, 7 N. Y. App. Div. 185; *People v. New York, etc., Bridge*, 1 N. Y. App. Div. 186; *People v. Commissioners of Charities, etc.*, 1 N. Y. App. Div. 3.

Washington. — *Browne v. Gear*, 21 Wash. 147.

Test of Judicial Acts. — To render the proceedings of such tribunal judicial they must affect the legal or property rights of the citizen in a manner analogous to the procedure of courts acting judicially. *State v. Dunn*, 86 Minn. 301.

76. 2. Various Judicial Acts. — A proceeding to discontinue a street is judicial. *People v. Shaw*, 34 N. Y. App. Div. 61.

A decision of the railroad commissioners of New York in granting a certificate that public convenience and necessity required the construction of the proposed railroad is reviewable. *People v. Railroad Com'rs*, 40 N. Y. App. Div. 559, *affirmed* 160 N. Y. 202.

A determination by the special auditor as to the proper county in which to assess taxes is judicial. *State v. Dunn*, 86 Minn. 301.

Depriving one who under the statute has the right to a defense by counsel of such right will be reviewed. *People v. Flood*, 64 N. Y. App. Div. 209.

Under a statute which provides that

77. See note 1.

78. See note 1.

Appointment of Officers. — See note 3.

79. **Removal of Officers.** — See note 1.

b. NONJUDICIAL ACTS — (1) *Generally.* — See note 5.

a member of the fire department cannot be removed for misconduct by the board of fire commissioners until after an opportunity of making his defense, a decision by such board is judicial. *People v. Flood*, 64 N. Y. App. Div. 209.

County commissioners acting as a board of equalization exercise judicial functions in passing upon valuations of property returned by the assessor. *Lewis v. Bishop*, 19 Wash. 312.

77. 1. *Devlin v. Dalton*, 171 Mass. 338; *State v. Washoe County*, 23 Nev. 247.

In *New Jersey* the writ will not lie to determine whether an amendment had been adopted into the state constitution, as such a question is political and not judicial. *Bott v. Wurts*, 63 N. J. L. 289.

78. 1. *State v. Harrison*, 141 Mo. 12; *State v. Washoe County*, 23 Nev. 247.

A judicial decision must be one that declares the law and decides the rights of parties under it. *Frasher v. Rader*, 124 Cal. 132.

3. Nonjudicial Acts. — *State v. Harrison*, 141 Mo. 12.

79. 1. *Daily v. Chosen Freeholders*, 58 N. J. L. 319.

Officer Removable at Pleasure. — The rule is otherwise if the officer may be removed at pleasure. *People v. Conway*, 59 N. Y. App. Div. 329.

Revocation of Teacher's Certificate. — In *Washington* the decision of the superintendent of public instruction revoking a teacher's certificate is judicial and subject to review. *Browne v. Gear*, 21 Wash. 147.

5. *State v. Harrison*, 141 Mo. 12, *citing* 4 ENCYC. OF PL. AND PR. 79. See also the following cases:

California. — *People v. Contra Costa County*, 122 Cal. 421; *Lorbeer v. Hutchinson*, 111 Cal. 272.

Idaho. — *Adleman v. Pierce*, (Idaho 1898) 55 Pac. Rep. 658.

Minnesota. — *State v. Clough*, 64 Minn. 378.

Missouri. — *State v. Shelton*, 154 Mo. 670.

Nevada. — *Southern Development*

Co. v. Douglass, (Nev. 1900) 63 Pac. Rep. 38; *State v. Washoe County*, 23 Nev. 247.

New York. — *People v. Brady*, 166 N. Y. 44; *People v. Gleason*, 63 N. Y. App. Div. 435; *People v. Conway*, 59 N. Y. App. Div. 329; *People v. Van Alstyne*, 53 N. Y. App. Div. 1; *People v. Lauterbach*, 7 N. Y. App. Div. 293; *People v. Manhattan State Hospital*, 5 N. Y. App. Div. 249.

Applications of Rule. — The act of a school board in dismissing a janitor is not judicial. *People v. Simonson*, 66 N. Y. App. Div. 18.

A board of fire commissioners, whose duty it is to decide whether three-fourths of the property owners in a certain block have petitioned for a permit to build a blacksmith shop, does not exercise judicial functions in granting a permit. *Frasher v. Rader*, 124 Cal. 132.

Examining commissioners acting under the civil-service law are not judicial officers, nor do they perform judicial functions. *People v. Roosevelt*, 19 N. Y. App. Div. 431.

The action of a civil-service commission in making rules for classifications is not judicial. *People v. Burt*, 65 N. Y. App. Div. 157.

The establishment of fire districts by boards of supervisors is a legislative act. *People v. Queens County*, 14 N. Y. App. Div. 608.

The refusal of a police commissioner to grant a theatrical license is not reviewable. *Armstrong v. Murphy*, 65 N. Y. App. Div. 126.

In letting a contract to do public work a city council performs an administrative act. *Adleman v. Pierce*, (Idaho 1898) 55 Pac. Rep. 658.

The appointment of a special marshal by a town council is not a judicial act. *Lorbeer v. Hutchinson*, 111 Cal. 272.

The action of county commissioners in approving a bill is not judicial. *Morse v. Norfolk County*, 170 Mass. 555.

A board of examiners whose duty it is to ascertain whether a military officer is competent is not a judicial body. *Devlin v. Dalton*, 171 Mass. 338.

80. (2) *Ministerial and Executive Acts.* — See note 2.

81. *Issuing Execution.* — See note 1.

Canvassing Votes. — See note 2.

(3) *Legislative Acts.* — See note 3.

c. *DISCRETIONARY ACTS.* — See note 4.

Audit and Allowance. — Matter of Lanehart, 32 N. Y. App. Div. 4.

But where the claim pretended vests the auditing body with authority to exercise judgment and requires determination based upon conflicting testimony and inferences arising therefrom, whatever right of review exists must be by certiorari. Matter of Lanehart, 32 N. Y. App. Div. 4.

80. 2. *Arkansas.* — Pine Bluff Water, etc., Co. v. Pine Bluff, 62 Ark. 196.

Colorado. — State Board of Land Com'rs v. Carpenter, 16 Colo. App. 436.

Idaho. — Adleman v. Pierce, (Idaho 1898) 55 Pac. Rep. 658.

Illinois. — Harvey v. Dean, 62 Ill. App. 41.

Massachusetts. — Flanders v. Roberts, 182 Mass. 524.

Missouri. — State v. Harrison, 141 Mo. 12; State v. Madison County Ct., 136 Mo. 323.

Nevada. — State v. Osburn, 24 Nev. 187; State v. Washoe County, 23 Nev. 247.

New York. — People v. Brady, 166 N. Y. 44; People v. Queens County, 153 N. Y. 370; People v. Burt, 65 N. Y. App. Div. 157; People v. Conway, 59 N. Y. App. Div. 329; People v. Feeney, 43 N. Y. App. Div. 376; People v. Bush, 22 N. Y. App. Div. 363; People v. Austin, 20 N. Y. App. Div. 1; People v. Queens County, 14 N. Y. App. Div. 608; People v. Lauterbach, 7 N. Y. App. Div. 293; People v. Commissioners of Charities, etc., 1 N. Y. App. Div. 3.

West Virginia. — Dunlevy v. Marshall County Ct., 47 W. Va. 513.

Making of Contracts. — Adleman v. Pierce, (Idaho 1898) 55 Pac. Rep. 658.

Examination of Teachers. — A board of examiners whose duty it is to examine applicants to teach in the city of New York is not a judicial body and does not exercise judicial functions in making its appointments. Walker v. Maxwell, 68 N. Y. App. Div. 196.

Penitentiary Commissioners have only executive and ministerial powers. McConnell v. Arkansas Brick, etc., Co., 70 Ark. 568,

81. 1. People v. Simonson, 66 N. Y. App. Div. 18; People v. Conway, 59 N. Y. App. Div. 329.

2. State v. Osburn, 24 Nev. 187; People v. Austin, 20 N. Y. App. Div. 1.

Canvass by Court. — A justice of the peace acting as an inspector of an election does not exercise judicial functions. People v. Bush, 22 N. Y. App. Div. 363.

3. *Arkansas.* — Pine Bluff Water, etc., Co. v. Pine Bluff, 62 Ark. 196.

California. — Brown v. San Francisco, 124 Cal. 274; People v. Contra Costa County, 122 Cal. 421; Quinchard v. Alameda, 113 Cal. 664.

Idaho. — Adleman v. Pierce, (Idaho 1898) 55 Pac. Rep. 658.

Illinois. — Harvey v. Dean, 62 Ill. App. 41.

Nevada. — State v. Osburn, 24 Nev. 187.

New York. — People v. Conway, 59 N. Y. App. Div. 329; People v. Queens County, 14 N. Y. App. Div. 608; People v. Lauterbach, 7 N. Y. App. Div. 293; People v. Brady, 166 N. Y. 44; People v. Queens County, 153 N. Y. 370.

4. *California.* — Brown v. San Francisco, 124 Cal. 274.

Illinois. — Harvey v. Dean, 62 Ill. App. 41.

Louisiana. — State v. Barksdale, 50 La. Ann. 55.

Missouri. — State v. Madison County Ct., 136 Mo. 323.

Nevada. — State v. First Judicial Dist., (Nev. 1901) 66 Pac. Rep. 743.

New York. — Jordan v. Board of Education, (C. Pl. Spec. T.) 14 Misc. (N. Y.) 119; People v. Conway, 59 N. Y. App. Div. 329; People v. Woodruff, 54 N. Y. App. Div. 1; Matter of Lanehart, 32 N. Y. App. Div. 4; People v. Roosevelt, 19 N. Y. App. Div. 431; People v. Commissioners of Charities, etc., 1 N. Y. App. Div. 3; Armstrong v. Murphy, 65 N. Y. App. Div. 126.

Pennsylvania. — Shoup v. Shoup, (Pa. 1903) 54 Atl. Rep. 476.

Acting on Conflicting Evidence. — Where an application for certiorari is brought on the ground that the verdict is contrary to the evidence, the court

83. See note 1.

Setting Aside Verdict — Granting New Trial — Vacating Judgment. —

See note 4.

84. Highway Proceedings. — See note 1.

Assessment Proceedings. — See note 2.

d. RESOLUTIONS AND ORDINANCES OF MUNICIPAL DEPARTMENTS. — See note 3.**85.** See note 1.**86.** 13. Proceedings According to, or Different from, Common Law — *a.* ACCORDING TO COMMON LAW. — See note 1.

will not interfere with the discretion of the trial judge if the evidence was conflicting on material issues in the case. *Hilton, etc., Lumber Co. v. Browning*, 105 Ga. 841.

Further Illustrations of Discretionary Acts. — The granting or refusal of bail is a matter resting in the sound discretion of the court, and will not be reviewed unless it appears that such discretion has been abused. *State v. Madison County Ct.*, 136 Mo. 323.

Dismissing an inspector of buildings by the commissioner is a discretionary act. *People v. Guilfoyle*, 65 N. Y. App. Div. 498.

Under a provision that the members of a board of health "shall be entitled to receive for the services rendered by them such fair and reasonable compensation as shall be fixed by the board of trustees," the writ will not lie because the board made no decision or determination and did not pass upon the fairness or reasonableness of the amount claimed by the relator, thereby declining to exercise its judgment. *People v. Haverstraw*, 11 N. Y. App. Div. 108.

83. 1. *McNaughton v. Evert*, 116 Mich. 141; *State v. Madison County Ct.*, 136 Mo. 323; *Matter of Lanehart*, 32 N. Y. App. Div. 4.

4. *State v. Madison County Ct.*, 136 Mo. 323.

84. 1. *Brown v. San Francisco*, 124 Cal. 274.

2. *Brown v. San Francisco*, 124 Cal. 274.

3. *State v. Osburn*, 24 Nev. 187 [*citing* 4 ENCYC. OF PL. AND PR. 84]; *People v. Contra Costa County*, 122 Cal. 421; *Quinchard v. Alameda*, 113 Cal. 664; *People v. Queens County*, 14 N. Y. App. Div. 608.

Legislative Resolutions and Ordinances. — A determination of the city council

to issue bonds for the purpose of constructing waterworks and an electric-light plant is not judicial. *State v. Osburn*, 24 Nev. 187.

The granting of a franchise to construct a wharf is not judicial. *People v. Contra Costa County*, 122 Cal. 421.

The determination whether a street shall be opened or closed, widened or contracted, is a legislative act. *Brown v. San Francisco*, 124 Cal. 274; *Quinchard v. Alameda*, 113 Cal. 664.

The act does not cease to be legislative because the members of the city council are required to exercise their judgment in determining whether an improvement shall be made. *Quinchard v. Alameda*, 113 Cal. 664.

The writ will lie to review proceedings of a county board changing the site of a court house. *Way v. Fox*, 109 Iowa 340.

85. 1. *New Jersey*. — *Bloomfield Tp. v. Glen Ridge*, 55 N. J. Eq. 505.

The writ may be brought to test the validity of a municipal ordinance providing for the payment of an official salary. *Christee v. Bayonne*, 64 N. J. L. 191.

The writ will lie to review the passage of an ordinance which was not introduced at least three days before its passage, as required by statute. *Delaware, etc., Tel., etc., Co. v. Pensauken Tp.*, 67 N. J. L. 531.

Where the city council is sole judge of the election and qualification of its members, its action in seating a member is final and conclusive, and a resolution offered in a succeeding council to strike from the roll the name of a member seated by the preceding council whose term is not expired may be reviewed by certiorari before any action is taken upon the resolution. *Roberts v. Camden*, 63 N. J. L. 186.

86. 1. *State v. Lawler*, 103 Wis. 460.

87. b. NOT ACCORDING TO COMMON LAW — SUMMARY PROCEEDINGS. — See note 1.

89. Attachment Acts. — See note 1.

90. 14. Want or Excess of Jurisdiction — a. WHETHER WRIT LIES FOR OTHER THAN JURISDICTIONAL ERRORS. — See note 1.

91. b. GENERAL RULE AS TO JURISDICTIONAL ERRORS. — See note 2.

93. See note 1.

Proceedings Without Proper Notice. — See note 2.

87. 1. Roberts v. Shafer, 63 N. J. L. 182; State v. Lawler, 103 Wis. 460.

89. 1. S. K. Martin Lumber Co. v. Menominee Circuit Judge, 116 Mich. 354.

90. 1. State v. Woodson, 161 Mo. 444; Garnsey v. County Ct., 33 Oregon 201 [in each of which cases the court cited 4 ENCYC. OF PL. AND PR. 90]; Lancaster v. State, 90 Md. 215; State v. Shelton, 154 Mo. 670; State v. Gill, 137 Mo. 627; State v. Second Judicial Dist. Ct., 24 Mont. 494; Miller v. Summers, 13 Pa. Super. Ct. 127; Com. v. Tragle, 4 Pa. Super. Ct. 159.

Arizona. — Territory v. Doan, (Ariz. 1900) 60 Pac. Rep. 893.

91. 2. State v. Dobson, 135 Mo. 1, citing 4 ENCYC. OF PL. AND PR. 91. See also the following cases

California. — Brown v. San Francisco, 124 Cal. 274; Frasher v. Rader, 124 Cal. 132; White v. Superior Ct., 110 Cal. 60.

District of Columbia. — Bradshaw v. Earnshaw, 11 App. Cas. (D. C.) 495; Hendley v. Clark, 8 App. Cas. (D. C.) 165.

Florida. — Mernaugh v. Orlando, 41 Fla. 438.

Illinois. — People v. Gary 196 Ill. 310; White v. Wagar, 185 Ill. 195, affirming 83 Ill. 592; Behrens v. Highway Com'rs, 169 Ill. 558; Sanner v. Union Drainage Dist., 175 Ill. 575.

Iowa. — Bardes v. Hutchinson, 113 Iowa 610.

Michigan. — Brady v. Hayward, 114 Mich. 326.

Missouri. — State v. Smith, (Mo. 1903) 73 S. W. Rep. 211; Ward v. Board of Equalization, 135 Mo. 309; State v. McDavid, 84 Mo. App. 47.

Montana. — State v. District Ct., (Mont. 1902) 70 Pac. Rep. 516; State v. Second Judicial Dist. Ct., 24 Mont. 494.

New York. — People v. City Prison, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 545.

North Dakota. — State v. Lauder, (N. Dak. 1902) 90 N. W. Rep. 564.

Pennsylvania. — Young v. Trunkley, 22 Pa. Co. Ct. 127.

South Dakota. — Kirby v. Circuit Ct., 10 S. Dak. 38.

Utah. — Hansen v. Anderson, 21 Utah 286.

Wisconsin. — State v. Circuit Ct., (Wis. 1903) 93 N. W. Rep. 16.

Defect of Jurisdiction. — Jurisdiction to bind over is established if there is any evidence before a magistrate that the crime was committed by the defendant. People v. City Prison, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 545.

Foundation for an Objection to the Jurisdiction exists only where it is plainly shown that the proceedings are affected by some fatal irregularity rendering them absolutely void, such as the want of notice or the refusal of a hearing to a party entitled to it, or that the jurisdiction of the cause did not belong to the court assuming to exercise it, or that the cause involved is of a nature the jurisdiction of which is denied to any court. Bradshaw v. Earnshaw, 11 App. Cas. (D. C.) 495.

A denial of the appellant's right to make a defense goes to the jurisdiction. McClatchy v. Superior Ct., 119 Cal. 413; Bradshaw v. Earnshaw, 11 App. Cas. (D. C.) 495.

Unconstitutionality of Act. — But see McClatchy v. Superior Ct., 119 Cal. 413, wherein the court said that depriving one of a constitutional right is such a fundamental error as will be reviewed, and is as much an excess of jurisdiction as where an inceptive lack of power exists.

93. 1. Imhoff v. Highway Com'rs, 89 Ill. App. 66, quoting 4 ENCYC. OF PL. AND PR. 92, 93.

2. Stumpf v. San Luis Obispo County, 131 Cal. 364; Los Angeles v. Young, 118 Cal. 295; Bradshaw v. Earnshaw, 11 App. Cas. (D. C.) 495; Cummings v.

94. *c.* WHERE OTHER REMEDIES EXIST. — See note 1.

96. *f.* JURISDICTIONAL ERRORS IN PARTICULAR TRIBUNALS — (1) *Judicial Bodies* — (b) *County and Probate Courts*. — See note 1.

(a) *Justice of Peace*. — See note 3.

(2) *Quasi-judicial Bodies*. — See note 4.

97. See note 2.

98. 15. *Errors in Exercise of Proper Jurisdiction* — *a.* GENERALLY. — See note 1.

99. See note 1.

b. *ERRORS IN RENDITION OF JUDGMENT*. — See note 2.

Steele, (Idaho 1899) 59 Pac. Rep. 15; *People v. McGuire*, 27 N. Y. App. Div. 593; *People v. New Rochelle*, 17 N. Y. App. Div. 603; *People v. Brookfield*, 1 N. Y. App. Div. 68; *Bair v. Diller*, 18 Pa. Co. Ct. 521; *Lewis v. Bishop*, 19 Wash. 312; *State v. Clifton*, 113 Wis. 107.

Insufficient Citation. — *State v. Voorhies*, 50 La. Ann. 671.

Insufficiency of Service. — *State v. Taylor*, 50 La. Ann. 459.

Dissolution of Injunction Ex Parte. — The dissolution of an injunction on an *ex parte* application will be reviewed. *State v. Monroe*, 50 La. Ann. 642.

Insufficient Showing as to Notice. — The writ will be sustained where a recital of the notice as a conclusion of law appears in the record, and no facts are stated from which the court is able to see that this conclusion is true. *Imhoff v. Highway Com'rs*, 89 Ill. App. 66.

94. 1. *State v. Probate Ct.*, 76 Minn. 132; *Bayer v. Raleigh*, etc., Air Line R. Co., 125 N. Car. 17; *Garnsey v. County Ct.*, 33 Oregon 201.

96. 1. *State v. Probate Ct.*, 76 Minn. 132.

3. *Lancaster v. State*, 90 Md. 215.

If the Justice Has Jurisdiction of the Parties and of the Subject-matter and possesses the power to decide the matter in dispute the writ will not lie for errors in the procedure. *Bradshaw v. Earnshaw*, 11 App. Cas. (D. C.) 495.

4. *People v. Hoffman*, 166 N. Y. 462.

97. 2. *Ward v. Board of Equalization*, 135 Mo. 309; *Lewis v. Bishop*, 19 Wash. 312; *State v. Lawler*, 103 Wis. 460.

98. 1. *Garnsey v. County Ct.*, 33 Oregon 201, citing 4 ENCYC. OF PL. AND PR. 98. See also the following cases:

Arkansas. — *Aven v. Wilson*, 61 Ark. 287.

California. — *San Francisco v. Superior Ct.*, (Cal. 1897) 50 Pac. Rep. 432; *Frasher v. Rader*, 124 Cal. 132; *Los Angeles v. Young*, 118 Cal. 295; *White v. Superior Ct.*, 110 Cal. 60.

District of Columbia. — *Bradshaw v. Earnshaw*, 11 App. Cas. (D. C.) 495.

Iowa. — *Eels v. Bailee*, (Iowa 1902) 92 N. W. Rep. 668.

Maryland. — *Lancaster v. State*, 90 Md. 211.

Michigan. — *Brady v. Hayward*, 114 Mich. 326.

Missouri. — *State v. Shelton*, 154 Mo. 670; *Ward v. Board of Equalization*, 135 Mo. 309.

Montana. — *State v. District Ct.*, (Mont. 1902) 70 Pac. Rep. 516; *State v. Second Judicial Dist. Ct.*, 24 Mont. 494; *State v. Second Judicial Dist. Ct.*, 24 Mont. 238; *State v. Second Judicial Dist. Ct.*, 22 Mont. 241.

Nevada. — *State v. First Judicial Dist.*, (Nev. 1901) 66 Pac. Rep. 743; *Wilson v. Morse*, 25 Nev. 375; *State v. Osburn*, 24 Nev. 187.

New York. — *People v. Feitner*, 81 N. Y. App. Div. 118.

South Dakota. — *Kirby v. Circuit Ct.*, 10 S. Dak. 38.

Wisconsin. — *State v. Circuit Ct.*, (Wis. 1903) 93 N. W. Rep. 16; *State v. Circuit Ct.*, 101 Wis. 422.

99. 1. *State v. Shelton*, 154 Mo. 670 [quoting 4 ENCYC. OF PL. AND PR. 98, 99]; *Merchants, etc., Bank v. Fitzgerald*, 61 Ark. 605; *Aven v. Wilson*, 61 Ark. 287; *Lancaster v. State*, 90 Md. 211; *State v. Woodson*, 161 Mo. 444; *Wilson v. Morse*, 25 Nev. 375; *Garnsey v. Klamath County Ct.*, 33 Oregon 201.

If in Such a Case No Appeal Is Provided the writ will lie. *White v. Wagar*, 185 Ill. 195.

2. *Weldon v. Superior Ct.*, (Cal. 1903) 71 Pac. Rep. 502; *Eels v. Bailee*, (Iowa 1902) 92 N. W. Rep. 668; *State*

- 100.** *c.* ERRORS IN EXERCISE OF JUDGMENT. — See note 1.
16. Illegality and Irregularity in Proceedings — *a.* GENERALLY. — See note 3.
103. See note 1.
104. *b.* NO ILLEGALITY OR IRREGULARITY. — See note 1.
c. IMMATERIAL OR HARMLESS ERROR. — See note 2.
105. *e.* ILLUSTRATIONS — (1) *Improper Issuance of Execution*. — See note 2.
106. (3) *Proceedings in Ouster from Office*. — See note 2.
107. 17. *Contested Election Cases*. — See note 1.
 18. *Road and Highway Cases* — *a.* GRANTING WRIT DISCRETIONARY. — See note 2.
114. 19. *Taxes and Assessments* — *a.* IN GENERAL. — See note 1.
115. See notes 1, 2.

v. Martin, 48 La. Ann. 1249; *State v. Ferguson*, 48 La. Ann. 787.

100. 1. *Eels v. Bailee*, (Iowa 1902) 92 N. W. Rep. 668.

3. *In re Lewisohn*, 9 N. Mex. 101; *State v. Lawler*, 103 Wis. 460.

Constitutionality of Statute. — Where a relator seeks to review an order of court denying his right to the books and papers of a public office claimed by him, the constitutionality of the statute creating the office may be attacked by the respondent. *Fillmore v. VanHorn*, (Mich. 1901) 88 N. W. Rep. 69.

One Who Has Been Dismissed by a Board of Police Commissioners and subsequently applies for a rehearing on the ground of newly discovered evidence cannot, upon the refusal of his application, have the decision reviewed, as the board had no power to reopen the case; and this even though it is held that Const. N. Y., art. 1, § 6, which secures certain rights to a party appearing to defend in any trial in any court, applies to trials before police commissioners. *People v. York*, 43 N. Y. App. Div. 138.

103. 1. *Mernaugh v. Orlando*, 41 Fla. 433; *State v. Lawler*, 103 Wis. 460.

No Entry of Judgment. — On certiorari to review an order in aid of an execution it is competent to inquire into the existence of the original judgment upon which the order is based. *Weiland v. Krause*, 63 N. J. L. 192.

104. 1. *People v. Woods*, 39 N. Y. App. Div. 660.

2. *Imhoff v. Highway Com'rs*, 89 Ill.

App. 66; *People v. Feltner*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 204; *McAloon v. License Com'rs*, 22 R. I. 191.

105. 2. *State v. Circuit Ct. of Appeals*, 49 La. Ann. 1221.

106. 2. *Bilderback v. Chosen Freeholders*, 63 N. J. L. 55.

Quo Warranto. — *State v. Recorder*, 48 La. Ann. 1375; *Wilson v. Camden*, 63 N. J. L. 200; *Roberts v. Shafer*, 63 N. J. L. 182; *Clayton v. Chosen Freeholders*, 60 N. J. L. 364; *Miller v. Washington*, 67 N. J. L. 167; *Roberson v. Bayonne*, 58 N. J. L. 325.

Collateral Questions Involving the Legality of an Election to office may be raised and determined under the writ in testing the validity of statutes and resolutions. *Roberts v. Shafer*, 63 N. J. L. 182.

107. 1. *Cushwa v. Lamar*, 45 W. Va. 326, citing 4 ENCYC. OF PL. AND PR. 107.

2. **To Prevent Payment for Improvements.** — The writ will not lie to prevent a town from paying the costs of highway improvements which have been defectively executed. *Reynolds v. West Hoboken*, 63 N. J. L. 497.

114. 1. *Ward v. Board of Aldermen*, 181 Mass. 432; *State v. Dunn*, 86 Minn. 301; *State v. Springer*, 134 Mo. 212; *People v. Syracuse*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 95; *People v. Buffalo*, 39 N. Y. App. Div. 651; *State v. Lawler*, 103 Wis. 460.

115. 1. *People v. McNamara*, 18 N. Y. App. Div. 17; *Charleston, etc., Bridge Co. v. Kanawha County Ct.*, 41 W. Va. 658.

2. *Weed v. Boston*, 172 Mass. 28.

- 117.** *c.* QUESTIONS OF JURISDICTION. — See note 1.
d. ILLEGALITY IN PROCEEDINGS. — See note 4.
- 119.** *c.* AMOUNT OF VALUATION. — See note 4.
- 120.** See note 1.
- 122.** 20. Assessment of Damages. — See notes 3, 4.
 21. Criminal Cases. — See note 7.
- 123.** See note 1.
- 124.** 22. Contempt Proceedings — *a.* IN GENERAL. — See note 1.
- 126.** *b.* TO REVIEW CASE ON ITS MERITS — Order Refusing to Punish. — See note 2.
- 127.** *c.* TO REVIEW JURISDICTION ONLY. — See note 2.
 23. In Connection with Habeas Corpus — *a.* AS ANCILLARY TO HABEAS CORPUS — At Common Law. — See note 3.
- 128.** In State Courts. — See note 3.
- 129.** *b.* TO REVIEW PROCEEDINGS ON HABEAS CORPUS. — See note 1.

117. 1. *State v. Springer*, 134 Mo. 212.

Drain Assessments. — The writ cannot be used to test the legality of the existence of a drainage district. *Lees v. Drainage Com'rs*, 125 Ill. 47.

But where a drainage district is being organized, and before it becomes a legal entity a controversy arises in the proceeding for its organization, which is tried before a tribunal provided for determining it, and that tribunal acts illegally and without authority, the proceeding may be reviewed. *Sanner v. Union Drainage Dist.*, 175 Ill. 575, reversing 64 Ill. App. 62, and *distinguishing* *Lees v. Drainage Com'rs*, 125 Ill. 47.

4. *People v. Buffalo*, 39 N. Y. App. Div. 651.

119. 4. *Moran v. Jersey City*, 58 N. J. L. 144; *People v. Feitner*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 204.

120. 1. Injustice Must Have Been Done. — The assessment cannot be interfered with unless the evidence against it be such as clearly carries conviction that it is wrong and that injustice has been done. *Moran v. Jersey City*, 58 N. J. L. 144.

Decision Contrary to Evidence. — Under a statute providing that a board of review shall, when satisfied from the evidence that the commissioner's valuation is too high or too low, lower or raise the same accordingly, a decision contrary to credible evidence indisputably establishing a fact will be reviewed. *State v. Lawler*, 103 Wis. 460.

122. 3. *Ward v. Board of Alder-*

men, 181 Mass. 432; *People v. Feitner*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 204.

4. *People v. Feitner*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 204.

7. *New York*. — *People v. Workhouse*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 639.

123. 1. See *Portland v. Erickson*, 39 Oregon 1, holding that the writ will not lie in favor of the state in a criminal proceeding.

124. 1. *McClatchy v. Superior Ct.*, 119 Cal. 413.

After Payment of Fine. — The writ will not issue to a party who has been adjudged to be in contempt of court and who has paid the fine thereunder, as no advantage could accrue by an adjudication of the invalidity of the judgment. *Ellis v. People*, 15 Colo. App. 341.

The United States Supreme Court may issue the writ to review contempt proceedings. *In re Chewwood*, 165 U. S. 443.

126. 2. Rule Qualified. — *Garrett v. Bishop*, 113 Iowa 23; *Lake v. Wolfe*, 108 Iowa 184.

127. 2. *Ellis v. People*, 15 Colo. App. 341.

3. *State v. Madison County Ct.*, 136 Mo. 323; *State v. Dobson*, 135 Mo. 1; *Com. v. Gibbons*, 9 Pa. Super. Ct. 527.

128. 3. *State v. Madison County Ct.*, 136 Mo. 323; *State v. Dobson*, 135 Mo. 1.

Pennsylvania. — *Com. v. Gibbons*, 9 Pa. Super. Ct. 527, affirmed *Kelly's Contested Election*, 200 Pa. St. 430.

129. 1. *State v. Madison Count*

130. In Favor of Prosecution. — See note 1.

Evidence. — See note 4.

VI. LACHES AND LIMITATIONS — 1. Generally — Reasonable Time. — See note 5.

131. See note 1.

132. 2. Analogy to Writs of Error and Appeals. — See note 2.

133. 3. Where Public Detriment or Inconvenience Would Result. — See note 2.

134. 4. Where Public Money Has Been Expended. — See note 1.

135. 5. Ordinary Cases — *a.* GENERALLY. — See note 1.

137. *b.* STATUTORY LIMITATIONS. — See note 2.

Ct., 136 Mo. 323; *State v. Dobson*, 135 Mo. 1.

130. 1. Compare *State v. Gill*, 137 Mo. 627; *State v. Dobson*, 135 Mo. 1.

4. *State v. Madison County Ct.*, 136 Mo. 323.

5. *Illinois*. — *Highway Com'rs v. Barnes*, 195 Ill. 43.

Louisiana. — *State v. Police Board*, 107 La. 162.

Michigan. — *Baudistel v. Jackson*, 110 Mich 357.

Failing to Appear in Response to Notice and a summons, and keeping away from the proceedings, will bar a review. *Stevens v. Hill*, (Vt. 1902) 52 Atl. Rep. 437.

Pleading. — Unreasonable delay need not be specially pleaded. *People v. District Ct.*, 28 Colo. 218; *State v. Police Board*, 107 La. 162.

131. 1. **Illustrations of Rule.** — In *State v. Police Board*, 107 La. 162, a year after the relator's removal from office was held to be too late.

A delay of thirteen months will not subject the petitioner to the charge of laches when it appears that no effort had been made in the meantime to enforce the judgment. *Lyons v. Green*, 68 Ark. 205.

132. 2. *Highway Com'rs v. Barnes*, 195 Ill. 43; *Union Drainage Dist. v. Volke*, 163 Ill. 243, 59 Ill. App. 283.

133. 2. *State v. Police Board*, 107 La. 162, quoting 4 ENCYC. OF PL. AND PR. 133. See also the following cases:

Illinois. — *Highway Com'rs v. Barnes*, 195 Ill. 43; *Drainage Com'rs v. Volke*, 59 Ill. App. 283.

New Jersey. — *Ralph v. Atlantic Highlands*, (N. J. 1900) 47 Atl. Rep. 223; *Noe v. West Hoboken*, (N. J. 1897) 37 Atl. Rep. 439; *Carling v. Hoboken*, 64 N. J. L. 223.

134. 1. *Coward v. Bayonne*, 67 N.

J. L. 470; *Noe v. West Hoboken*, (N. J. 1897) 37 Atl. Rep. 439.

135. 1. *New Jersey*. — Delay for a year and a half by one who is dismissed from the police force will bar the right to the writ. *Noe v. West Hoboken*, (N. J. 1897) 37 Atl. Rep. 439.

Pennsylvania. — Where the writ was not issued until ten years after judgment and the record appeared to be regular the proceedings were not disturbed. *Tamaqua v. Morgans*, 24 Pa. Co. Ct. 10.

137. 2. *Georgia*. — Under the Georgia statutes now embodied in 2 Code Ga. (1895), §§ 3771, 4642, a certiorari must be applied for within thirty days from the date of the judgment, and if this is done and the sanction of the court obtained, the petition may be filed at any time within three months from the date of the judgment. *Carson v. Forsyth*, 97 Ga. 258. See also *O'Keefe v. Colton*, 102 Ga. 516.

Certiorari is a suit in contemplation of 2 Code Ga., § 3786, providing that if the plaintiff is nonsuited he shall commence action again in six months. *Hill v. State*, 115 Ga. 833. See also *O'Keefe v. Cotton*, 102 Ga. 516.

An attempted renewal of a void certiorari within six months is ineffectual. *Hamilton v. Phenix Ins. Co.*, 111 Ga. 875.

Illinois. — See *Okerling v. Fyke*, 90 Ill. App. 192.

Iowa. — See *Polk v. McCartney*, 104 Iowa 567.

New Jersey. — See *Weiland v. Krause*, 63 N. J. L. 192.

New York. — The New York statute is not solely a statute of limitation, but by implication grants to the relator four months in which to procure the writ; therefore, in a case where the determining body finally adjourned after disposition made of the matter, it or

139. 6. Tax Assessments — *a. GENERALLY.* — See note 1.

142. *b.* BY STATUTE. — See note 3.

144. VII. PETITION — 1. *Generally* — *Precise and General Statement.* — See note 3.

145. Statement of Error. — See note 1.

Interest of Petitioner. — See note 2.

What Should Be Set Out. — See notes 3, 4.

its successor at its next meeting can obey the order made by the court. *People v. Town Auditors*, 33 N. Y. App. Div. 277; *People v. Sutphin*, 166 N. Y. 163.

If the statute of limitations is not raised or suggested in the return it is too late to raise the question upon argument of the appeal, as the objection is waived. *People v. Lantry*, 44 N. Y. App. Div. 392.

Under the charter of the city of New York, Laws 1897, c. 378, § 302, which section is practically identical with § 272 of the Consolidation Act, relating to the former city of New York (Laws 1882, c. 410, § 272, as amended by Laws 1884, c. 180, § 7), the limitation applicable to police officers is two years. *People v. York*, 47 N. Y. App. Div. 552.

Oregon. — In Oregon application must be made within six months from the judgment complained of. *Southern Oregon Co. v. Coos County*, 30 Oregon 250.

Pennsylvania. — It is provided in Pennsylvania that no judgment shall be set aside in pursuance of a writ of certiorari unless such writ is issued within twenty days after the judgment was rendered. *Young v. Trunkley*, 22 Pa. Co. Ct. 127.

But if it is apparent on the face of the record that there was no jurisdiction the court will reverse the proceedings, although more than twenty days have elapsed since the entry of the judgment. *Bair v. Diller*, 18 Pa. Co. Ct. 521.

Vermont. — Under Stat. Vt., § 1640, the writ must be issued and served on the adverse party within one year after the rendition of the judgment. *Sowles v. Bailey*, 69 Vt. 277.

139. 1. Discretion of Court. — In *People v. Syracuse*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 95, the court held that a limitation of two weeks was so stringent that it would exercise its discretion in allowing additional property owners to be made parties, to a pro-

ceeding properly commenced, after the expiration of the time, providing the final result of the proceeding should be upon the line suggested in the original petition and writ.

142. 3. Section 145 of the Charter of Syracuse provides that the writ to review a paving assessment must be brought within two weeks from the publication by the city treasurer of the first notice that he had received the assessment roll. *People v. Syracuse*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 95.

144. 3. Georgia. — An application must show that it is brought to review the decision of an inferior court or person exercising judicial powers, and must indicate by whom the decision in question was rendered. *Freeman v. Eatonton*, 114 Ga. 528.

While a petition for certiorari is held to be in a certain sense a suit, it does not belong to that class of suits to which pleas can be filed, and hence such petition need not be drawn in separate paragraphs, and consecutively numbered, as required by the Pleading Act of 1893. *Royal v. McPhail*, 97 Ga. 457.

145. 1. Southern Oregon Co. v. Coos County, 30 Oregon 185.

Assignment of Error. — 2 Code Ga., § 4650, declares: "No ground of error shall be insisted upon, on the hearing, which is not distinctly set forth in the petition." If this statute is not complied with the writ will be overruled. *Taft Co. v. Smith*, 112 Ga. 196.

The court will notice a substantial error when deemed necessary for the furtherance of justice, even if it is not made a subject of an exception. *Stouffer v. Beetem*, 18 Pa. Co. Ct. 605.

2. Imhoff v. Highway Com'rs, 89 Ill. App. 66 [citing 4 ENCYC. OF PL. AND PR. 145]; *Wilson v. Remley*, 106 Iowa 583. See also *Hamblet v. Asbury Park*, 61 N. J. L. 502.

3. Setting Out the Gist of the Proceedings is sufficient. *Southern Oregon Co. v. Coos County*, 30 Oregon 250.

- 146.** *Matters of Record.* — See note 1.
147. *2. Must Show Error.* — See note 1.
149. *3. Allegations of Error Must Be Specific*—*a. GENERALLY.* — See note 2.
151. See note 1.
153. *5. Must Show Merits*—*a. GENERALLY.* — See note 2.
154. *b. WRONG OR INJUSTICE DONE PETITIONER.* — See note 1.
157. *8. Amendments* — *Generally.* — See notes 3, 5.
158. *9. Verification* — *Affidavits* — *a. GENERALLY.* — See note 2.

Harmless Error. — Error in allegations touching the date of the entry of an order is of no consequence. *Southern Oregon Co. v. Coos County*, 30 Oregon 250.

145. *4. Where the Writ Seeks to Perfect the Record on Appeal* the incorrect portions of the transcript must be pointed out, and if the defect consists in transcribing orders, judgments, or pleadings in the case, a copy of the particular instrument claimed to be erroneously inscribed should be attached to the application. A statement that the attorneys believe a transcript to be incorrect is too indefinite. *Nunn v. State*, 40 Tex. Crim. 435.

146. *1. Transcript of Record.* — In *Louisiana* the application will not be considered unless the opinion and decision complained of or a copy thereof is annexed. *Brown Shoe Co. v. Hill*, 51 La. Ann. 920.

In *North Carolina*, if the transcript of the record is not filed and no good reason is given for failure to file it, the writ will be denied. *Critz v. Sparger*, 121 N. Car. 283.

147. *1. State v. Probate Ct.*, 76 Minn. 132, citing 4 ENCYC. OF PL. AND PR. 147. See also the following cases: *Georgia*. — *Hargrove v. Turner*, 108 Ga. 580.

New York. — *People v. Scannell*, 56 N. Y. App. Div. 51.

Oregon. — *Southern Oregon Co. v. Coos County*, 30 Oregon 250.

Georgia Statute. — 2 Code Ga., § 4637; *Papworth v. Fitzgerald*, 111 Ga. 54.

Error Apparent of Record. — A petition alleging generally the unlawfulness of a conviction will be sustained if the error is apparent on the face of the record. *Marcellus v. Treasurer*, (N. J. 1902) 52 Atl. Rep. 233.

149. *2. Southern Oregon Co. v. Coos County*, 30 Oregon 250, citing 4

ENCYC. OF PL. AND PR. 149. See also the following cases:

Georgia. — *Papworth v. Fitzgerald*, 111 Ga. 54.

New York. — *People v. Scannell*, 56 N. Y. App. Div. 51.

151. *1. Southern Oregon Co. v. Coos County*, 30 Oregon 250.

153. *2. Reed v. Sieckenius*, (Tex. Civ. App. 1901) 65 S. W. Rep. 487.

154. *1. Hamblet v. Asbury Park*, 61 N. J. L. 502; *People v. Feitner*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.), 204.

157. *3. Amendment as to Petitioner.* — Under Code Civ. Pro. Mont., §§ 774, 778, if it clearly appears from an inspection of the petition for the writ that another person is the party beneficially interested and that the proceeding is prosecuted in behalf of such person, and the use of the wrong name resulted from a mistaken view with respect to the person having the beneficial interest, the petition may be amended so that the party beneficially interested will be named as the petitioner, especially if the defendant was not, and could not have been, misled or injured or his rights jeopardized by reason of this formal error. *State v. Napton*, 24 Mont. 450.

5. New York Statute. — Under Code Civ. Pro. N. Y., §§ 723, 2133, a petition to review a tax assessment may be amended so as to include an allegation of inequality of the assessment, to enable the relators to have the real question brought up for review. *People v. Feitner*, 58 N. Y. App. Div. 343.

158. *2. Kaufman v. Elder*, (Ind. App. 1899) 54 N. E. Rep. 766; *Matter of Belmont*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 133; *Critz v. Sparger*, 121 N. Car. 283.

Georgia. — *Paulk v. Hawkins*, 106 Ga. 206.

159. See notes 2, 3.

160. *b. BY WHOM MADE.* — See note 3.

10. Dismissal of Petition. — See note 7.

161. *Proving Truth of Statements.* — See note 3.

162. VIII. PARTIES — **1. Applicant for Writ** — *a. PROSECUTION IN NAME OF STATE.* — See note 2.

Test as to Right of Individuals to Writ. — See note 3.

Under a requirement that the petition must be signed by the petitioner it is sufficient if he signs merely the affidavit. *Neal v. Fox*, 114 Ga. 164.

Under 3 Code Ga., § 765, providing that in criminal cases an affidavit must be appended to the petition for the writ, a writ without an affidavit is void. *Hill v. State*, 115 Ga. 833.

North Carolina. — If the petition is not verified, and no transcript of the record is filed, and no excuse is shown for the failure to file it, the writ will be denied; but if no motion to dismiss has been made it can be docketed at any time during the same term of court. *Rothchild v. McNichol*, 121 N. Car. 284.

159. 2. Paulk v. Hawkins, 106 Ga. 206; *State v. Napton*, 24 Mont. 450. See also *Matter of Belmont*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 133, decided under Code Civ. Pro. N. Y., § 2127.

Georgia. — Civ. Code Ga., § 4638, provides that "no writ of certiorari shall be granted or issued, except to the Court of Ordinary, unless the party applying for the same, his agent or attorney, shall make and file with his petition the following affidavit," etc. Under this section it is held that the affidavit of several petitioners is not sufficient to relieve the others from making an affidavit of a similar character. *Velvin v. Austin*, 109 Ga. 200.

A substantial compliance with the requirements of the statute is sufficient. *Ethridge v. Forsyth*, 109 Ga. 156.

The omission of the word "only" in the affidavit that the petition is not filed for delay and the word "verily" in the allegation that the petitioner believes his petition to be meritorious does not constitute sufficient ground for dismissal of the writ. *Ethridge v. Forsyth*, 109 Ga. 156.

In **Montana**, if the affidavit upon which the application is made does not set forth a copy of the order complained of, as required by the rules of

court, and states no reason for such noncompliance, the application will be denied. *State v. District Ct.*, 26 Mont. 224.

3. Western Union Tel. Co. v. Gibson, (Tex. Civ. App. 1899) 52 S. W. Rep. 631.

160. 2. Matter of Belmont, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 133.

Affidavit of Stranger. — *Okerlind v. Fyke*, 90 Ill. App. 192; *Kerschner v. Mountz*, 4 Pa. Dist. 690.

When an Attorney Subscribes to the Affidavit it will not be assumed that he did so without authority. *Matter of Belmont*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 133.

Montana Statute. — Code Civ. Pro. Mont., § 1942, requires the application for a writ of certiorari to be made on affidavit by the party beneficially interested. Under this section an affidavit by the duly authorized agent or attorney of the party beneficially interested, in which the material averments are stated as true to the knowledge of the affiant, is sufficient. *State v. Napton*, 24 Mont. 450.

7. Okerlind v. Fyke, 90 Ill. App. 192.

161. 3. Reed v. Sieckenius, (Tex. Civ. App. 1901) 65 S. W. Rep. 487.

162. 2. Imhoff v. Highway Com'rs, 89 Ill. App. 66 [citing 4 ENCYC. OF PL. AND PR. 162]; *Tallon v. Hoboken*, 59 N. J. L. 383; *West Jersey Traction Co. v. Board of Public Works*, 58 N. J. L. 362.

3. Collins v. Keokuk, 108 Iowa 28.

Where Applicant Is One of Class. — The court may in its discretion, at the instance of a private person, act by certiorari when the applicant is one of a class of persons most directly affected in the enjoyment of a public right, and the public convenience will be subserved by the remedy. *Oliver v. Jersey City*, 63 N. J. L. 96.

Attorney-General. — The regular appointment of teachers' institute boards is a matter of public concern that will justify the attorney-general in applying for the writ. *State v. Harrison*, 141 Mo. 12.

166. b. WHETHER APPLICANT MUST HAVE BEEN PARTY. — See note 1.

167. c. ISSUANCE OF WRIT ON APPLICATION OF PERSON AGGRIEVED. — See note 3.

168. See note 1.

169. Acquiescence in Irregularities and Estoppel. — See note 5.

171. e. MUNICIPAL IMPROVEMENTS AND ASSESSMENTS. — See note 1.

172. f. HIGHWAY PROCEEDINGS — *Review on Application of Private Citizens.* — See note 2.

173. Highway Commissioners. — See note 1.

166. 1. *Okerlind v. Fyke*, 90 Ill. App. 192; *Smalley v. Board of Education*, 63 N. J. L. 201; *Wilson v. Camden*, 63 N. J. L. 200.

167. 3. *Wilson v. Remley*, 106 Iowa 583; *Collins v. Keokuk*, 108 Iowa 28; *Wolpert v. Newcomb*, 106 Mich. 357; *McGovern v. Trenton*, 60 N. J. L. 402; *West Jersey Traction Co. v. Board of Public Works*, 58 N. J. L. 362; *People v. Barnes*, 17 N. Y. App. Div. 197; *People v. Campbell*, 152 N. Y. 59. See also *State v. Second Judicial Dist. Ct.*, 24 Mont. 238; *Smalley v. Board of Education*, 63 N. J. L. 201.

New York Statute. — Code Civ. Pro. N. Y., § 2127, provides: "An application for the writ must be made by or in behalf of a person aggrieved by the determination to be reviewed." *Matter of Belmont*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 133; *People v. Woodruff*, 64 N. Y. App. Div. 239.

Presumption as to Right to Writ. — After the allowance of a certiorari the right of the prosecutors to the writ will be assumed in the absence of proof to the contrary. *Biddle v. Riverton*, 58 N. J. L. 289.

An Owner of Taxable Property may prosecute the writ to review proceedings which tend to burden the taxing district with debt. *Biddle v. Riverton*, 58 N. J. L. 289.

Effect of Parting with Title to Property Involved. — Under Rev. Codes N. Dak., § 6099, which requires that the application must be made by the party beneficially interested, an applicant for relief from an order providing for the destruction of certain gambling devices is not beneficially interested where it appears that he has sold such devices. *Sanderson v. Winchester*, 10 N. Dak. 85.

Agent of Party Beneficially Interested. — The fact that one is the agent and

attorney of the party beneficially interested does not attract to him the beneficial interest of his principal so that he may bring a writ under a statute which provides that the application for the writ must be made by a party beneficially interested. *State v. Napton*, 24 Mont. 450.

168. 1. *People v. Campbell*, 152 N. Y. 59.

A Committee of a Lunatic whose land is illegally assessed is a person aggrieved within Laws N. Y. 1880, c. 269, § 1. *People v. Williams*, 90 Hun (N. Y.) 501.

Bidder for Public Work. — The action of a city in awarding a contract to pave a street to one who was not the lowest bidder affords sufficient grievance to the actual lowest bidder. *McGovern v. Trenton*, 60 N. J. L. 402.

Discontinuance of Street. — One who, by the discontinuance of a street, is deprived of the only direct way to reach the shore of a harbor which is but two blocks distant from his dwelling, and is compelled to make a considerable detour to reach the shore, is a party aggrieved. *People v. Shaw*, 34 N. Y. App. Div. 61.

169. 5. *State v. Barksdale*, 50 La. Ann. 55.

171. 1. *Oliver v. Jersey City*, 63 N. J. L. 96.

172. 2. In *New Jersey* the interest which every citizen has in public highways is sufficient to entitle him to prosecute the writ to test the legality of the action of the surveyor of highways in vacating a public road, although he was not an adjoining owner nor interested in its continuance otherwise than as one of the public. *Oliver v. Jersey City*, 63 N. J. L. 96.

173. 1. *Highway Com'rs v. Barnes*, 195 Ill. 43, citing 4 ENCYC. OF PL. AND PR. 173.

174. g. JOINDER IN APPLICATION FOR WRIT. — See note 2.

Joinder to Save Expense. — See note 3.

175. Circumstances Authorizing Joinder. — See note 1.

176. 2. Defendant — *a. DIRECTION OF WRIT* — (1) *To Custodian of Record.* — See note 3.

(2) *To Recording Officers* — *County Clerk.* — See note 4.

City or Town Clerk. — See note 5.

177. (3) To Court, Judge, or Clerk — *Court or Judge.* — See note 1.

Clerk of Court. — See note 2.

(4) *To Municipal and Quasi-municipal Bodies and Officers* — *Municipal Improvements and Assessments.* — See note 3.

180. (5) Loss of Control Over Record. — See note 2.

181. (6) Expiration of Term of Office — *Continuing Office.* — See note 1.

182. (8) Misdirection of Writ — *Supersedeas or Quashal of Writ.* — See notes 4, 5.

174. 2. Potter v. Orange, 62 N. J. L. 192.

New York Statute. — The New York Tax Law (Laws 1896, c. 908; Gen. Laws, c. 24). § 250, which reads: "Two or more persons assessed upon the same roll who are affected in the same manner by the alleged illegality, error, or inequality may unite in the same petition," has been held to apply to a case wherein the adjudication upon the complaint of one taxpayer must necessarily determine the complaint of others, *i. e.*, where a number of taxpayers complain of their assessment for the same reason upon the same facts, and the particular illegality which is complained of by one petitioner is equally injurious to every petitioner united in the application. *People v. Feitner*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 247.

3. See *People v. Webster*, 49 N. Y. App. Div. 556.

175. 1. Rule of Court Construed. — A rule of court providing that in matters of taxation not more than four prosecutors shall be joined is restrictive and not permissive. To warrant any joining of prosecutors there must be a common grievance, not merely a co-ownership of property. *Potter v. Orange*, 62 N. J. L. 192.

176. 3. State v. Moore, 54 S. Car. 556 [*citing* 4 ENCYC. OF PL. AND PR. 176-180]; *Quinchard v. Alameda*, 113 Cal. 664; *State v. Souders*, 69 Mo. App. 472; *Young v. Crane*, 67 N. J. L. 453;

Potter v. Orange, 62 N. J. L. 192; *People v. Hoffman*, 166 N. Y. 462; *People v. Feitner*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 247; *Vanden Bos v. Douglas County*, 11 S. Dak. 190.

4. *State v. Moore*, 54 S. Car. 556 [*citing* 4 ENCYC. OF PL. AND PR. 176-180]; *State v. Clifton*, 113 Wis. 107.

5. **To Town Rather than to Town Clerk.** — *State v. Everett*, 103 Wis. 269; *State v. McGovern*, 100 Wis. 666; *State v. Manitowoc*, 92 Wis. 546.

The corporation must be brought before the court. *Young v. Crane*, 67 N. J. L. 453.

Inasmuch as the clerk is not the proper party, he cannot by agreement waive the necessity for a return. *State v. Lien*, 112 Wis. 282.

177. 1. See *Young v. Crane*, 67 N. J. L. 453.

2. *State v. Souders*, 69 Mo. App. 472.

3. *State v. Souders*, 69 Mo. App. 472; *State v. McGovern*, 100 Wis. 666; *State v. Manitowoc*, 92 Wis. 546.

180. 2. State v. Moore, 54 S. Car. 556 [*citing* 4 ENCYC. OF PL. AND PR. 176-180]; *State v. Moore*, 54 S. Car. 556.

181. 1. Direction of Writ to Ex-officer. — *State v. Souders*, 69 Mo. App. 472.

182. 4. State v. Souders, 69 Mo. App. 472; State v. Moore, 54 S. Car. 556; State v. Everett, 103 Wis. 269; State v. Manitowoc, 92 Wis. 546.

6. *State v. Everett*, 103 Wis. 269.

183. b. PARTIES DEFENDANT BECAUSE OF INTEREST IN PROCEEDINGS. — See note 4.

184. See note 1.

185. IX. BOND—1. Necessity for Bond—b. UNDER STATUTES. — See note 3.

187. Statutes Mandatory. — See note 1.

188. Prosecution of Writ in Forma Pauperis. — See note 3.

189. 2. Sufficiency of Bond—General Principles Governing Its Execution. — See note 1.

Description of Suit and Judgment. — See note 2.

190. 3. Amendment and Substitution. — See note 3.

196. X. THE WRIT, ITS ISSUANCE AND INCIDENTAL PROCEEDINGS—1. Rule to Show Cause and Notice—b. UNDER STATUTES. — See note 3.

183. 4. Duffo v. Wayne Circuit Judge, 114 Mich. 350; *State v. Washoe County*, 23 Nev. 247 [both citing 4 ENCYC. OF PL. AND PR. 183]; *Bowlby v. Dover*, 64 N. J. L. 185; *Cowen v. Wildwood*, 60 N. J. L. 365; *People v. Onondaga County Ct.*, 92 Hun (N. Y.) 13.

184. 1. State v. Washoe County, 23 Nev. 247.

185. 3. Georgia. — 2 Code Ga., § 4639, which provides that the party or his agent or attorney shall give bond, means that the bond shall be given by the party himself or by his agent, either general or special, who is authorized to represent him in the case, or by the attorney whose employment includes services in the case or who is authorized by the party to give the bond. *Alabama Midland R. Co. v. Stevens*, (Ga. 1902) 43 S. E. Rep. 46.

In Criminal Cases. — Such statute has no application to a criminal prosecution. *Colvard v. State*, (Ga. 1903) 43 S. E. Rep. 855.

In Washington, while the writ of review is in the nature of an appeal, it is a special statutory proceeding, and the statutes do not expressly require that a bond be given by the relator as upon an appeal. *State v. Moore*, 23 Wash. 276.

The Approval of the Bond is essential in *Georgia* to the validity of the writ. *Stover v. Doyle*, 114 Ga. 85; *Wingard v. Southern R. Co.*, 109 Ga. 177.

Such approval must be made by the judge or justice who tried the case in the first instance. The fact of approval may be evidenced by a formal entry or by any act of the judge showing his acceptance of the bond. *Dykes*

v. Twiggs County, 115 Ga. 698; *Hamilton v. Phenix Ins. Co.*, 107 Ga. 728.

187. 1. Dykes v. Twiggs County, 115 Ga. 698. But see *Howth v. Shumard*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1079.

Failure to Give Bond—Running of Statute of Limitations. — The pendency of a writ which is sued out without a bond does not suspend the statute of limitations requiring the suing out of the writ within thirty days. *Carpenter v. Southern R. Co.*, 112 Ga. 152.

188. 3. Dykes v. Twiggs County, 115 Ga. 698; *Stover v. Doyle*, 114 Ga. 85; *Carpenter v. Southern R. Co.*, 112 Ga. 152; *Hamilton v. Phenix Ins. Co.*, 107 Ga. 728; *Reese v. Ryals*, 112 Ga. 910.

189. 1. In Delaware the writ will not be quashed because an attorney becomes surety on the bond, in violation of a rule of court, although such practice is held to be improper. *McLaughlin v. Sentman*, 2 Penn. (Del.) 565.

2. Harris v. Parker, (Tex. Civ. App. 1898) 46 S. W. Rep. 844.

190. 3. When There Is No Bond. — When the writ is issued without the proper bond being filed, there is nothing before the court to amend, as the proceedings are a nullity. *Dykes v. Twiggs County*, 115 Ga. 698; *Hamilton v. Phenix Ins. Co.*, 107 Ga. 728.

196. 3. Georgia. — *Bunn v. Henderson*, 113 Ga. 609; *Georgia, etc., R. Co. v. McElroy*, 110 Ga. 316; *O'Keefe v. Cotton*, 102 Ga. 516; *Moore v. State*, 96 Ga. 309.

There is no particular method for evidencing service, neither is there any statute or rule of court which pre-

198. 2. Hearing of Application for Writ. — See note 1.

199. 3. Allocatur or Fiat. — See note 1.

202. 6. Service of Writ — How Made. — See notes 5, 6.

204. 8. Amendment of Writ. — See notes 3, 4.

205. 9. Alias Writ. — See note 2.

XI. SUPERSEDEAS AND STAY OF PROCEEDINGS — 1. Doctrine as to Suspension of Further Proceedings. — See note 5.

206. Award of Special Supersedeas. — See note 2.

208. Correction of Record. — See note 1.

After Issuance of Execution. — See note 2.

scribes that there shall be any particular sort of evidence, but service can be made by a proper officer, or affidavit of service by a private person, or admission of parties in open court that service has been made; and if counsel who have control of the case are served with written notice, such notice will bind all associate counsel, or counsel subsequently employed. *Butler v. Farley*, 99 Ga. 631.

Telegram as Notice. — Under 2 Code Ga., § 4644, a telegram is a sufficient written notice. *Western Union Tel. Co. v. Bailey*, 115 Ga. 725.

Insufficient Evidence of Service. — A certificate of service of notice which does not purport to be a return of service signed by an officer charged with the duty of serving process, and which is merely a written statement not sworn to and containing no date of service, does not conform to 2 Code Ga., § 4644, and such irregularity is ground for dismissal. *Hardy v. Miller*, 115 Ga. 107.

Notice of the Sanction of the Writ Mailed to the Attorney for the Defendant, without proof that the notice was actually received, is insufficient. *Butler v. Farley*, 99 Ga. 631.

Waiver of Notice. — By answering the writ a magistrate waives the service required by Civ. Code Ga., § 4643. *Crapp v. Morris*, 108 Ga. 793.

Washington. — Ball. Annot. Codes & Stat. Wash. (1897), § 5742; *State v. Moore*, 23 Wash. 276; *Leavitt v. Chambers*, 16 Wash. 353.

198. 1. *Citizens' St. R. Co. v. Heath*, 154 Ind. 303, citing 4 ENCYC. OF PL. AND PR. 197, 198.

199. 1. *Wallace v. Jameson*, 179 Pa. St. 94.

Effect of Allocatur. — The allocatur does not adjudge that there is illegality or that the party seeking the writ is entitled to it. It does not make even

a *prima facie* case, where the prosecutors fail to show their interest in the controversy. *Tallon v. Hoboken*, 59 N. J. L. 383.

202. 5. See *Gossett v. Devorss*, (Kan. App. 1903) 73 S. W. Rep. 731, holding that the writ need not be served by an officer.

6. *Atlanta, etc., R. Co. v. Whitaker*, 115 Ga. 644.

204. 3. *People v. Feitner*, 40 N. Y. App. Div. 620.

4. *People v. Webster*, 49 N. Y. App. Div. 556.

Particulars in Which Amendment Allowed. — The court may amend a writ issued to review an assessment for taxation so that it will state that it was issued upon the relation of the party assessed and by prescribing that service of the return shall be made upon the relator's attorney, also that the writ shall be subscribed by the justice of the Supreme Court granting it. *People v. Webster*, 49 N. Y. App. Div. 556.

205. 2. *After Dismissal of Writ.* — A second writ cannot be sued out when one has been dismissed, but the prosecutor should move to vacate the order of dismissal. *Dowd v. Jones*, 59 N. J. L. 367.

5. *Louisiana Statute.* — Garland's Rev. Code Prac. La. (1894), § 863, provides that "mere service of the order to send up the record renders void every act which may have been subsequently performed by the judge to whom it was directed." *State v. St. Paul*, 104 La. 203.

206. 2. *People v. Sturgis*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 448; *State v. Burnell*, 102 Wis. 232.

208. 1. *Cushwa v. Lamar*, 45 W. Va. 326.

2. *Louisiana Statute.* — Garland's Rev. Code Prac. La. (1894), § 866, provides that "when a court of competent

209. 2. Statutory Provisions. — See note 2.

211. 3. Vacation of Supersedeas. — See note 1.

212. XII. RETURN OR ANSWER — 1. Definition and Distinction Between Terms. — See note 1.

2. Necessity of Return. — See notes 2, 3, 4.

214. 6. By Whom Made — *a.* OFFICERS TO WHOM WRIT IS DIRECTED. — See note 1.

215. *f.* COURT OR BOARD HAVING MORE THAN ONE MEMBER. — See note 6.

g. WHETHER ATTORNEY MAY MAKE RETURN. — See note 8.

216. 7. Formalities of Return. — See note 1.

217. 8. Contents of Return — *a.* TRANSCRIPT OF RECORD. — See note 1.

Return of Original Records. — See note 2.

218. *c.* RELEVANCY OF MATTERS RETURNED. — See note 3.

jurisdiction issues a mandate for the purpose of inquiring into the validity of a proceeding in the last resort, if judgment has been rendered and execution sued out in the court below, it may arrest the execution by enjoining the party suing it and the officer charged with it to proceed no further until the validity of the proceedings has been pronounced upon, and this under the same penalties which are inflicted for contempt of court." *State v. St. Paul*, 104 La. 203.

209. 2. New York. — Code Civ. Pro. N. Y., § 2131, instead of enlarging the power of the writ to effect a stay, limits it. *People v. Sturgis*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 448.

211. 1. *People v. Sturgis*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 448, *citing* 4 ENCYC. OF PL. AND PR. 211.

212. 1. See *Stumpf v. San Luis Obispo County*, 131 Cal. 364; *State v. Lien*, 112 Wis. 282.

Propriety of Answer. — It is improper to file an answer denying the allegations of the petition, as a return to the writ constitutes the answer. *McAloon v. License Com'rs*, 22 R. I. 191.

But if facts are set up touching the discretion of the court against issuing the writ, the petitioner may answer them. *Ward v. Board of Aldermen*, 181 Mass. 432.

2. *Monitor Lodge No. 219 v. Goldy*, 58 N. J. L. 119; *State v. Lien*, 112 Wis. 282.

If No Return Is Made the Writ Will Be Dismissed, and a stipulation of the attorney setting forth the facts cannot take the place of the return. *Pierson v. Klahre*, (N. J. 1899) 43 Atl. Rep. 569.

3. *Fain v. Shy*, 115 Ga. 765; *Pierson v. Klahre*, (N. J. 1899) 43 Atl. Rep. 569; *State v. Lien*, 112 Wis. 282.

4. *Fain v. Shy*, 115 Ga. 765; *Monitor Lodge No. 219 v. Goldy*, 58 N. J. L. 119; *Cushwa v. Lamar*, 45 W. Va. 326; *State v. Lien*, 112 Wis. 282.

214. 1. See *Lane v. Ocean Grove Camp Meeting Assoc.*, 58 N. J. L. 123.

215. 6. See *State v. Souders*, 69 Mo. App. 472, wherein it was held that where a writ is directed to a court composed of several judges the return should be made by at least a quorum of that body.

8. A Stipulation of Counsel cannot form the foundation upon which to reverse the judgment. *Monitor Lodge No. 219 v. Goldy*, 58 N. J. L. 119.

216. 1. *Cushwa v. Lamar*, 45 W. Va. 326, *citing* 4 ENCYC. OF PL. AND PR. 216, in support of the various propositions stated on that page.

Signature by Attorney is irregular. *Warren v. Hart*, (Mass. 1903) 66 N. E. Rep. 412.

217. 1. *Cushwa v. Lamar*, 45 W. Va. 326 [*citing* 4 ENCYC. OF PL. AND PR. 217]; *Stumpf v. San Luis Obispo County*, 131 Cal. 364; *Buckner v. State*, 115 Ga. 238; *Heidt v. Canuet*, 108 Ga. 752; *State v. Woodson*, 161 Mo. 444; *State v. Harrison*, 141 Mo. 12; *State Commercial Dime Bldg., etc., Assoc. v. Pietroniro*, (N. J. 1901) 50 Atl. Rep. 451; *Venable v. Police Com'rs*, 40 Oregon 458.

2. *Cushwa v. Lamar*, 45 W. Va. 326.

218. 3. If the Requirements of the Writ Are Too Broad, a motion may be made for a modification of the writ so

- 219.** Irrelevant Matters. — See note 1.
Disposition of Irrelevant Matters. — See note 2.
- 220.** *d.* JURISDICTION OF INFERIOR COURT OR TRIBUNAL.
— See note 1.
- 221.** *e.* EVIDENCE—Whether It Should Be Returned.—See notes 1, 2.
- 224.** Fulness and Completeness. — See note 3.
- 9.** Conclusiveness of Return. — See note 5.
- 225.** See note 1.

that the defendant may be excused from making a return to unnecessary and improper matters. *People v. Feitner*, 37 N. Y. App. Div. 362.

219. 1. *Cushwa v. Lamar*, 45 W. Va. 326 [citing 4 ENCYC. OF PL. AND PR. 219]; *Kirby v. Circuit Ct.*, 10 S. Dak. 38. Compare *Ward v. Board of Aldermen*, 181 Mass. 432, holding that as the petition for the writ is addressed to the discretion of the court, the respondent may set up extraneous matters which show that even if the record does disclose an error, justice does not require the quashal of the writ.

2. *Cushwa v. Lamar*, 45 W. Va. 326, citing 4 ENCYC. OF PL. AND PR. 219.

220. 1. *State Commercial Dime Bldg., etc., Assoc. v. Pietroniro*, (N. J. 1901) 50 Atl. Rep. 451.

221. 1. *Matter of Private Road*, 13 Pa. Super. Ct. 227.

2. In *New Jersey* the evidence cannot be laid before the court by stipulation of counsel without a prior rule of the lower court to review it. *Houman v. Schulster*, 60 N. J. L. 132.

224. 3. *State v. Probate Ct.*, 83 Minn. 58.

5. *State v. Thorne*, 112 Wis. 81, citing 4 ENCYC. OF PL. AND PR. 224. See also the following cases:

California. — *Los Angeles v. Young*, 118 Cal. 295; *Rauer v. Justices' Ct.*, 115 Cal. 84; *White v. Superior Ct.*, 110 Cal. 60.

Georgia. — *Buckner v. State*, 115 Ga. 238.

Louisiana. — *State v. King*, 50 La. Ann. 659.

Michigan. — *Scholtz v. Smith*, 119 Mich. 634; *Taylor v. Shimmel*, 107 Mich. 676.

New York. — *People v. Wurster*, 149 N. Y. 549; *People v. Vanderpoel*, 35 N. Y. App. Div. 73; *People v. Brady*, 50 N. Y. App. Div. 372; *People v. Commissioners of Charities, etc.*, 1 N. Y. App. Div. 3; *People v. Feitner*, 81 N. Y. App. Div. 118; *People v. Feitner*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.)

204; *People v. York*, 73 N. Y. App. Div. 445; *People v. Feitner*, 65 N. Y. App. Div. 224; *People v. Barnes*, 17 N. Y. App. Div. 197.

Rhode Island. — *Wheeler v. Probate Ct.*, 21 R. I. 49.

Wisconsin. — *State v. Oconomowoc*, 104 Wis. 622.

225. 1. *California*. — *Stumpf v. San Luis Obispo County*, 131 Cal. 364; *Los Angeles v. Young*, 118 Cal. 295; *Rauer v. Justices' Ct.*, 115 Cal. 84.

District of Columbia. — *Hendley v. Clark*, 8 App. Cas. (D. C.) 165.

Louisiana. — *State v. Barksdale*, 50 La. Ann. 55.

Rhode Island. — *Wheeler v. Probate Ct.*, 21 R. I. 49.

South Dakota. — *Kirby v. Circuit Ct.*, 10 S. Dak. 38.

Wisconsin. — *State v. Thorne*, 112 Wis. 81.

Compare *Union Drainage Dist. v. Volke*, 163 Ill. 243, holding that extrinsic evidence may be heard to show that no injustice has been done to the petitioner or that great public detriment might result from quashing the proceedings. And see *Fowler v. Larabee*, 58 N. J. L. 314, to the effect that in reviewing proceedings of the Court of Common Pleas under the Road Act the return may be contradicted by testimony when ordered by the court to be taken for that purpose.

Presumptions. — When the return is silent as to material allegations of fact contained in the petition, the presumption is that the officers making the return intended to admit those allegations; but this presumption does not extend to conclusions of law. *People v. Surphin*, 166 N. Y. 163. See also *State v. Probate Ct.*, 83 Minn. 58, holding, however, that the presumption is not conclusive.

Motion to Have Additional Matters Certified. — If the petitioner wishes to raise facts not of record and which are suggested by the petition, he should move that the defendant be ordered to

- 226.** Statements in Return Dehors Record. — See note 3.
227. Traverse of Return under Authority of Statute — See note 2.
 10. Amendment and Further Return. — See note 4.
228. Grounds for Amendments or Further Return. — See note 2.
232. 11. Remedy for False Return. — See note 2.
234. XIV. QUASHAL, DISMISSAL, AND SUPERSEDEAS OF WRIT —
 1. Distinction Between Quashal and Supersedeas. — See note 1.
 3. When Writ Will Be Quashed or Superseded — *a.* IM-
 PROVIDENT ISSUANCE OF WRIT IN GENERAL. — See note 4.
235. See note 1.
238. *c.* LACHES AND LIMITATIONS—Limitations.—See note 2.

certify such material facts in addition to the record. *Tilston v. Street Com'rs*, 182 Mass. 325.

226. 3. *Los Angeles v. Young*, 118 Cal. 295.

227. 2. *Georgia Statute*. — If an answer is not sufficiently full to enable the court to determine the assignment of error, or if the answer is untrue, exceptions may be taken or the answer may be traversed as the case may require. *Buckner v. State*, 115 Ga. 238.

An alleged error contradicted by answer and not traversed by the petitioner will not be considered. *Lanier v. Byrd*, 115 Ga. 200.

In *New Jersey* the record is the primary source of information, and if it is alleged that the statements of the record are not warranted by the actual facts, a rule must be taken to certify what those facts are; and only when the court is unable to respond to such rule can the testimony of witnesses be invoked. *Genuario v. DeGaudenzio*, 64 N. J. L. 157.

4. *State v. Springer*, 134 Mo. 212; *State v. Thorne*, 112 Wis. 81.

Georgia Statute. — 2 Code Ga., § 4647, provides that an answer to a writ of certiorari may be perfected, provided exceptions thereto be filed in writing specifying the defects and notice thereof be given to the opposite party before the case is called in its order for a hearing. *Ford v. Toomer*, (Ga. 1902) 43 S. E. Rep. 45; *Stoner v. Magins*, (Ga. 1902) 43 S. E. Rep. 45.

If the applicant proceeds upon an answer which is not sufficiently full or explicit to enable the court to decide the assignment of error made in the petition, the certiorari will be overruled. *Buckner v. State*, 115 Ga. 238.

New York Statute. — *People v. Wurster*, 149 N. Y. 549.

Where it is claimed that the return

is incomplete and that a correct and full report of the proceedings would disclose many other irregularities, it is the proper practice to apply for an order for a further return, and not to show irregularity by affidavits. Under Code Civ. Pro. N. Y., § 2139, the court has no power to allow any affidavit to be read except for the purpose of establishing some fact which is essential to the jurisdiction of the body or officer. *People v. Board of Contract*, etc., 39 N. Y. App. Div. 30.

228. 2. *State v. Springer*, 134 Mo. 212, citing 4 ENCYC. OF PL. AND PR. 228.

232. 2. *People v. Wurster*, 149 N. Y. 549; *People v. Feitner*, 65 N. Y. App. Div. 224.

234. 1. *People v. Feitner*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 247; *State v. Oconomowoc*, 104 Wis. 622. See also *People v. Peck*, 73 N. Y. App. Div. 89.

4. *Colorado*. — *Ellis v. People*, 15 Colo. App. 341.

Delaware. — *Newell v. Hampton*, 1 Marv. (Del.) 1.

Illinois. — *Behrens v. Highway Com'rs*, 169 Ill. 558.

Michigan. — *Culver v. Travis*, 108 Mich. 640.

Missouri. — *State v. Smith*, (Mo. 1903) 73 S. W. Rep. 211.

New Jersey. — *Layton v. Ocean Grove Camp Meeting Assoc.*, 59 N. J. L. 369; *Dowd v. Jones*, 59 N. J. L. 367.

Pennsylvania. — *Wallace v. Jameson*, 179 Pa. St. 94.

Washington. — *Leavitt v. Chambers*, 16 Wash. 353.

Wisconsin. — *State v. Daubner*, 111 Wis. 671.

235. 1. *People v. Sturgis*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 448, citing 4 ENCYC. OF PL. AND PR. 235.

238. 2. *Southern Oregon Co. v. Coos County*, 30 Oregon 250.

243. *g.* WANT OR INSUFFICIENCY OF BOND — Approval of Bond. — See note 10.

245. *i.* MISCELLANEOUS GROUNDS FOR QUASHAL — Writ Improperly Issued. — See note 1.

247. *4.* Motion — *c.* ON DEMURRER. — See note 7.

253. XV. HEARING AND DETERMINATION — 2. Hearing on Pleadings. — See note 3.

255. *3.* Extent of Review — *a.* RESTRICTION OF INQUIRY TO JURISDICTION AND REGULARITY OF PROCEEDINGS. — See note 1.

256. Regularity of Proceedings. — See note 1.

257. Relaxation of Rule in Discretion of Court. — See note 1.

258. *c.* RULINGS ON EVIDENCE. — See note 2.

260. Jurisdictional Errors. — See note 3.

261. *d.* WHETHER SUFFICIENCY OF EVIDENCE WILL BE REVIEWED — (1) *Common-law Doctrine.* — See note 3.

243. 10. Approval of Bond. — *Gossett v. Devorss*, (Kan. App. 1903) 73 S. W. Rep. 731, *citing* 4 ENCYC. OF PL. AND PR. 243.

245. 1. *Leavitt v. Chambers*, 16 Wash. 353.

247. 7. *State v. Clifton*, 113 Wis. 107.

Such Motion Comes Too Late After a Return Has Been Made to the writ, the effect of filing the return being to waive the demurrer. *School Directors v. School Trustees*, 91 Ill. App. 96.

253. 3. *Behrens v. Highway Com'rs*, 169 Ill. 558.

255. 1. *O'Brien v. Pawtucket*, 20 R. I. 49, *citing* 4 ENCYC. OF PL. AND PR. 254, 255. See also the following cases:

Illinois. — *People v. Gary*, 196 Ill. 310; *People v. Lindblom*, 182 Ill. 241.

Louisiana. — *State v. Barksdale*, 50 La. Ann. 55.

New Jersey. — *Wait v. Krewson*, 59 N. J. L. 71.

Wisconsin. — *State v. Circuit Ct.*, 101 Wis. 422.

In *Illinois* extrinsic evidence may be heard to show that no injustice has been done to the petitioner or that great public detriment or inconvenience might result from quashing the proceedings. *Union Drainage Dist. v. Volke*, 163 Ill. 243.

Modification of Assessment. — Under the charter of the city of New York, § 895 (Laws N. Y. 1897, c. 378), an application for reduction of the assessed valuation of property must allege the grounds of objection thereto and will stand or fall upon the grounds of error averred therein, and is limited in re-

view to the case made out in the application. *People v. Feitner*, 77 N. Y. App. Div. 428.

256. 1. *Garnsey v. Klamath County Ct.*, 33 Oregon 201 [*citing* 4 ENCYC. OF PL. AND PR. 256]; *People v. Lindblom*, 182 Ill. 241.

257. 1. *McClatchy v. Superior Ct.*, 119 Cal. 413. In this case, which was a proceeding for constructive contempt in publishing a malicious and false statement concerning the judge, the defendant sought to introduce evidence denying a wrongful intent and falsity, which was disallowed. The Supreme Court held that a refusal to allow this evidence was the same as refusing to hear the defendant, and that it would look at the evidence to see whether the court below exceeded its power.

258. 2. **Review of Ruling on Evidence.** — *White v. Superior Ct.*, 110 Cal. 60; *People v. Lindblom*, 182 Ill. 241.

260. 3. **Error Not Clearly Apparent.** — The court will not review a question of fact on which jurisdiction depends when the error is not made clearly to appear. *State v. Watkins*, 49 La. Ann. 1056.

261. 3. *California.* — *White v. Superior Ct.*, 110 Cal. 60.

New Jersey. — The question how far the court will go in reviewing the facts upon which the court below acted appears to be somewhat unsettled in *New Jersey*. The *Certiorari Act*, § 18 (Gen. Stat. N. J., p. 370), which authorizes the court to determine disputed questions of fact, only relates to extraordinary proceedings of special statutory tribunals outside of regular suits at law. A writ of certiorari sued out to

264. Jurisdictional Facts. — See note 1.

267. (2) *Under Statutes* — Statutes Authorizing Review of Evidence. — See note 1.

273. *c.* EXTENT OF REVIEW OF EVIDENCE — Findings Supported by Some Evidence. — See note 1.

277. 4. *Matters Dehors Record* — *a.* DOCTRINE AS TO CONSIDERATION OF. — See note 3.

282. *b.* ORAL EVIDENCE, AFFIDAVITS, AND DEPOSITIONS. — See note 3.

284. *c.* REFERENCES. — See note 2.

review the decision of an inferior tribunal is in the nature of a writ of error, and therefore the ordinary rule, in cases not within the statute referred to, is that the review will be confined to errors of law; and the court will not consider the weight to be given to testimony nor the conclusions of fact to be drawn from it; and where there is legal evidence before the court below, upon which its finding of fact may be supported, the court will not reverse its determination. *McAdam v. Block*, 63 N. J. L. 508. See also *Rogers v. Kershaw*, 64 N. J. L. 213.

264. 1. *Stumpf v. San Luis Obispo County*, 131 Cal. 364; *Sweeny v. Mayhew*, (Idaho 1899) 56 Pac. Rep. 85 [both cases quoting 4 ENCYC. OF PL. AND PR. 262-264]; *McAloon v. License Com'rs*, 22 R. I. 191; *Salt Lake City Water, etc., Power Co. v. Salt Lake City*, 24 Utah 282.

Extent of Examination of Evidence. — The examination of the evidence is not for the purpose of determining whether the preponderance thereof is on one side or the other, but to determine whether there is any evidence which will justify the judgment. *Salt Lake City Water, etc., Power Co. v. Salt Lake City*, 24 Utah 282.

267. 1. *New York.* — *People v. Railroad Com'rs*, 54 N. Y. App. Div. 615; *People v. Railroad Com'rs*, 4 N. Y. App. Div. 259; *People v. Barker*, 1 N. Y. App. Div. 532.

Extent of Review. — A special statutory proceeding to review questions of taxation authorizes a rehearing of the questions at issue and the introduction of additional proofs bearing thereon. The petition and the return of the commissioners are regarded simply as pleas, and the issue raised thereby furnishes the subject-matter. *People v. Feitner*, 81 N. Y. App. Div. 118.

The writ brings up both record and proceedings, and the court not only

inquires into the jurisdiction, but considers the evidence both as to alleged errors committed and as to its sufficiency. *People v. Feitner*, 81 N. Y. App. Div. 118.

Where application is made to tax commissioners for the reduction of an assessment, and the commissioners have acted thereon adversely to the applicant, either wholly or in part, he may sue out the writ, and as a matter of right is entitled to a rehearing, and may produce and give before the court all the evidence which was laid before the commissioners and such further evidence as he chooses to produce bearing upon the material issues raised by the petition and return, if the court deems it necessary for a proper disposition of the matter. *People v. Feitner*, 81 N. Y. App. Div. 118.

273. 1. *Houman v. Schuister*, 60 N. J. L. 132.

277. 3. *Alabama.* — *Moore v. Martin, etc., Co.*, 124 Ala. 291.

Illinois. — *People v. Gary*, 196 Ill. 310; *Behrens v. Highway Com'rs*, 169 Ill. 558; *Scheiwe v. Holz*, 168 Ill. 432; *Union Drainage Dist. v. Volke*, 163 Ill. 243; *Board of Education v. School Trustees*, 74 Ill. App. 401; *Randecker v. Highway Com'rs*, 61 Ill. App. 426.

Iowa. — *Wilson v. Remley*, (Iowa 1899) 80 N. W. Rep. 542.

Missouri. — *Ward v. Board of Equalization*, 135 Mo. 309; *State v. Williams*, 70 Mo. App. 238.

New York. — *People v. Murray*, (C. Pl. Spec. T.) 14 Misc. (N. Y.) 177. See also *People v. Wurster*, 89 Hun (N. Y.) 7.

Oregon. — *Venable v. Police Com'rs*, 40 Oregon 458.

South Dakota. — *Kirby v. Circuit Cl.*, 10 S. Dak. 38.

282. 3. *People v. Gary*, 196 Ill. 310.

284. 2. *State v. Barksdale*, 50 La. Ann. 55.

- 284.** *d. MATTERS IMPROPERLY RETURNED.* — See note 6.
287. *5. Errors Not Apparent of Record — a. WHETHER THEY ARE CONSIDERED.* — See note 5.
288. *b. MERE SILENCE OF RECORD.* — See note 1.
297. *8. Burden of Proof.* — See note 1.
9. Trial de Novo. — See note 3.
302. *XVI. JUDGMENT — 1. Affirmance or Quashal of Proceedings — Scope of Judgment.* — See note 1.
303. *3. Power to Render Judgment Anew — b. UNDER STATUTES.* — See note 1.
305. *Certiorari as Substitute for Appeal.* — See note 1.
315. *7. Remand — a. COMMON-LAW DOCTRINE.* — See note 2.
321. *XVII. COSTS — 1. Whether Costs Are Allowable — a. AT COMMON LAW.* — See note 8.
323. *b. UNDER STATUTES.* — See note 1.
Whether Certiorari Is an Action. — See note 3.
Certiorari Is Special Proceeding. — See note 4.

284. *6. Board of Education v. School Trustees*, 74 Ill. App. 401.

287. *5. Scheiwe v. Holz*, 168 Ill. 432; *Massasoit Tribe No. 121 v. Voorhees*, (N. J. 1899) 43 Atl. Rep. 571; *State v. Lien*, 112 Wis. 282.

288. *1. State v. Barksdale*, 50 La. Ann. 55.

297. *1. Brown v. Moore*, (N. J. 1899) 42 Atl. Rep. 1063.

3. *Mississippi.* — *Evans v. Southern R. Co.*, 74 Miss. 230.

302. *1. Prescribing Future Action.* — See *People v. Campbell*, 156 N. Y. 64, *reversing* 22 N. Y. App. Div. 170 and holding that the court may grant conditional relief and do equity between the parties.

303. *1. See generally Evans v. Southern R. Co.*, 74 Miss. 230 [citing 4 ENCYC. OF PL. AND PR. 303]; *People v. Lindblom*, 182 Ill. 241; *Sanner v. Union Drainage Dist.*, 175 Ill. 575; *Warren v. Hart*, (Mass. 1903) 66 N. E. Rep. 412.

Georgia. — *Ford v. Price, etc., Cider, etc., Co.*, (Ga. 1902) 43 S. E. Rep. 69; *Tison v. Savannah, etc., R. Co.*, 97 Ga. 366; *Walker v. Reese*, 110 Ga. 582; *Velvin v. Austin*, 109 Ga. 200; *Holmes v. Pye*, 107 Ga. 784; *Johnson v. Coleman*, 106 Ga. 205; *Almand v. Georgia R., etc., Co.*, 102 Ga. 151; *Royal v. McPhail*, 97 Ga. 457.

Iowa. — Code Iowa, § 4160 (substantially embodying Code 1873, § 3222), provides that the court must "give judgment affirming or annulling

the proceedings in whole or in part, or, in its discretion, correcting the same and prescribing the manner in which the parties or either of them shall further proceed." See *Independent Dist. v. Taylor*, 100 Iowa 617.

305. *1. Evans v. Southern R. Co.*, 74 Miss. 230, citing 4 ENCYC. OF PL. AND PR. 305.

315. *2. Award of Execution.* — Where the judgment is reversed and a final judgment is rendered, the court ought to enter judgment and award execution without remitting the record to the inferior court. *Smith v. Ocean Castle No. 11*, 59 N. J. L. 198.

321. *8. Kirby v. Circuit Ct.*, 10 S. Dak. 196, citing 4 ENCYC. OF PL. AND PR. 321.

323. *1. Haire v. McCardle*, 107 Ga. 775; *People v. Town Auditors*, 42 N. Y. App. Div. 250.

In *New Jersey* by the Certiorari Act, § 8 (Gen. Stat. N. J., p. 368), the court may in its discretion give judgment for costs to either party. *Smith v. Ocean Castle No. 11*, 59 N. J. L. 198.

3. *Kirby v. Circuit Ct.*, 10 S. Dak. 196. Compare *State v. Probate Ct.*, 67 Minn. 51.

4. *New York Code.* — Code Civ. Pro. N. Y., § 2143, authorizes the award of costs not exceeding fifty dollars. *People v. Town Auditors*, 42 N. Y. App. Div. 250.

South Dakota. — See *Kirby v. Circuit Ct.*, 10 S. Dak. 196.

325. 2. Right to, and Liability for, Costs — Construction of Statutes. — See note 3.

326. Discretion of Court. — See note 1.

Successful Party. — See note 2.

328. XVIII. APPEAL AND WRIT OF ERROR — 1. When Appeal Lies. — See note 4.

331. 2. Examination of Case on Appeal — *a.* IN GENERAL. — See note 2.

332. Questions of Fact. — See note 4.

333. *b.* OBJECTIONS NOT RAISED BELOW — Errors Not Apparent of Record. — See note 2.

334. 3. Judgment on Appeal — *a.* AFFIRMANCE — Error Not Apparent of Record. — See note 1.

325. 3. Against Real Party in Interest. — Costs will be allowed against the real party in interest where the writ is brought to review the determination of the Probate Court. *State v. Probate Ct.*, 67 Minn. 51.

Costs in Favor of Court. — Under Comp. Laws Dak., § 5189 (Annot. Stat. S. Dak. 1901, § 6414), which provides that in all actions and special proceedings the clerk must tax disbursements as a part of the judgment in favor of the prevailing party, it has been held that the Circuit Court cannot recover such disbursements or judgment in its favor, as it could not incur or pay any of the expenses if judgment should go against it. *Kirby v. Circuit Ct.*, 10 S. Dak. 196.

326. 1. Dismissal of Proceedings of Which Review Is Sought. — Where the plaintiff below dismisses the proceedings when the certiorari is served on him, he thereby confesses error, and the petitioner should have the costs of the certiorari without considering whether it was a proper case for the writ. *State v. Third Judicial Dist. Ct.*, (Nev. 1903) 71 Pac. Rep. 664.

2. *Paulk v. Tanner*, 106 Ga. 219.

328. 4. Alabama. — Civ. Code Ala. (1896), § 2827, which provides that an appeal may be taken within thirty days from the final judgment rendered, is

mandatory, and counsel cannot by stipulation extend the time. *Lusk v. Capehart*, 129 Ala. 599.

331. 2. *Vanden Bos v. Douglas County*, 11 S. Dak. 190.

Insufficient Bill of Exceptions. — A bill of exceptions brought to review a refusal to sanction a petition for certiorari which does not set forth either that petition or its substance will not be considered. *Wilks v. Smith*, 101 Ga. 229; *Lake v. Kellum*, 99 Ga. 130.

332. 4. *Carter v. Garrett*, 115 Ga. 595; *Flanders v. Wood*, 113 Ga. 635; *Georgia R., etc., Co. v. Pounds*, 111 Ga. 851; *Shearouse v. Morgan*, 111 Ga. 858; *Ballard v. Shaw*, 110 Ga. 265; *Savannah, etc., R. Co. v. Fennell*, 100 Ga. 474; *Tucker v. Banks*, 99 Ga. 302; *Smith v. State*, (Ga. 1903) 43 S. E. Rep. 371; *Southern R. Co. v. Fincher*, (Ga. 1903) 43 S. E. Rep. 370.

333. 2. *Wilks v. Smith*, 101 Ga. 229; *Lake v. Kellum*, 99 Ga. 130; *Vanden Bos v. Douglas County*, 11 S. Dak. 190.

334. 1. *Wilks v. Smith*, 101 Ga. 229; *Lake v. Kellum*, 99 Ga. 130.

Where the reason why the court below dismissed the writ does not appear on the record, it will be presumed that the court had good reason. *West Chicago St. R. Co. v. Becker*, 57 Ill. App. 533.

CHAMBERS AND VACATION.

337. I. DEFINITION. — See note 1.

II. POWERS OF JUDGES AT CHAMBERS IN TERM AND IN VACATION — 1. In General. — See note 2.

338. Fundamental Limitation of Power. — See note 1.

340. 9. Punishing for Contempt. — See notes 2, 3.

343. 13. Rendition of Judgment or Final Order. — See note 1.

344. See note 1.

337. 1. *Hoskins v. Baxter*, 64 Minn. 226, citing 4 ENCYC. OF PL. AND PR. 337.

Judgment Rendered in Vacation. — Act Pa. May 5, 1864, grants the power to a special court to take a matter heard in open court under advisement, and render a judgment thereon in vacation time. *Korman's Application*, 162 Pa. St. 151. See also *Butts v. Armor*, 164 Pa. St. 73.

2. *State v. Start*, 62 Kan. 111; *In re Barnhouse*, 60 Kan. 849, in each of which cases the court quoted 4 ENCYC. OF PL. AND PR. 337. See also the following cases:

Illinois. — *Schlesinger v. Allen*, 69 Ill. App. 137.

Nebraska. — *Browne v. Edwards*, etc., *Lumber Co.*, 44 Neb. 361.

Texas. — *Ford v. Liner*, 24 Tex. Civ. App. 353.

Compliance with Statute. — Where the statute provides the manner and time in which an application should be made to a court at chambers, a material deviation from the provisions of the statutes will be grounds for a refusal to grant the order. *Walker v. Tamsen*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 734.

338. 1. *Conover v. Wright*, (Neb. 1902) 91 N. W. Rep. 545.

340. 2. *Kansas.* — In *in re Barnhouse*, 60 Kan. 849, the court said: "The act of 1897 [Gen. Stat. Kan., c. 85, §§ 11, 12], however, has taken away from the judge all power either to try or to commit persons for contempt, and has vested such authority solely in the courts. Indeed, by § 3 [§§ 11, 12] contempts of the judge at chambers

must be tried and punished by the court."

3. *Montana.* — Code Civ. Pro. Mont., §§ 2170-2183, taken in connection with § 171, confers upon judges sitting in chambers the power to punish for contempt. *State v. Loud*, 24 Mont. 428, citing 4 ENCYC. OF PL. AND PR. 340.

In *Nebraska* a court in chambers may punish for contempt. *Nebraska Children's Home Soc. v. State*, 57 Neb. 765.

343. 1. *Arizona.* — *Babbitt v. Field*, (Ariz. 1898) 52 Pac. Rep. 775.

Indiana. — *Pond v. Simons*, 17 Ind. App. 84.

Missouri. — *State v. Woodson*, 161 Mo. 444.

Nebraska. — *Browne v. Edwards*, etc., *Lumber Co.*, 44 Neb. 361.

See also *Woodlief v. Logan*, 50 La. Ann. 438.

A Default Judgment cannot be entered in vacation at chambers. *Rogers v. Traders' Nat. Bank*, 60 Kan. 855, 55 Pac. Rep. 463. Compare *Kalb v. German Sav., etc., Soc.*, 25 Wash. 349, which holds that where there is no constitutional or statutory provision for a vacation of a court, a decree may be signed at any time and at any place in the district for which the court sits, and a recital that a decree was "entered in chambers" will not avoid it.

344. 1. Under the Constitution and Statutes of Nebraska it has been decided that a judge sitting at chambers in his judicial district may, after notice to the prosecuting attorney, receive a plea of guilty from a defendant charged with crime and pass sentence upon him. *McCarty v. Hopkins*, 61 Neb. 550.

345. Consent of Parties. — See note 1.

346. See note 1.

347. 14. Vacation and Amendment of Judgments and Orders. — See note 1.

348. See note 1.

16. Motion for New Trial. — See note 3.

350. 17. Proceedings to Perfect Appeals. — See note 1.

351. 19. Appointment and Discharge of Receiver. — See notes 2, 4.

352. Removal and Discharge. — See note 4.

356. 21. Powers in Relation to Extraordinary Remedies — *a*.
INJUNCTIONS — (1) *Granting* — Only Temporary Injunctions Grantable. — See note 5.

357. (2) *Dissolution and Modification*. — See note 3.

345. 1. *Gamble v. Buffalo County*, 57 Neb. 163; *Johnson v. Bouton*, 56 Neb. 626.

346. 1. *Young v. Rann*, 111 Iowa 253.

Waiver of Objection. — Appearing and contesting at chambers an application to modify an injunction waives the right of the defendants to complain that the court had no jurisdiction. *Landt v. Remley*, 113 Iowa 555.

Order May Be Voidable but Not Void. — Unless it affirmatively appears in the record that the consent of the parties was not obtained, an order made at chambers in vacation is not void *ab initio* although it may be voidable. *Royal Trust Co. v. Exchange Bank*, 55 Neb. 663.

347. 1. *Fisk v. Thorp*, 51 Neb. 1 [quoting 4 ENCYC. OF PL. AND PR. 347]; *Haskens v. State*, 114 Ga. 837; *Gamble v. Buffalo County*, 57 Neb. 163; *Manning Bank v. Mellett*, 44 S. Car. 383.

Georgia Statute. — Under 3 Code Ga., § 1075, a judge of the Superior Court sitting at chambers in vacation has power to make an order for the entry of a judgment in conformity with a remittitur of the Supreme Court. *Wiggins v. Tyson*, 114 Ga. 64.

348. 1. *Fisk v. Thorp*, 51 Neb. 1, citing 4 ENCYC. OF PL. AND PR. 347.

3. *Turner v. Foreman*, 47 S. Car. 31; *Only v. Fort*, 42 S. Car. 200.

350. 1. In *Colorado* a judge at chambers in vacation after the term in which a final judgment is entered cannot extend the time in which to file papers on appeal from such judgment. *Van Duzer v. Towne*, 12 Colo. App. 4.

In *Iowa* the court cannot settle a bill

of exceptions in vacation. *Young v. Rann*, 111 Iowa 253.

In *Texas* an order striking a bill of exceptions from the file is a nullity if made in vacation. *Ford v. Liner*, 24 Tex. Civ. App. 353.

In *Virginia* a bill of exceptions signed by a court in vacation is no part of the record. *Virginia Development Co. v. Rich Patch Iron Co.*, 98 Va. 700.

351. 2. *Indiana*. — Under Rev. Stat. Ind. (1894), § 1236 (*Horner's Stat. Ind.* 1894, § 1358), the court at chambers has jurisdiction to appoint a receiver. *Chicago, etc., R. Co. v. St. Clair*, 144 Ind. 371.

4. **Receiver's Certificate.** — In *State v. Port Royal, etc., R. Co.*, 45 S. Car. 413, it was held that Rev. Stat. S. Car., § 2244 (Civ. Code S. Car., §§ 2733, 2734), authorized a judge at chambers to order the issuance of a receiver's certificate.

352. 4. In *Georgia*, under 2 Code Ga., §§ 4323, 4324, a judge in vacation has the power to discharge a receiver who has disobeyed the order of the court and been imprisoned for contempt therefor. *Nisbet v. Tindall*, 115 Ga. 374.

356. 5. *Johnson v. Bouton*, 56 Neb. 626.

A *Lay Judge* has no authority in *Pennsylvania* to grant a preliminary injunction at chambers. *Hicks v. Derick*, 17 Pa. Co. Ct. 605.

357. 3. See *Browne v. Edwards, etc., Lumber Co.*, 44 Neb. 361.

Waiver of Objection. — The question as to the power of the judge at chambers in vacation to modify or dissolve a temporary injunction is waived when the parties plaintiff appear and contest

358. *b.* MANDAMUS — (1) *In General.* — See note 6.

359. (3) *Peremptory Writ.* — See note 3.

360. *c.* HABEAS CORPUS — *In General.* — See note 3.

363. *d.* QUO WARRANTO. — See note 1.

e. CERTIORARI. — See note 4.

364. *f.* PROHIBITION. — See note 1.

Nature of Rule or Order. — See note 6.

22. Other Powers. — See note 7.

366. IV. APPEALS. — See note 3.

the application. *Landt v. Remley*, 113 Iowa 555.

358. 6. The Statutes of Texas authorize the issuance of a writ of mandamus by a judge sitting in chambers in vacation. *Hines v. Morse*, 92 Tex. 194.

Mandamus for Recusation. — There is no authority under the statutes of Louisiana by which a judge at chambers can be compelled by mandamus to enter an order recusing himself. *State v. Hengel*, 48 La. Ann. 1137; *State v. Hingle*, 48 La. Ann. 1074.

359. 3. In *Mayer v. State*, 52 Neb. 764, it was held that under Code Civ. Pro. Neb., § 647 (Comp. Stat. Neb. 1899, § 2451), a court sitting at chambers may issue a peremptory writ of mandamus providing there are no issues of fact to try.

360. 3. *Colorado.* — *People v. District Ct.*, 28 Colo. 485.

Idaho. — *In re Dowling*, (Idaho 1896) 43 Pac. Rep. 871.

363. 1. *People v. District Ct.*, 28 Colo. 485.

4. *People v. District Ct.*, 28 Colo. 485.

364. 1. *Lincoln-Lucky, etc.*, Min. Co. v. District Ct., 7 N. Mex. 486.

6. In *Colorado* a Rule to Show Cause why a writ of prohibition should not issue cannot be entered in vacation time. *People v. District Ct.*, 28 Colo. 485.

7. *Reference.* — In *South Carolina* the court at chambers has power to issue an order of reference. *Green v. McCarter*, 64 S. Car. 290.

Alimony Pendente Lite may be allowed in *North Carolina* by a court at chambers in vacation. *Moore v. Moore*, 130 N. Car. 333.

A court in *West Virginia* has not the power to allow alimony *pendente lite* unless in some manner the husband has been summoned to appear and given an opportunity to be heard. *Coger v. Coger*, 48 W. Va. 135.

Appeal from Clerk. — In *North Carolina* a court sitting at chambers may hear an appeal from a clerk of a court who has refused to issue an execution as required by the statute. *McCaskill v. McKinnon*, 121 N. Car. 192.

Vacation of Orders. — In *Nebraska* a judge of chambers possesses no jurisdiction to vacate orders of judgments of the District Court. *Kime v. Fenner*, 54 Neb. 476.

Allowance of Attorney's Fees. — In *Idaho* the district judge at chambers has no jurisdiction to pass upon and make an order allowing claims for attorney's fees against an insolvent estate. *Gaffney v. Piper*, (Idaho 1897) 51 Pac. Rep. 99; *In re Genesee Bank*, (Idaho 1897) 51 Pac. Rep. 406.

Outside of District. — In *Nebraska* a court at chambers outside of the district in which an action has been brought has no power to issue any orders or judgments in such action. *Ellsworth v. Fairbury*, 41 Neb. 881.

In Proceedings in Bastardy the court has no power in *North Carolina* to issue interlocutory orders outside of the district in which the action is pending. *State v. Parsons*, 115 N. Car. 730.

366. 3. *Exceptions.* — A record must show that an exception was taken to an order granted at chambers or an objection thereto will not be considered on appeal. *Ellsworth v. Fairbury*, 41 Neb. 881.

CHAMPERTY AND MAINTENANCE.

368. I. CHAMPERTOUS AGREEMENTS. — See note 1.

370. Rescission of Contract. — See note 3.

General Rule. — See notes 4, 5, 6.

368. 1. In the District of Columbia the court will dismiss actions founded on champertous contracts. *Johnson v. Van Wyck*, 4 App. Cas. (D. C.) 294. See also *Peck v. Heurich*, 167 U. S. 624, which case arose in the District of Columbia.

In Wisconsin champerty need not be pleaded, and issue need not be formed in regard thereto in order that it may be established and taken advantage of in the suit. *Miles v. Mutual Reserve Fund L. Assoc.*, 108 Wis. 421.

370. 3. In Minnesota a champertous contract cannot be rescinded and a suit instituted on a *quantum meruit*. *Gammons v. Gulbranson*, 78 Minn. 21.

4. *Croco v. Oregon Short Line R. Co.*, 18 Utah 311. See also *Kennedy v. Oregon Short Line R. Co.*, 18 Utah 325; *Ellis v. Smith*, 112 Ga. 480.

5. *Wehmhoff v. Rutherford*, 98 Ky. 91; *Bick v. Overfelt*, 88 Mo. App. 139; *Woods v. Walsh*, 7 N. Dak. 376; *Davis v. Settle*, 43 W. Va. 17. See also

Bowser v. Patrick, (Ky. 1901) 65 S. W. Rep. 824.

In *Potter v. Ajax Min. Co.*, 22 Utah 273, it was held that the fact that a champertous contract had been entered into between the plaintiff and his attorney could not affect the validity of a judgment against the defendant.

6. *Potter v. Ajax Min. Co.*, 22 Utah 273 [citing 4 ENCYC. OF PL. AND PR. 370]; *Casserleigh v. Wood*, 14 Colo. App. 265.

When Not Sought to Be Enforced. — A champertous contract will be disregarded if no attempt is made to enforce it or to conduct the case in accordance with the terms thereof. *Straw-Ellsworth Mfg. Co. v. Cain*, 20 Wash. 351.

A Demurrer to a Complaint on the ground that it is tainted with champerty will not be sustained unless the fact relied upon to sustain the demurrer appears on the face of the complaint. *Frum v. Weaver*, 13 S. Dak. 457. See also *Fuson v. Bowlin*, (Ky. 1895) 30 S. W. Rep. 622.

CHANGE OF VENUE.

- 375. II. RIGHT TO CHANGE — 1. Origin of Right.** — See note 3.
377. 2. Statutory Right — a. NECESSITY OF STATUTORY AUTHORIZATION. — See note 1.
 b. LEGISLATIVE POWER. — See note 2.
378. Criminal Cases. — See notes 5, 6.
379. See notes 1, 3.
382. 3. Power of Court. — See note 1.
383. 4. Nature of Right. — See note 2.

375. 3. Practice at Common Law. — See *Hewitt v. State*, (Fla. 1901) 30 So. Rep. 795.

377. 1. Missouri. — *State v. Headrick*, 149 Mo. 396; *State v. Lanahan*, 144 Mo. 31; *Cole v. Cole*, 89 Mo. App. 228; *Manson v. Coleman*, 86 Mo. App. 18.

2. See *Miller v. Kern County Land Co.*, 134 Cal. 586.

Statute Prohibiting Change of Venue. — In *Warner v. Palmer*, 66 N. Y. App. Div. 127, it was held that the prohibition of a change of venue is unconstitutional.

378. 5. Florida. — *Hewitt v. State*, (Fla. 1901) 30 So. Rep. 795.

Missouri. — *State v. Dyer*, 139 Mo. 199.

Ohio. — *State v. McCarty*, 52 Ohio St. 363.

United States Constitution — Territories. — Const. U. S., Amendment 6, ordaining that the accused shall be tried in the "district wherein the crime shall have been committed, which district shall have been previously ascertained by law," has no application to the territories of the United States. *Mahaffey v. Territory*, 11 Okla. 213.

6. But see *contra*, *Hewitt v. State*, (Fla. 1901) 30 So. Rep. 795.

The Statutes of Texas do not authorize the defendant in a misdemeanor case to change the venue. *Henderson v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 116.

379. 1. In Hawaii it is held that a change of venue in a criminal case may be granted on the application of the

prosecutor. *Republic of Hawaii v. Hickey*, 11 Hawaii 314.

New York. — Prior to Code Crim. Pro. N. Y. (1881) an application for a change of venue in a felony case might be made in the Court of Oyer and Terminer, either by the people or the accused; this procedure was changed by § 346 of the code, so that now the application can be made by the defendant only, and must be made at a special term of the Supreme Court. *People v. McLaughlin*, 2 N. Y. App. Div. 408.

3. In *Hewitt v. State*, (Fla. 1901) 30 So. Rep. 795, it was held that statutes authorizing the judge to change the venue in a criminal case without the consent of the accused are constitutional when they are limited to the impossibility of securing an impartial jury in the county where the offense is committed.

382. 1. Where Court Has No Jurisdiction of Subject-matter. — Code Iowa, § 3504, providing for a change of place of trial, has no application where the court has no jurisdiction of the subject-matter. *Hawkeye Ins. Co. v. Huston*, 115 Iowa 621.

383. 2. Brady v. Times-Mirror Co., 106 Cal. 56. See also *Herd v. Tuohy*, 133 Cal. 55.

What Constitutes Waiver. — Where the defendant has requested the trial to go over the term and has agreed to have the cause placed on the calendar for the next term, he will not be heard on a motion to change the venue for the convenience of witnesses. *Rodie v. Verdon*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 409.

384. See note 1.

5. In What Cases Right Exists — Equity Cases. — See note 4.

385. Other Cases. — See note 6.

387. See notes 1, 2, 5, 6.

388. See notes 1, 3.

384. 1. A nonresident corporation brought suit against residents of the state, in a county of its own selection. Upon a plea for extension of time an order was given that "the time to plead or otherwise move herein be extended fifteen days. Defendants to accept ten days' notice of trial by mail. The case to go on the calendar." It was held that this order would not be construed in such a manner as to prevent the defendants from moving to change the cause to the county of their residence. *Molson's Bank v. Marshall*, (Supm. Ct.) 32 Misc. (N. Y.) 602.

Statement in Amended Complaint. — *Brady v. Times-Mirror Co.*, 106 Cal. 56.

4. Equitable Causes. — In *Herd v. Tuohy*, 133 Cal. 55, it was held that the provision of the *California* statute regarding a change of venue does not affect the jurisdiction of the court in which a suit in equity is commenced, except in actions concerning real estate.

385. 6. Divorce Proceedings. — In *Hennessy v. Nicol*, 105 Cal. 138, it was held that an action for alimony is one which, under Code Civ. Pro. Cal., § 395, the defendant has a right to have tried in the county of his residence, and that a motion for a change of venue thereto should be heard and granted.

In *Pfueller v. Superior Ct.*, 14 Wash. 115, it was held that under a statute providing that an action for divorce may be filed in the county in which the plaintiff resides, a change of venue will not be granted to the county of the defendant's residence.

A Petition for the Alteration of a Decree in a divorce case as to the custody of a minor child is a continuation of the original suit, and no change of venue can be granted. *Cole v. Cole*, 89 Mo. App. 228.

387. 1. Decedent's Estates. — An action against an administrator to compel him to pay a claim allowed against the estate, which he attempts to retain in payment for his services, is not a civil action within the meaning of the *Indiana* statute providing for a change

of venue in certain civil actions. *Everroad v. Lewis*, 16 Ind. App. 65.

3. Condemnation Proceedings. — In *State v. Rowe*, 69 Ark. 642, it was held that Sand. & H. Dig. Stat. Ark., § 7379, providing that any party to a civil action "may obtain an order for a change of venue therein," authorizes a change in condemnation proceedings.

5. Action to Vacate Decree. — In *Indiana* it has been held to be a matter of discretion whether a change shall be granted in such cases. *Masterson v. State*, 144 Ind. 240.

6. Foreclosure of Mortgage — Cross-complaint. — In an action to foreclose a chattel mortgage where the cross-complainant seeks to foreclose a real-estate mortgage, a change of venue will not be granted on the ground that the real estate described in the mortgage is located in another county. *Murphy v. Russell*, (Idaho 1901) 67 Pac. Rep. 427.

388. 1. On Appeal from Justice's Court. — In proceedings for forcible entry and detainer, on appeal from a justice's court to the Circuit Court, the case stands as if it had originated in the latter court and a change of venue may be granted as in other civil actions. *Manson v. Coleman*, 86 Mo. App. 18.

Police Justice. — In *Puyallup v. Snyder*, 13 Wash. 572, it was held that a change of venue will lie from a police justice of a city of the third class.

In a Prosecution Before a Mayor for the violation of an ordinance, the defendant is not entitled to a change of venue. *State v. Joyner*, 127 N. Car. 541.

3. Miscellaneous Cases. — In *Forbes v. Grand County*, 23 Colo. 344, it was held that the *Colorado* statute providing that actions upon notes may be tried in the county where they are made payable does not give to a defendant sued elsewhere an absolute right to such change.

The appointment of a guardian for a person of unsound mind is a civil action within the meaning of the *Indiana* statute, providing for a change of

389. 6. Who May Exercise Right. — See notes 1, 3.

390. 7. Number of Changes Allowed. — See note 1.

391. See note 4.

392. See note 1.

393. III. GROUNDS FOR CHANGE — 2. Action Brought in Wrong County. — See note 1.

venue in any "civil action." *Berry v. Berry*, 147 Ind. 176.

389. 1. Change of Residence of Defendant. — A defendant is not entitled to a change of venue to the county to which he has moved since the original notice was served. *Kulburz v. Jacobs*, 104 Iowa 580.

3. County Where Principal Place of Business Is. — A corporation is not entitled to change the place of trial to the county in which it has its principal place of business, in an action against it upon a contract made in the county of the venue. *Whitney v. Seller's Commission Co.*, 130 Cal. 188.

Agency in County. — Code Iowa (1897), § 3500, provides that "when a corporation, company, or individual has an office or agency in any county for the transaction of business, any actions growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located." Where a contract was made by special agents in a certain county and suit was brought thereon to reform the contract, and at the time the suit was so brought the agents were engaged for the company in carrying out the contract in such county, it was held that there was an agency within the meaning of the statute and that the venue of the action was properly laid. *Wood v. Rice*, (Iowa 1902) 91 N. W. Rep. 902.

390. 1. *Indiana*. — Where a change of venue is granted to a party who fails to perfect the change, dismisses the action, and refiles it in another court of the same county, a second change will not be granted. *Citizens' St. R. Co. v. Shepherd*, (Ind. App. 1901) 59 N. E. Rep. 349.

Missouri. — *St. Louis, etc., R. Co. v. Holladay*, 131 Mo. 440.

391. 4. *Augustine v. State*, 41 Tex. Crim. 59, holding that it is not erroneous for the court to make two changes of venue *ex mero motu*.

Disqualification of Judge. — Under Rev. Stat. Mo. (1899), § 819, providing for a change of venue on account of the disqualification of the judge, it was

held, in *State v. Woodson*, 86 Mo. App. 253, that there may be as many changes as may be necessary to find a judge who is not disqualified.

392. 1. *New Indictment*. — Where a *nolle prosequi* is entered after a change of venue and the grand jury of the county in which the offense was committed finds another indictment for the same offense, another change may be granted to the defendant if the original cause for the change still exists. *State v. Billings*, 140 Mo. 193.

Res Adjudicata. — Where a change of venue is granted to the accused on the ground of local prejudice and the cause is dismissed in the county to which it is sent, and three years afterwards another indictment for the same offense is filed in the original county, the change of venue is not *res adjudicata* as to subsequently existing prejudice. *Luttrell v. State*, 40 Tex. Crim. 651.

Previous Refusal. — The *Indiana* statute providing that only one change of venue shall be granted to the same party from the county and from the judge does not contemplate that a proper application for a change shall not be granted because of the previous refusal, for reasons no longer existing, to grant a change. *Louisville, etc., R. Co. v. Martin*, 17 Ind. App. 679.

393. 1. *Iowa*. — *Kell v. Lund*, 99 Iowa 153; *Day v. Greenwood*, 96 Iowa 228.

New York. — *Hankins v. Hanford*, 61 N. Y. App. Div. 341.

County Having Jurisdiction. — In *Quint v. Dimond*, 135 Cal. 572, where the action was brought in the proper county, it was held that a denial of a motion by all of the defendants to change the venue was proper.

Failure to Designate Proper County. — In *Colorado*, in an action for a tort, the county where the defendant resides, the county where the plaintiff resides and the defendant is served, and the county where the tort was committed, are all proper counties in which to sue, and if an action is commenced in any one of these, the place of the trial can-

394. See note 2.

395. *But Right Cannot Be Defeated.* — See note 1.

396. *Local Actions.* — See note 1.

Transitory Actions. — See note 2.

397. See note 1.

not be changed to another county on the ground that the county designated by the plaintiff is not the proper one. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158.

394. 2. *Hearne v. DeYoung*, 111 Cal. 373; *Updegraff v. Lesem*, 15 Colo. App. 297.

395. 1. *Fletcher v. Church*, 11 S. Dak. 537.

Fictitious Parties. — In *Bachman v. Cathry*, 113 Cal. 498, one defendant was sued in his true name and two others by fictitious names, and the original summons was returned served only on the former, who appeared and demanded a change of the place of trial, stating on affidavit that the other defendants were residents of another county. It was held that such demand could not be defeated by the subsequent return of the alias summons stating that one of the defendants was served by his true name and that he was a resident of the county in which the action was brought, nor by hearsay affidavits of third persons to the same effect, in the absence of an amendment of the complaint describing him as a defendant under his true name, and in the absence of any affidavit or showing by the plaintiff himself as to the person intended to be sued by such fictitious name.

396. 1. *Action to Declare Trust.* — An action to have property belonging to the estate of a decedent declared subject to secret trusts, and for the construction of a will, is a local action and should on motion be changed to the county in which the decedent's real estate is located. *Harmon v. Van Ness*, 56 N. Y. App. Div. 160.

An Action to Set Aside an Assignment in which it is alleged that the assignor, prior to the assignment, had executed mortgages on certain real estate and conveyances in trust for his own benefit of certain other lands, and that the mortgages and conveyances were fraudulent as to the creditors, is a local action and should be changed to the county in which the lands are situated. *Iron Nat. Bank v. Dolge*, 46 N. Y. App. Div. 327.

2. See *Sinnit v. Cambridge Valley Agricultural Soc., etc., Assoc.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 586.

Convenience of Witnesses. — In transitory actions the county in which the transaction took place is to be preferred in considering the convenience of witnesses. *Jacobs v. Davis*, 65 N. Y. App. Div. 144. To the same effect see *Hickok-Aldrich Co. v. Hughes*, 57 N. Y. App. Div. 635.

In Replevin, where the only issues are whether the defendant's grantor fraudulently purchased the goods and whether the defendant was a purchaser of them in good faith, the venue may be changed to the county in which the transactions occurred. *Zenner v. Dexter*, 92 Hun (N. Y.) 195.

Action to Recover Penalty. — In *Warner v. Palmer*, 66 N. Y. App. Div. 127, which was an action to recover a penalty for unlawfully having in possession certain milk cans of the plaintiff, it was held that Laws N. Y. 1896, c. 376, § 29, providing that such an action "may be laid in the county where such owner, dealer, or shipper resides at the time of the commencement thereof," repeals by implication Code Civ. Pro. N. Y., § 983, providing that an action to recover a penalty must be brought in the county in which the action arose. The former act was not repealed by Laws N. Y. 1896, c. 977, but is still in force; hence where such action is brought in the county in which the owner of the cans resides it is proper to refuse to change the venue thereof to the county of the defendant's residence — the county in which the cause of action arose.

397. 1. *Ohio Statute.* — Bates's Annot. Stat. Ohio (1897), § 5033, which provides that a change of venue shall be granted "when a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office or transacts its principal business," etc., is not unconstitutional. *Snell v. Cincinnati St. R. Co.*, 60 Ohio St. 256.

397. 3. Local Prejudice — *a. CRIMINAL CASES* — (1) *Generally* — **Right to Fair Trial.** — See note 5.

398. (2) What Must Be Shown. — See notes 1, 2.

(3) *Nature of Prejudice.* — See note 3.

399. See note 1.

(4) *Cases Governed by Circumstances.* — See note 2.

397. 5. People v. Diamond, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 71; *Barnes v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 882.

Discretion of Court. — In *Indiana* the granting of a change of venue in such a case is a matter of discretion. *Conrad v. State*, 144 Ind. 290.

Oregon. — In *State v. Pomeroy*, 30 Oregon 16, it was held that under the Oregon statute authorizing the court to grant a change of venue where it appears by affidavit that the accused cannot have a fair and impartial trial, the granting of such a change rests in the sound discretion of the court.

398. 1. Goldsberry v. State, (Neb. 1902) 92 N. W. Rep. 906; *Welsh v. State*, 60 Neb. 101.

2. Sufficient Showing. — Affidavits of the defendant and his counsel making a *prima facie* case in support of the motion are sufficient where no counter affidavits are introduced. *People v. Fredericks*, 106 Cal. 554. See also *State v. Hudspeth*, 150 Mo. 12. But see *State v. Stark*, 63 Kan. 529, where a *prima facie* showing of prejudice of the judge against the accused was held to be insufficient.

Mere Expression of Opinion. — In *Harrison v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 1002, it was held that but little weight should be given to the opinion of a witness that an impartial trial can or cannot be had.

3. Personal Prejudice. — *Compare* *Meyers v. State*, 39 Tex. Crim. 500; *Gallaher v. State*, 40 Tex. Crim. 296.

399. 1. State v. Moats, 108 Iowa 13; *State v. Headrick*, 149 Mo. 396; *Red v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 618.

Counties Attached for Judicial Purposes. — *Black v. Bent*, 20 Colo. 342.

2. Alabama. — *Daughdrill v. State*, 113 Ala. 7.

Arizona. — *Parker v. Territory*, (Ariz. 1898) 52 Pac. Rep. 361.

Colorado. — *Doll v. Stewart*, (Colo. 1902) 70 Pac. Rep. 326.

Delaware. — *State v. Lynn*, (Del. 1901) 51 Atl. Rep. 878,

Iowa. — *State v. Hamil*, 96 Iowa 728; *State v. Weems*, 96 Iowa 426; *State v. Helm*, 92 Iowa 540; *State v. Williams*, 115 Iowa 97.

Nebraska. — *Argabright v. State*, 62 Neb. 402.

Oregon. — *State v. Humphreys*, (Oregon 1902) 70 Pac. Rep. 824.

South Dakota. — *State v. Hall*, (S. Dak. 1902) 91 N. W. Rep. 325.

Texas. — *Meyers v. State*, 39 Tex. Crim. 500; *Blain v. State*, 34 Tex. Crim. 448; *Faulkner v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1093; *Mott v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 368.

Utah. — *State v. Haworth*, 24 Utah 398.

Wisconsin. — *Pool v. Milwaukee Mechanics' Ins. Co.*, 94 Wis. 447.

Lynching Mob. — Where the affidavits and other evidence showed that the public was so greatly aroused against the defendant that it required the most prompt and vigorous action of the executive officers of the state, including the military, to protect the defendant from mob violence and summary execution, and that this state of feeling continued to and existed at the trial, the court erred in denying a change of venue. *Thompson v. State*, 117 Ala. 67. See also *Tennison v. State*, 79 Miss. 708.

Undue Influence of Opposite Party — Peremptory Statute. — Under the *Missouri* statute providing that a party is entitled to a change of venue where the opposite party has an undue influence over the inhabitants of the county, the application, duly verified, is conclusive as to the existence of the influence in the county from which the cause is to be taken, but not as to the existence of such influence in the county to which the cause is to be sent. *Gee v. St. Louis R. Co.*, 140 Mo. 314.

Proof of Prejudice Rebutted. — In *State v. Belvel*, 89 Iowa 405, it was held that a counter affidavit by the state showing that there was but little discussion of the case in the county, and that there

- 401.** (5) *Newspaper Articles*. — See note 1.
 (6) *Threats of Personal Harm*. — See note 2.
402. (8) *Prejudice Subsided*. — See note 1.
 (9) *Test of Prejudice*. — See note 2.
404. *b. CIVIL CASES*. — See note 1.
405. 4. *Interest, Bias, Prejudice, Etc., of Judge* — *a. INTEREST*. — See note 3.
407. *c. BIAS OR PREJUDICE*. — See notes 1, 2.
408. *Nature of Prejudice*. — See notes 2, 3.

was neither excitement nor prejudice against the accused, warranted the court in denying the change.

Political Contest Concerning Case. — Where it appeared that there had been a previous trial in the county from which the venue was changed which had excited great public interest, and certain instances of the trial entered into and became an issue in a warm political contest in the county, it was held not to be an abuse of discretion to change the venue on the ground that a fair and impartial jury could not be had in the county. *Nite v. State*, 41 Tex. Crim. 340.

Judges and Jurors as Taxpayers. — In a prosecution where a fine, if imposed, would go to the county, the interests of judges or jurors as taxpayers do not constitute ground for a change of venue. *State v. Lynn*, (Del. 1901) 51 Atl. Rep. 878.

401. 1. *State v. Hamil*, 96 Iowa 728; *State v. Weems*, 96 Iowa 426. But see *contra*, *People v. Suesser*, 132 Cal. 631; *State v. Crafton*, 89 Iowa 109.
 2. *Thompson v. State*, 122 Ala. 12. See also *People v. Suesser*, 132 Cal. 631.

Sheriff Apprehensive of Mob. — In *Harrison v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 1002, it was held that the fact that the sheriff was apprehensive of a mob, and that the governor responded to the call for troops, was not ground for a change of venue.

402. 1. *State v. Reed*, (Idaho 1894) 35 Pac. Rep. 706; *State v. Weems*, 96 Iowa 426; *State v. Hamil*, 96 Iowa 728; *State v. Shephard*, 49 W. Va. 582.

2. In *People v. Diamond*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 71, it was held that the defendant may have a change of venue without demonstrating that a fair and impartial jury cannot be drawn.

404. 1. *Huntingdon County Line*, 14 Pa. Super. Ct. 571, holding that where there is no greater interest than

is ordinarily incidental to a county line commission, the court is not bound to change the venue.

405. 3. *Claim Against City — Judge as Taxpayer.* — In an action against a city in which the judges are taxpayers, the fact that the verdict against the city may cause an extra tax levy does not disqualify such judges. *Higgins v. San Diego*, 126 Cal. 303.

407. 1. *LeHane v. State*, 48 Neb. 105.

2. *California Statute.* — In *Matter of Jones*, 103 Cal. 397, it was held that under Code Civ. Pro. Cal., § 170, specifying certain disqualifications of the judge, bias or prejudice is not a ground for changing the place of trial.

In *Texas* the prejudice of a judge is not a statutory ground for a change of venue. *Gaines v. State*, 38 Tex. Crim. 202.

408. 2. *Judge Material Witness for Plaintiff.* — In *Spencer v. Iowa Mortg. Co.*, 6 Kan. App. 378, it was held that where an uncontradicted affidavit shows that the judge is a material witness for the plaintiff, there is no error in granting a change of venue.

3. *Judge Who Presided at Former Trial.* — The fact that a judge who presided at a former trial expressed his belief in the guilt of the accused is not ground for a change of venue. *State v. LaGrange*, 94 Iowa 60.

Prejudice of Party Against Judge. — That the party applying for the change is prejudiced against the judge is not ground for a change, where the judge denies that he is prejudiced against the party. *State v. Grinstead*, 62 Kan. 593.

Friend of Plaintiff. — The fact that the judge is an intimate friend of the plaintiff will not authorize a change of venue. *Isenhardt v. Hazen*, 10 Kan. App. 577, 63 Pac. Rep. 451.

Former Decision. — An application for a change of venue upon the ground of prejudice of the judge cannot be

409. *f.* EFFECT OF DISQUALIFICATION. — See notes 2, 3, 5.

410. *g.* SUBSTITUTE FOR CHANGE. — See note 1.

5. Undue Influence of Party or Attorney. — See note 2.

granted because such judge tried the case before without the aid of a jury and rendered judgment against the party applying for the change. *Doll v. Stewart*, (Colo. 1902) 70 Pac. Rep. 326.

Strained Relations Between a Judge and Counsel do not disqualify the judge; nor does a former controversy between a judge and attorneys growing out of a previous affidavit for bias and prejudice. *Higgins v. San Diego*, 126 Cal. 303.

409. 2. In Indiana and Wisconsin a change in such cases is held to be a matter of discretion. *Hauk v. State*, 148 Ind. 238; *French v. State*, 93 Wis. 325.

Where Disqualified Judge Is Succeeded by Another. — In *Santa Cruz Sav. Bank v. Taylor*, 125 Cal. 240, it was held that where a motion for change of venue on the ground of the disqualification of the presiding judge was taken under advisement by such judge, but never passed upon by him, it was the duty of his successor to retain the case.

Judge as Former Counsel. — In *Gordon v. Conor*, (Idaho 1897) 51 Pac. Rep. 747, it was held that a change ought to be granted by a judge who was formerly counsel for the defendant.

Party to Action. — *Isenhart v. Hazen*, 10 Kan. App. 577, 63 Pac. Rep. 451, wherein it was held that under a statute providing for a change when the judge is disqualified, a judge who was party to an action could grant a change of venue thereof.

3. See *Chenault v. Spencer*, (Ky. 1902) 68 S. W. Rep. 128.

Party Should Request Change. — While it is the duty of a judge, if he knows he is disqualified, to refuse to allow any step to be taken in the particular case, yet it is also the duty of the party obtaining the change to object and request that such judge shall not sit. *Sampson v. People* 188 Ill. 592.

In Pennsylvania, under Act Pa. April 22, 1856 (Laws Pa. 500), the presiding judge may certify his disability and order the case to be heard before "the president judge residing nearest the place of such trial, who shall be disinterested;" and by Act Pa. March 30, 1875 (Bright. Purd. Dig. Laws Pa. 1894,

p. 2069, § 4), either party may by petition apply for a change of venue. The latter act is cumulative and was not intended to repeal the former; the remedies are not repugnant, but when one is applied it is held to be exclusive of the other. *Wallace v. Jameson*, 179 Pa. St. 98.

5. *Isenhart v. Hazen*, 10 Kan. App. 577, 63 Pac. Rep. 451, citing 4 ENCYC. OF PL. AND PR. 409.

But he cannot act on any preliminary motion calling for the exercise of judicial discretion. *Gordon v. Conor*, (Idaho 1897) 51 Pac. Rep. 747.

Convenience of Witnesses. — In *Anaheim Water Co. v. Jurupa Land, etc., Co.*, 128 Cal. 568, it was held that a disqualified judge cannot pass upon a question of the convenience of witnesses; that matter is to be determined by a qualified judge of the nearest and most accessible county.

410. 1. Substitution of Another Judge. — Where a motion for a change of venue on account of the disqualification of the judge is denied, and a judge against whom there is no objection tries the case, there is no error. *Chicago, etc., R. Co. v. Harrington*, 90 Ill. App. 638, affirmed 192 Ill. 9.

Where a judge is disqualified he may call in a judge of another circuit to hear a demurrer in the case, and such act will not be a transfer of the case. *State v. Hocker*, 35 Fla. 19.

Missouri Statute. — Under Rev. Stat. Mo. (1899), § 822, where no special judge is agreed on and no election is requested, it is error to award a change to another county. *Penfield v. Vaughan*, 169 Mo. 371; *State v. McKee*, 150 Mo. 233, distinguishing *State v. Bacon*, 107 Mo. 627; Rev. Stat. Mo., § 1679, is not applicable in such a case. *State v. Flournoy*, 160 Mo. 324.

2. *Asher v. Beckner*, (Ky. 1897) 41 S. W. Rep. 35.

Missouri Statute. — In *Gee v. St. Louis R. Co.*, 140 Mo. 314, it was held that Rev. Stat. Mo. (1889), §§ 2258, 2262 (Rev. Stat. Mo. 1899, §§ 818, 822), providing that a party is entitled to a change of venue on a sufficient showing "that the opposite party has an undue influence over the inhabitants of the county," are peremptory.

411. 6. Convenience of Witnesses—*a.* IN GENERAL.—See note 1.

Where Plaintiff's Son Is Sheriff.—The fact that the son of the plaintiff has been elected sheriff will not justify a change of venue on the ground that "there is reason to believe that an impartial trial cannot be had" in the county, as provided in Code Civ. Pro. N. Y., § 987, subdiv. 2. *Weiant v. Rockland Lake Trap Rock Co.*, 74 N. Y. App. Div. 24.

Where Sheriff Is Plaintiff.—In *Houston Printing Co. v. Moulden*, 15 Tex. Civ. App. 574, it was held that the fact that the sheriff who summoned the jury was plaintiff was not ground for a change of venue.

Judge as Plaintiff.—The fact that the plaintiff in an action of libel is a county judge, whose duty it is to supervise the drawing of the petit jury to serve at the term of court at which the case is expected to be tried, does not entitle the defendant to a change of venue on the ground that an impartial trial may not be had in the county, where it appears that the method observed in drawing the jurors is such that the actual drawing is taken by the commissioner of jurors and that the county judge has no opportunity for misconduct in the selection of names. *Lent v. Ryder*, 47 N. Y. App. Div. 415.

411. 1. California.—*Duffy v. Duffy*, 104 Cal. 602.

New York.—*Tuomey v. Kingsford*, 68 N. Y. App. Div. 180; *Hankins v. Hanford*, 61 N. Y. App. Div. 341; *Prouty v. Glens Falls, etc.*, St. R. Co., 47 N. Y. App. Div. 627; *Thomson v. Perkins*, 39 N. Y. App. Div. 656; *Harrington v. Warsaw*, 4 N. Y. App. Div. 181; *Zenner v. Dexter*, 92 Hun (N. Y.) 195; *Fielding v. Cohoes Masonic Temple Assoc.*, (Supm. Ct. Spec. T.) 23 Misc (N. Y.) 52; *Saunders v. Post-Standard Co.*, 72 N. Y. App. Div. 621.

Recent Removal.—In *Herbert v. Terhune*, (N. J. 1902) 52 Atl. Rep. 241, it is held that where it appears that the defendant and all the witnesses reside in the county in which the cause of action arose, and that the plaintiff resided there up to within a few days of the time he instituted the action, a change of venue may be granted to such county.

Convenience of Parties.—In *Lane v. Bochlowitz*, 77 N. Y. App. Div. 171, it is held that a change of venue will not

be granted for the convenience of a party or of a single witness. See also *Simanton v. Moore*, 65 N. J. L. 530.

Convenience of Court.—In *White v. Superior Ct.*, 110 Cal. 60, it was held that transferring a case from one department of the Superior Court of the city and county of San Francisco to another, to facilitate the administration of justice, is not a transfer of the jurisdiction of the cause and does not affect the jurisdiction of the court.

Action to Compel Conveyance of Land.

—Where an action to compel a conveyance of land is brought in the county in which the land is situated, the venue of the trial may be changed by agreement of the parties, or by an order of the court, to another county, for the convenience of the witnesses. *Duffy v. Duffy*, 104 Cal. 602.

Promotion of Ends of Justice.—In *Kopf v. Encking*, 91 Wis. 15, it was held that under a *Wisconsin* statute providing that a change of venue will be granted when the convenience of witnesses and the ends of justice will be promoted by the change, the fact that a large number of witnesses will be inconvenienced by the trial of the case far from their residences may, of itself, be sufficient ground for the conclusion that a removal of the case would promote the ends of justice.

Action to Recover Penalty.—Section 18 of the Liquor Tax Law (Laws N. Y. 1896, c. 112), as amended by Laws N. Y. (1897), c. 312, providing that the state commissioner of excise may "commence and maintain an action * * * in any court of record in any county of the state for the recovery of the penalty for the breach of any condition of any bond," does not deprive the Supreme Court of its inherent power to change the place of trial of an action brought by the state commissioner in pursuance of such authority, where the convenience of witnesses requires the change. *Lyman v. Gramercy Club*, 28 N. Y. App. Div. 30.

Transitory Action.—Where the action is transitory the change may be granted for the convenience of witnesses, though none of the parties reside in the county to which the action is sent. *Herbert v. Griffith*, 2 N. Y. App. Div. 566.

Expert Witnesses.—In *Adrian v.*

412. See note 1.

b. NUMBER OF WITNESSES. — See note 2.

413. See notes 1, 3.

414. *c.* WHO MAY OBTAIN CHANGE. — See note 4.

d. REQUISITES OF APPLICATION. — See notes 6, 7, 9.

415. See notes 3, 4.

Coon, 15 N. Y. App. Div. 92, it was held that a change of venue will not be granted on account of the convenience of expert witnesses.

412. 1. *Extraordinary Traveling Facilities.* — In *Brink v. Home Ins. Co.*, 2 N. Y. App. Div. 122, where the action was laid in Westchester county, a change of venue to New York county on the ground of the convenience of the witnesses was not granted, since the counties are so accessible to each other that the inconvenience of travel which justifies changes of venue in country districts has no application. See also *McCready v. Haight*, 22 N. Y. App. Div. 632.

2. *Ransom v. Erdt*, 74 N. Y. App. Div. 627; *Rodd v. Sleicher*, 53 N. Y. App. Div. 638.

413. 1. *O'Beirne v. Miller*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 337; *Willoughby v. Buffalo, etc., R. Co.*, 203 Pa. St. 243.

3. *Browne v. Mt. Hope*, 73 N. Y. App. Div. 599; *Roberts v. Lansing*, 60 N. Y. App. Div. 81; *Thomson v. Perkins*, 39 N. Y. App. Div. 656; *Osterhout v. Rabe*, 39 N. Y. App. Div. 413. See also *Navratil v. Bohm*, 26 N. Y. App. Div. 460; *Saunders v. Post-Standard Co.*, 72 N. Y. App. Div. 621; *Frances v. Graves*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 656; *Sinnit v. Cambridge Valley Agricultural Soc., etc., Assoc.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 586.

Condition and Situation of Witnesses. — Where it appeared that the plaintiff's witnesses were mostly laboring men who could not attend court in the county to which the change was sought to be had, and that nearly all of the defendant's witnesses were its own officers and employees, it was held that a change of venue was properly denied to the defendant. *Sparks v. United Traction Co.*, 66 N. Y. App. Div. 204.

414. 4. *Lyman v. Gramercy Club*, 28 N. Y. App. Div. 30.

6. *Demand Before Motion.* — In *Larkin v. Watson Wagon Co.*, 68 N. Y. App. Div. 86, it was held that where a de-

fendant desires to move, under Code Civ. Pro. N. Y., § 987, subdiv. 3, for a change of venue for the convenience of witnesses, he need not make a demand prior to making the motion.

7. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158.

9. *Occupation — Residence by Street and Number.* — In *Dean v. Cunningham*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 31, it was held that the occupation of the witnesses and their residence by street and number should be given.

The rule does not apply to small cities or rural districts. *Ballston Refrigerating Storage Co. v. Defeo*, 67 N. Y. App. Div. 341.

415. 3. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158; *Prouty v. Glens Falls, etc., St. R. Co.*, 47 N. Y. App. Div. 627; *Lane v. Bochlowitz*, 77 N. Y. App. Div. 171.

Failure to Show Materiality. — An affidavit which fails to state the facts upon which the applicant bases his allegations that the witnesses are material is defective. *McPhail v. Ridout*, 83 Hun (N. Y.) 446. See also *Lane v. Bochlowitz*, 77 N. Y. App. Div. 171.

4. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158; *Hills v. La Due*, 5 Colo. App. 248; *Sinnit v. Cambridge Valley Agricultural Soc., etc., Assoc.*, 27 N. Y. App. Div. 318; *Bell v. Whitehead Bros. Co.*, 5 N. Y. App. Div. 555.

"Expect" and "Can" — New York. — In *Hayes v. Garson*, 25 N. Y. App. Div. 115, it was held that a statement that the defendant expects to prove certain facts is sufficient. The court said that there is a conflict of authority in the several departments of the state as to whether an affidavit may state that the defendants expect to prove the facts of their defense by certain witnesses, or whether it must state that they can prove such facts. In the first department it has been held that the affidavit must contain a statement that the party can prove his allegations by the witnesses; in the third department a contrary doctrine seems to obtain. See also *Browne v. Mt. Hope*, 73 N. Y. App. Div. 599; *Ballston Re-*

416. See notes 1, 2.

e. RESISTANCE TO APPLICATION. — See note 3.

417. See notes 1, 2.

418. *f.* DETERMINATION OF APPLICATION. — See notes 1, 4, 5.

7. County, Public Officers, City, or Town as Party. — See note 6.

419. IV. APPLICATION — 1. Who May Apply. — See notes 2, 3.

frigerating Storage Co. v. Defeo, 67 N. Y. App. Div. 341; *National Contracting Co. v. Hudson River Water Power Co.*, 63 N. Y. App. Div. 613; *Schwarz v. Robbins*, 58 N. Y. App. Div. 336; *Lyman v. Gramercy Club*, 28 N. Y. App. Div. 30; *White v. Hall*, 8 N. Y. App. Div. 618, 40 N. Y. Supp. 945; *Rheinstrom v. Weir*, 5 N. Y. App. Div. 109; *Bennett v. Weed*, (Supm. Ct. Spec. T.), 38 Misc. (N. Y.) 290.

416. 1. *Randerson v. White Star Towing Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 305.

2. *White v. Hall*, 8 N. Y. App. Div. 618, 40 N. Y. Supp. 945.

3. See *Fletcher v. Church*, 11 S. Dak. 537, decided under Comp. Laws Dak. (1887), § 4891 (Annot. Stat. S. Dak. 1901, § 6091).

Defective Affidavit. — In *Fish v. Fish*, 61 N. Y. App. Div. 572, it was held that affidavits used in opposition to a motion for a change on account of the convenience of witnesses, which show that a greater number reside in the county of the venue, are defective in failing to show that the plaintiff has been advised by counsel that the testimony of the resident witnesses is material for the establishment of his cause.

417. 1. *Rhodes v. Wheeler*, 48 N. Y. App. Div. 361.

Effect of Stipulation. — A stipulation by the plaintiff that copies of such records would be needed and affidavits of some of the witnesses would be received on the trial will not defeat the motion. *Roberts v. Lansing*, 60 N. Y. App. Div. 81.

2. Stipulations to Take Depositions. — In *Fish v. Fish*, 61 N. Y. App. Div. 572, the Supreme Court granted a change of venue on condition that the defendant should stipulate to allow the testimony of the plaintiff's witnesses to be taken, or that, if she should prefer to have them actually present at the trial, the defendant should pay her witnesses' fees in the county to which the change was taken.

418. 1. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158; *Harris v. Ramsey*, 16 Mont. 302; *O'Beirne v. Miller*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 337; *Belding v. Archer*, 131 N. Car. 287; *Lassiter v. Norfolk, etc., R. Co.*, 126 N. Car. 507; *Fletcher v. Church*, 11 S. Dak. 537.

4. In *Schoonmaker v. Hilliard*, 55 N. Y. App. Div. 140, it was held that the convenience of witnesses not residing in the county to which the venue is sought to be changed should not be considered.

5. In *Tuomey v. Kingsford*, 68 N. Y. App. Div. 180, it was held that a motion by the defendant for a change of venue will not be granted where it appears from a statement of his agent that, on account of the popularity and influence of the defendant, a fair and impartial trial cannot be had in the county to which the venue is sought to be changed.

6. In a **Proceeding to Free a Turnpike**, where the petition filed by the turnpike company for a change of venue alleged that all of the taxpayers of the county had an interest in the question, and that a fair and impartial trial could not be had therein, and the affidavits presented gave no reasons for the assertion, the application was not granted. *Limerick, etc., Turnpike Co. v. Berks County*, 20 Pa. Co. Ct. 199.

419. 2. Parties Who Answer. — Where only a part of the defendants answer, a change is properly granted on their application. *Suter v. Page*, 64 Minn. 444.

Where a Judgment Has Been Confessed and leave to plead is granted, a change of venue should be granted on application for a new trial of the new issue. *Donahue v. Egan*, 85 Ill. App. 20.

3. *Arkansas.* — *Klein v. German Nat. Bank*, 69 Ark. 140.

California. — *McKenzie v. Barling*, 101 Cal. 459.

New York. — *Bennett v. Weed*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.)

- 420.** Application by Plaintiff. — See note 2.
421. In Criminal Proceeding. — See notes 1, 2.
3. When Application Should Be Made — Diligence Required.
 — See note 8.
422. See notes 1, 2.
423. After Procuring Continuance. — See note 1.
 What Constitutes Reasonable Time. — See note 2.

290; *Lyman v. Gramercy Club*, 28 N. Y. App. Div. 30.

Residents and Nonresidents. — Where some of the defendants are residents and the others nonresidents, only those who are residents need join in the application for a change of venue in an action to have the plaintiff adjudged the owner of the property of a copartnership, and for an accounting thereof. *Banta v. Wink*, 119 Cal. 78.

Effect of Stipulations. — In *Harris v. Bradley*, 55 N. Y. App. Div. 206, stipulations made by all the defendants except a corporation, for the purpose of obtaining time to answer, providing that the plaintiff might "at any time after such date of issue serve a notice of trial and file a note of issue for the special term of the court" appointed to be held in and for a certain county at a certain time, were held not to prevent a change to another county when all the defendants intended in demanding such change.

420. 2. *Wallace v. Jameson*, 179 Pa. St. 98.

Infant Plaintiff. — Under the *Missouri* statute requiring an application to be made by the party in his own person, it was held that such application may be made by the next friend of an infant plaintiff. *Raming v. Metropolitan St. R. Co.*, 157 Mo. 477.

421. 1. *Bond v. State*, 63 Ark. 504. See also *Green v. State*, 97 Tenn. 50.

2. Effect of Application. — *Jones v. State*, 152 Ind. 318.

3. Minnesota. — *Potter v. Holmes*, 72 Minn. 153, quoting 4 ENCYC. OF PL. AND PR. 421.

Missouri. — *Bruce Lumber Co. v. Hoos*, 67 Mo. App. 264.

Pennsylvania. — *Wallace v. Jameson*, 179 Pa. St. 98.

422. 1. *Potter v. Holmes*, 72 Minn. 153.

In *Indiana* an application filed later than the time fixed by a rule comes too late. *Hamilton v. Miller*, 24 Ind. App. 617.

But where the rule requires the ap-

plication to be made by the second Wednesday of the term, an application made on the second Wednesday comes in time. *Walters v. Stockberger*, 20 Ind. App. 277.

Amendment of Complaint. — *Potter v. Holmes*, 72 Minn. 153, quoting 4 ENCYC. OF PL. AND PR. 421, held that an amendment of the complaint does not revive the right or extend the time to demand a change of venue.

2. *Hamilton v. Miller*, 24 Ind. App. 617.

Notary's Jurat. — A notary's jurat attached to an affidavit verifying a petition for a change of venue will control a statement in the petition that knowledge of the prejudice came to the petitioner at a later time. *North Chicago St. R. Co. v. Leonard*, 167 Ill. 618.

423. 1. In *Iowa*. — *German Sav. Bank v. Citizens Nat. Bank*, 101 Iowa 530; *Union Mill Co. v. Prenzler*, 100 Iowa 540.

Where the applicant states that on account of being confined in the penitentiary he was ignorant of the bias and prejudice existing against him, such fact will be an excuse for not having filed the application at an earlier date. *State v. Foster*, 91 Iowa 164.

Effect of Agreement for Continuance. — An agreement of the parties that they will not move for a change of venue if a continuance is granted does not estop the accused from afterwards moving for such change. *Luttrell v. State*, 40 Tex. Crim. 651.

2. Failure of Statute to Fix Time. — In *Willoughby v. Northwestern R. Co.*, 46 S. Car. 317, it was held that as the statute failed to fix the time for making a change of venue, the defendants were not estopped from moving for a change after issue had been joined and the parties had gone to trial.

"As Early as Practicable" — *Missouri Statute.* — Under Rev. Stat. Mo. (1880), § 2260 (Rev. Stat. Mo. 1899, § 820), providing that "such application shall be

- 425.** Before or After Joining Issue. — See note 1.
426. See note 2.
427. After Cause Has Been Reached for Trial. — See notes 1, 2, 3.
429. In Criminal Cases. — See note 1.
4. Notice of Application. — See notes 2, 3.

made as soon as practicable after the defendant acquires such information and knowledge, and in no case later than the first day of the next regular term of the court thereafter," filing the application after the first day of the next term is not a sufficient compliance with the statute; neither is an offer to file the application with the clerk during vacation a compliance with Rev. Stat. Mo. (1889), § 2261 (Rev. Stat. Mo. 1899, § 821), requiring the application to be presented to the court or judge thereof in vacation. *Bruce Lumber Co. v. Hoos*, 67 Mo. App. 264.

Application Made Pending Motion Requiring Applicant to Pay Costs. — Where there was no other court in which the plaintiff could sue, and on the third day of the term at which summons was returnable the defendants moved to require the plaintiff to give security for costs, and again moved for a stay of proceedings until the costs in a previous suit should be paid, and the plaintiff's application for a change of venue was made pending the determination of the latter motion, it was held that such application was made in time, although the plaintiff knew before he brought the suit that he could not have a fair trial in the county in which suit was brought. *Raming v. Metropolitan St. R. Co.*, 157 Mo. 477.

425. 1. California Practice. — Under Code Civ. Pro. Cal., § 396, providing in effect that an affidavit and demand should be filed by the defendant "at the time he appears and answers or demurs," it is sufficient to file the notice, affidavit, and demand at the same time the demurrer is filed. *Fletcher v. Maginnis*, 136 Cal. 362.

In *Colorado* it has been held that the defendant may appear and file a demurrer and a motion for a change of venue at the same time. *Smith v. Post Printing, etc., Co.*, (Colo. App. 1902) 68 Pac. Rep. 119.

Filed with Amended Answer. — In *Harmon v. Van Ness*, 56 N. Y. App. Div. 160, it was held, under Code Civ. Pro. N. Y., §§ 985, 986, requiring that the demand for a change of venue be made at the time of the service of the

answer, that such demand might be served with an amended answer.

Preliminary Motions. — An objection to a special judge must be made before the submission of any preliminary motions preparatory to the trial. *Small v. Reeves*, (Ky. 1896) 37 S. W. Rep. 682.

426. 2. Improper Delay in Presenting Application. — An application for a change of venue on the ground that the opposing party has undue influence over the trial judge will not be granted where such application appears to have been prepared before a request that a receiver be made a party, and not presented until after the refusal of such request. *St. Louis, etc., R. Co. v. Holladay*, 131 Mo. 440.

427. 1. In Oklahoma a party may apply for a change of venue at any time before trial. *Maharry v. Maharry*, 5 Okla. 371.

2. Illinois. — *Haley v. Alton*, 152 Ill. 113.

North Dakota Statute. — Under Comp. Laws Dak., § 7312, authorizing a change of venue in certain cases "at any time before trial is begun," it was held in *State v. Kent*, 5 N. Dak. 516, that the trial does not begin till the jury is impaneled.

3. Morris v. State, (Tex. Crim. 1901) 65 S. W. Rep. 531.

Before Announcement of Trial. — Where the application was made nine months after the suit was filed, but before the announcement of trial, it was held that the application was made in time. *Ellis v. Stearns*, (Tex. Civ. App. 1894) 27 S. W. Rep. 222.

429. 1. In New York it has been declared that the accused has a right to say when the application shall be made. *People v. McLaughlin*, 2 N. Y. App. Div. 408.

2. Illinois. — *Starr & Curt. Annot. Stat. Ill.* (1896), c. 146, par. 5; *Fire Assoc. v. Short*, 100 Ill. App. 553.

Kentucky. — *Bishop v. Com.*, (Ky. 1900) 58 S. W. Rep. 817.

Missouri. — *State v. Callaway*, 154 Mo. 91.

New York. — *People v. McLaughlin*, 2 N. Y. App. Div. 408; *Sherman v.*

430. See notes 1, 2, 3, 4.

431. **5. Effect of Application.** — See notes 1, 2.

6. Form, Sufficiency, and Support — Statutory Requirements. —

See note 3.

432. See note 1.

433. See note 1.

Adirondack R. Co., 92 Hun (N. Y.) 39.

South Carolina. — Willoughby v. Northeastern R. Co., 46 S. Car. 317.

429. 3. Notice to Prosecuting Attorney. — An application will not be considered where no notice has been given to the commonwealth's attorney and the right to notice has not been waived. Bishop v. Com., (Ky. 1900) 58 S. W. Rep. 817.

430. 1. Bishop v. Com., (Ky. 1900) 58 S. W. Rep. 817.

2. In Fire Assoc. v. Short, 100 Ill. App. 553, it was held that the notice must be reasonable, in writing, and signed by a party to the record.

3. Raming v. Metropolitan St. R. Co., 157 Mo. 477; Douglass v. White, 134 Mo. 228.

Notice upon Obtaining Knowledge of Cause. — Rev. Stat. Mo. (1889), § 2261 (Rev. Stat. Mo. 1899, § 821), requiring that the affiant shall state "when he obtained his information and knowledge of the existence" of the cause assigned as a basis of the application is not complied with by a statement that such information reached affiant "since the last term of the * * * Circuit Court." St. Louis, etc., R. Co. v. Holladay, 131 Mo. 440.

Two Hours' Notice. — In St. Louis, etc., R. Co. v. Holladay, 131 Mo. 440, it was held that two hours' notice is not sufficient, under Rev. Stat. Mo. (1889), § 2262 (Rev. Stat. Mo. 1899, § 822), requiring reasonable notice.

Ten Days' Notice. — Code Crim. Pro. N. Y., § 346, requires ten days' notice to the district attorney. People v. McLaughlin, 2 N. Y. App. Div. 408, 150 N. Y. 365.

Twenty Days' Notice — Four Days'. — Under the *South Carolina* statutes twenty days' notice of a motion for a change of venue on the ground that an impartial trial cannot be had must be given to the adverse party; and where made for the convenience of witnesses, four days' notice must be given. Willoughby v. Northeastern R. Co., 46 S. Car. 317.

4. Discretion of Court. — It is within the discretion of the court to determine

whether a day is reasonable notice. Thomas Pressed Brick Co. v. Fowler, 97 Ill. App. 80.

431. 1. California. — Nolan v. McDuffie, 125 Cal. 334; Brady v. Times-Mirror Co., 106 Cal. 56; Hennessy v. Nicol, 105 Cal. 138.

Colorado. — Denver, etc., R. Co. v. Cahill, 8 Colo. App. 158.

Iowa. — Warren County v. Polk County, 89 Iowa 44.

Minnesota. — State v. District Ct., 77 Minn. 302; Flowers v. Bartlett, 66 Minn. 213.

2. New York. — People v. McLaughlin, 2 N. Y. App. Div. 419, 150 N. Y. 365.

3. Florida. — Reddick v. Joseph, 35 Fla. 65.

Mississippi. — Purvis v. State, 71 Miss. 706.

Missouri. — State v. Flournoy, 160 Mo. 324; State v. Callaway, 154 Mo. 91; State v. Headrick, 149 Mo. 396; State v. Lanahan, 144 Mo. 31.

Ohio. — Snell v. Cincinnati St. R. Co., 60 Ohio St. 256.

Texas. — Murphy v. State, 41 Tex. Crim. 120.

432. 1. California. — Modoc County v. Madden, 136 Cal. 134; Miller v. Kern County Land Co., 134 Cal. 586; Hearne v. DeYoung, 111 Cal. 373.

Colorado. — In Adamson v. Bergen, 15 Colo. App. 396, it was held that the application should negative every hypothesis in favor of the county in which the action was commenced.

433. 1. Missouri. — State v. Headrick, 149 Mo. 396.

In Raming v. Metropolitan St. R. Co., 157 Mo. 477, it was held that an application for a change of venue by a next friend is not defective because it is alleged that the next friend (not the party) cannot have a fair trial.

Following Statutory Language. — In State v. District Ct., (Minn. 1902) 92 N. W. Rep. 518, it was held that, under Laws Minn. 1895, c. 28, requiring that an affidavit for a change of venue must state "the actual residence of the defendant at the time of the commencement of the action," an affidavit

434. Facts, Information, and Belief. — See notes 1, 2.

435. See note 1.

Affidavits Submitted. — See note 2.

436. See note 1.

437. Support of Application. — See note 6.

438. See notes 1, 2.

stating that the defendant "is now and for more than two months last past has been a resident of * * * county, in which county she does now and during all of said time has been and is a resident," was insufficient.

Under Stat. Ky. (1894), § 968, which provides that a party to an action may file his affidavit that "the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue," as one of the preliminary steps towards the designation of a special judge, an affidavit which states that the judge "will not grant plaintiffs a fair and impartial trial, either upon the motion for a change of venue, nor motions to file their reply and cross-petition, nor upon the motion of defendants to submit this cause for trial and judgment, nor any other motion in same," does not state ground for a change of judge. *Small v. Reeves*, (Ky. 1896) 37 S. W. Rep. 682.

434. 1. Idaho. — *State v. Reed*, (Idaho 1894) 35 Pac. Rep. 706.

Kentucky. — *Galbraith v. Williams*, 106 Ky. 431.

Ohio. — *Sauer v. Cincinnati St. R. Co.*, 7 Ohio Dec. 19.

West Virginia. — *State v. Sheppard*, 49 W. Va. 582.

2. McCormick Harvesting Mach. Co. v. Hayes, 7 Kan. App. 141, *Small v. Reeves*, (Ky. 1896) 37 S. W. Rep. 682; *Maharry v. Maharry*, 5 Okla. 371; *State v. Sheppard*, 49 W. Va. 582.

435. 1. Pennsylvania. — *Limerick, etc., Turnpike Co. v. Berks County*, 20 Pa. Co. Ct. 199.

Contra. — *Snell v. Cincinnati St. R. Co.*, 60 Ohio St. 256.

2. Negating Exceptions. — If the complaint shows that the case is not one included in any of the exceptions of the statute, such exceptions need not be negated in an affidavit for a change of venue. *Smith v. Post Printing, etc., Co.*, (Colo. App. 1902) 68 Pac. Rep. 119.

436. 1. What Constitutes Contempt. — In *Le Hane v. State*, 48 Neb. 105, it was held that presenting in a respect-

ful manner an affidavit for a change of venue on account of the bias of the presiding judge is not a contempt. *Compare Matter of Jones*, 103 Cal. 397.

437. 6. Quint v. Dimond, 135 Cal. 572; *State v. Headrick*, 149 Mo. 396; *Sauer v. Cincinnati St. R. Co.*, 7 Ohio Dec. 19; *Murphy v. State*, 41 Tex. Crim. 120.

438. 1. Necessity of Proof. — The application of the defendant supported by two disinterested witnesses, as required by Acts Mo. 1895, p. 162 (Rev. Stat. Mo. 1899, § 2576), does not dispense with the necessity of proof of the allegations. *State v. Tatlow*, 136 Mo. 678.

An application stating that the action has been brought in the wrong district of the Municipal Court of the city of New York, and that the defendant is a resident of another county, must be sustained by proof. *Whitman, etc., Mfg. Co. v. Hamilton*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 198.

Burden of Proof. — In *State v. Shepard*, 49 W. Va. 582, it was held that the burden of proof on an application for a change of venue is on the applicant. See also *Galveston, etc., R. Co. v. Bernard*, (Tex. Civ. App. 1900) 57 S. W. Rep. 686; *Galveston, etc., R. Co. v. Miller*, (Tex. Civ. App. 1900) 57 S. W. Rep. 702.

Where Complaint Fails to Show Residence. — Where a complaint in an action which the defendant has a right to have tried in the county of his residence fails to show the residence of the defendant, the burden of proof is upon such defendant to show the county of his residence if he would secure a change of venue. *Hearne v. De Young*, 111 Cal. 373.

Oral Testimony. — Where the defendant files an application supported only by his own affidavit, he cannot prove the allegations by oral testimony. *State v. Headrick*, 149 Mo. 396. See also *Gray v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 375.

Admissions as to Residence. — Where the record shows that on a hearing of a motion for a change of venue the

439. See note 2.

Affidavit of Merits. — See note 3.

440. 7. Abandonment and Withdrawal. — See note 2.

8. Change as of Right — Compliance with Statute. — See note 3.

defendant admits that his residence is in a county other than the one to which the change is sought to be taken, there is no necessity of other proof. *Hearne v. De Young*, 111 Cal. 373.

438. 2. Territory *v. Vialpando*, 8 N. Mex. 211.

Affidavit by Agent. — The local agent of a railway company may be one of the compurgators to an affidavit by the company for a change of venue. *Texas, etc., R. Co. v. Pierce*, 10 Tex. Civ. App. 429.

439. 2. *Purvis v. State*, 71 Miss. 706; *State v. Lanahan*, 144 Mo. 31.

Presumption as to Affiant's Credibility. — In *Snell v. Cincinnati St. R. Co.*, 60 Ohio St. 256, it was held that unless the affiant's character for truth is attacked he will be presumed to be a creditable person.

3. **Sufficient Affidavit.** — In *Rodd v. Sleicher*, 53 N. Y. App. Div. 638, it was held that a moving affidavit made by the defendants is sufficient if it contains a statement that the affiant "fully and fairly stated the case of the defendants" to counsel, instead of that they had "stated the case of the defendants" to counsel.

An affidavit of merits by a nonresident of the county which shows the county of his residence, that he fully and fairly stated the case to his attorneys, and that he was advised by them and believed that he had a good and substantial defense, is sufficient. *Nolan v. McDuffie*, 125 Cal. 334.

Verified Answer. — In *Iron Nat. Bank v. Dolge*, 46 N. Y. App. Div. 327, it was held that a verified answer may be served as an affidavit of merits.

440. 2. *Franke v. Neisler*, 97 Wis. 364. See also *Forbes v. Grand County*, 23 Colo. 344; *Nystrom v. Quinby*, 68 Minn. 4.

Presumption on Appeal. — On appeal an application not acted on will be presumed to have been abandoned. *Smith v. Com.*, (Ky. 1897) 42 S. W. Rep. 1138. See also *Christ v. Flannagan*, 23 Colo. 140.

Application After Amendment of Answer — *New York Statute.* — The facts that the plaintiff did not consent to a change of venue within five days after the first

demand was made, and that the defendant did not move for the change within ten days thereafter, as required by Code Civ. Pro. N. Y., § 986, do not constitute a waiver of the defendant's right to serve a second demand with his amended waiver. *Harmon v. Van Ness*, 56 N. Y. App. Div. 160.

Failure to Call up Motion. — Where, after a denial of the motion, the defendant's counsel is given a second opportunity to present it, and the date is set for the hearing, and on such date the counsel fails to call the motion up and no action is taken upon it, it will be deemed to have been waived. *People v. Fredericks*, 106 Cal. 554.

3. *Indiana.* — *Louisville, etc., R. Co. v. Martin*, 17 Ind. App. 679.

Kentucky. — *Draughan v. Com.*, (Ky. 1898) 45 S. W. Rep. 367; *Asher v. Beckner*, (Ky. 1897) 41 S. W. Rep. 35.

Michigan. — *Freud v. Rohnert*, (Mich. 1902) 92 N. W. Rep. 109.

New York. — *People v. McLaughlin*, 150 N. Y. 365.

Ohio. — *Snell v. Cincinnati St. R. Co.*, 60 Ohio St. 256.

Pennsylvania. — *Willoughby v. Buffalo, etc., R. Co.*, 203 Pa. St. 243.

South Carolina. — *State v. Conkle*, 64 S. Car. 371.

South Dakota. — *Smail v. Gilruth*, 8 S. Dak. 287.

Washington. — *Puyallup v. Snyder*, 13 Wash. 572.

Wisconsin. — Under the Wisconsin statute (formerly Stat. Wis., § 2467), providing that when a change of venue on account of prejudice of the judge shall be granted in a civil action pending in Dodge county, "it may in the discretion of the court be changed to the County Court of Dodge county, unless it shall appear that the judge of said County Court is prejudiced and disqualified," where an affidavit is filed alleging the prejudice both of the circuit and the county judge, the right of the applicant to have a change of venue to the Circuit Court of some other county becomes absolute. *State v. Dick*, 103 Wis. 407.

Substantial Compliance. — In *Douglass v. White*, 134 Mo. 228, it was held that a substantial compliance with the stat-

- 442.** Failure to Oppose. — See note 1.
9. Discretion to Grant. — See note 2.
443. Nature of Discretion. — See note 2.
444. 10. Compulsory Grant. — See note 2.
11. Opposition to Application. — See note 5.
445. See note 2.
446. Rebuttal. — See note 3.
Requisites of Counter Affidavits. — See note 5.
448. 12. Province of Judge — *a.* GENERALLY. — See note 1.

ute entitled the plaintiff to a change of venue. See also *State v. Headrick*, 149 Mo. 396.

Magistrates. — Act S. Car. 1896 (Code Civ. Pro. S. Car., § 88, subdiv. 19), providing that when a party files an affidavit before a magistrate stating that a fair and impartial trial cannot be had a change of venue shall be granted, is mandatory. *State v. Conkle*, 64 S. Car. 371.

Demand Served with Answer. — In *Spaulding v. American Wood-Board Co.*, 5 N. Y. App. Div. 620, 621, it was held that, under Code Civ. Pro. N. Y., § 986, the demand for a change of venue must be served with the answer and the answer must be served in time, or the defendant cannot demand a change of venue as of right.

Alternative Demand. — In *Binder v. Metropolitan St. R. Co.*, 68 N. Y. App. Div. 281, it was held that where the defendant obtained an order requiring the plaintiff to show cause why he should not furnish to the defendant a verified statement of his address, or, in default thereof, why an order should not be made removing the action, and that on the return of the order the court required the disclosure of the plaintiff's address but refused the alternative relief, the order did not preclude the defendant from making the motion for a change of venue as a matter of right.

442. 1. Kentucky Timber, etc., Co. v. Daniels, (Ky. 1899) 50 S. W. Rep. 1097; *State v. Goddard*, 146 Mo. 177.

2. Iowa. — *State v. Helm*, 92 Iowa 540; *State v. Foster*, 91 Iowa 164.

Nebraska. — *Welsh v. State*, 60 Neb. 101.

Ohio. — *Sauer v. Cincinnati St. R. Co.*, 7 Ohio Dec. 19.

443. 2. *Hawaii.* — *Republic of Hawaii v. Hickey*, 11 Hawaii 314.

New York. — *People v. McLaughlin*, 2 N. Y. App. Div. 419, 150 N. Y. 365.

444. 2. In *Hennessey v. Nicol*, 105 Cal. 138, it was held that a writ of mandate will issue to compel a superior court to hear a motion for a change of venue.

5. Affidavit that Defendant's Residence Is Unknown. — A defendant sued for the recovery of money may demand a trial in the county of his residence, and the affidavit by the plaintiff that the residence of the defendant is unknown must show due diligence in attempting to ascertain its location, or the plaintiff will not be entitled to a trial in the county designated by him in his complaint, as provided in Code Civ. Pro. Cal., § 395. *Thurber v. Thurber*, 113 Cal. 607.

445. 2. In a Criminal Case counter affidavits by the state should be permitted. *State v. Reed*, (Idaho 1894) 35 Pac. Rep. 706.

446. 3. *Laches.* — In *State v. Hawthorth*, 24 Utah 398, it was held that the cause would not be reversed because the defendant was not served with copies of the state's affidavits in rebuttal or did not have an opportunity to answer them, where, although the motion for a change was made and the case was called for trial but two days after the affidavit in support of the motion had been served on the state's attorney, the defendant did not ask for time to procure additional affidavits.

5. Requisites. — In *Crookston v. Centennial Eureka Min. Co.*, 13 Utah 117, it is held that when it does not appear from the counter affidavits that the plaintiff has fully and fairly stated his case to his counsel, or that he was advised by counsel, after such statement was made, that he had a good and meritorious cause of action, and that he believes such advice to be true, and when it does not appear how his witnesses will be inconvenienced, such affidavit is defective.

448. 1. In *Ward v. State*, 68 Ark. 466, it was held to be reversible error

- 448.** *b. EX MERO MOTU.* — See notes 2, 4.
13. Retention of Cause for Convenience of Witnesses. — See note 5.
450. **14. Hearing.** — See note 1.
 Calling Witnesses. — See note 3.
451. *Examining Affiants.* — See note 1.
 Examining Persons Called as Jurors. — See note 2.
 Time of Hearing. — See note 3.
452. See note 1.
 Presence of Applicant. — See note 2.

to refuse a change of venue in a criminal case on the ground that the court knows that the defendant can have a fair trial in the county.

448. 2. *Fisk v. Thorp*, 51 Neb. 1, citing 4 ENCYC. OF PL. AND PR. 448.

4. *In Texas.* — *Gray v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 375; *Campbell v. State*, 35 Tex. Crim. 160. See also *Nite v. State*, 41 Tex. Crim. 340.

In *Augustine v. State*, 41 Tex. Crim. 59, the venue was twice changed *ex mero motu*, and it was held to be not reversible error.

5. *New York.* — In *Sylvester v. Lewis*, 55 N. Y. App. Div. 470, it was held that the proper practice is to grant the change and allow the plaintiff to make a motion to change it back to the county designated in the summons, for the convenience of the witnesses. Compare *Whitcomb v. Friendly*, 67 N. Y. App. Div. 626.

In *South Dakota* it was held that the change should be granted and that the plaintiff may make his motion on proper affidavits for a change from the courts to which the action is sent. *Smail v. Gilruth*, 8 S. Dak. 287.

Requisites of Affidavit. — In *Sinnit v. Cambridge Valley Agricultural Soc., etc., Assoc.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 586, it was held that an affidavit for such a retention must show that the plaintiff has been advised by his counsel that the witnesses are material.

450. **1. Orders in Previous Cases.** — The orders and judgments in granting the defendant's changes of venue in other cases against him in the county are admissible in considering his motion for a change of venue. *Blain v. State*, 34 Tex. Crim. 448.

3. *Willoughby v. Buffalo, etc., R. Co.*, 203 Pa. St. 243.

451. **1.** *Territory v. Gonzales*, (N. Mex. 1902) 68 Pac. Rep. 925; *Territory v. Leary*, 8 N. Mex. 180.

2. *State v. Pruett*, 49 La. Ann. 283.

3. *New Jersey.* — In *Marsh v. McLaughlin*, (N. J. 1902) 51 Atl. Rep. 931, it was held that the court properly refused to stop cases at circuit to hear a motion for a change of venue.

In *New York* the defendant may name the time for the hearing of the motion and the court cannot fix any other time, but it may vacate a stay granted till the hearing or allow an earlier hearing as a condition of permitting the stay to continue. *People v. McLaughlin*, 2 N. Y. App. Div. 408.

In *Texas* it has been held that the motion may be heard and determined before the parties have announced that they are ready for trial, and that it is not necessary that a special venire be drawn and summoned before the motion is acted upon. *Sims v. State*, 36 Tex. Crim. 154.

452. **1. Right to Postpone.** — Where the defendant obtains an *ex parte* order extending the time for pleading, the court has the right to continue the hearing of the defendant's motion for a change of venue in order that the plaintiff's counsel may properly be heard on an application to retain the place of trial for the convenience of witnesses. *Allis v. White*, 70 Minn. 186.

In *State v. Pruett*, 49 La. Ann. 283, it was held that there was no error in postponing the hearing of evidence on motion for a change of venue for an examination of the jury on its *voir dire* in order to ascertain from that examination whether a fair and impartial trial could be had.

Discretion. — If the application be made before the time for answering expires, it is then with the parties and the court to say when the motion shall be heard. *Farmers' State Alliance v. Murrell*, 119 N. Car. 124.

2. Criminal Cause. — A change may be granted in the absence of the accused.

453. 15. Determination — What Is Tantamount To. — See notes 1, 2, 18. Costs. — See note 3.

455. V. CHANGE OTHER THAN BY APPLICATION — 1. By Amendment of Complaint. — See note 1.

2. By Consent. — See notes 2, 3.

456. See note 1.

Jones v. State, 152 Ind. 318. See also *Green v. State*, 97 Tenn. 50.

But in *Lester v. State*, 91 Wis. 249, it was held that a change of venue granted in the absence of the accused and his counsel is in violation of the right of the accused, under Const. Wis., art. 1, § 7, to be heard by himself and counsel.

453. 1. Loss of Jurisdiction. — In *State v. McKee*, 150 Mo. 233, it was held that the erroneous granting of a change of venue does not divest the court of jurisdiction. See also *Chicago, etc., R. Co. v. Harrington*, 90 Ill. App. 638, wherein it was held that the erroneous denial of a change of venue, requested on the ground that the judge is disqualified, does not divest the court of jurisdiction.

2. Consenting to Reference. — Where, after the erroneous overruling of an application for a change of venue, the applicant consents to send the case to a referee, he thereby waives the error. *Isenhardt v. Hazen*, 10 Kan. App. 577, 63 Pac. Rep. 451.

Subsequently Proceeding to Trial. — In *Missouri Pac. R. Co. v. Preston*, (Kan. 1901) 63 Pac. Rep. 444, the court, citing 4 ENCYC. OF PL. AND PR. 440, note 2, held that where an application for a change of venue on the ground of the disqualification of the judge was denied, but a qualified judge was called in and heard the case, which resulted in a disagreement of the jury, and the second trial was had without any objection before another judge who was called in, there was a waiver of the claim for a change of venue. See also *Ellis v. Fitzpatrick*, 3 Indian Ter. 656.

But in *Snell v. Cincinnati St. R. Co.*, 60 Ohio St. 256, it was held that where an application for a change of venue is erroneously overruled the applicant does not waive the error by submitting to trial without objection.

Answering Petition. — The defendant does not waive error in overruling his motion for a change of venue by answering the petition. *Foss v. Cobler*, 105 Iowa 728.

3. California Statute. — Code Civ. Pro.

Cal., § 399, provides that the costs and fees shall be paid by the party at whose instance the order of a change is made. *Modoc County v. Madden*, 136 Cal. 134.

455. 1. Amendment Will Not Revive Right. — An amendment after the time for demanding a change of venue has expired will not revive the right to demand the change. *Potter v. Holmes*, 72 Minn. 153.

2. Wisconsin Statute — Court Must Consent. — Under Stat. Wis., § 2622, providing that the court or the presiding judge thereof may change the place of trial when the parties or their attorneys shall stipulate in writing to change the place of trial, it was held that the parties cannot stipulate to try the case in another court without the consent of the court in which the action was filed. *Swan v. Porter*, 96 Wis. 34.

3. Missouri. — In *Scott Hardware Co. v. Riddle*, 84 Mo. App. 275, it was held that where the parties consent to a change and the cause is transferred and they appear and submit the issues without objection, they are estopped to deny the jurisdiction of the court, although by statute the court before whom the action arose could not so change the trial.

456. 1. Consent of Defendants to Change Place of Trial. — In *California* a creditor of a bank has a right to bring and maintain an action against its stockholders in the county where the cause of action arose and where some of the defendants reside, and nonresident defendants cannot, with the unanimous consent of all of the defendants to change the place of trial to the county of their residence, take away the plaintiff's right. *Greenleaf v. Jack*, 135 Cal. 154.

Local Action. — Under Code Miss. (1892), § 650, providing that "if a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, the venue shall be changed, on his application, to the county of his household and residence," a local civil action cannot be transferred by the mere

457. Sufficiency, Service, and Effect. — See notes 3, 4.

458. VI. TO WHAT COUNTY OR PLACE CHANGE MAY BE HAD. — See note 1.

459. See notes 1, 2.

461. Objections to County to Which Cause Is Sent. — See note 1.
Discretion of Court. — See notes 3, 4.

462. Convenience of Parties and Witnesses. — See notes 1, 2.

consent of the parties. *Wilkerson v. Jenkins*, 77 Miss. 603.

457. 3. Demand by Mail — Time Extended. — Code Civ. Pro. N. Y., § 986, giving to the defendant ten days' notice to move for a change of venue in case the plaintiff does not consent to such a change within five days after service of the demand for such change, does not prevent him from making such motion within twenty days where the demand is served by mail, as provided in Code Civ. Pro. N. Y., § 798. *Binder v. Metropolitan St. R. Co.*, 68 N. Y. App. Div. 281.

4. Denial of Application Made After Disregard of Demand. — Where a statute provides that the filing of proof of service of the demand and affidavits of residence shall operate as a change of venue, a denial of an application made after the filing of such proof does not change the place of trial back to the county in which it originated. *Flowers v. Bartlett*, 66 Minn. 213.

458. 1. "Nearest" or "Most Accessible" — Discretion. — In *California* if the nearest court is also the most accessible the judge has no discretion; but if the most accessible is not the nearest he may transfer the cause to the former. *Anaheim Water Co. v. Jurupa Land, etc., Co.*, 128 Cal. 568.

Necessity of Objection Before Trial. — An objection that the county to which the case is transferred is not an adjoining county cannot be made after the verdict. *Yontz v. Com.*, (Ky. 1902) 66 S. W. Rep. 383.

So an objection that a case was not sent to the nearest justice of the peace as required by Acts Mo. 1891, p. 121, must be made before engaging in the trial. *State v. Hoffmann*, 75 Mo. App. 380.

From Circuit to County Court. — Under an *Illinois* statute providing that when a change of venue is granted it may be to some other court of record of competent jurisdiction in the same county, a Circuit Court may grant a change of venue to the County Court of the

same county. *McGrath v. Miller*, 61 Ill. App. 497.

City Courts. — In *Illinois* one city court may grant a change of venue to another. *East St. Louis Connecting R. Co. v. Enright*, 152 Ill. 246.

459. 1. Determination of Most Convenient County — What May Be Considered. — What may be considered the most convenient county is within the sound discretion of the court, and where the motion is made on the ground of bias and prejudice of the presiding judge, the case may be sent to a convenient county, though in another circuit. *Stringam v. Parker*, 159 Ill. 304.

2. Selection of Remote County. — In *Forbes v. Grand County*, 23 Colo. 344, it was held that a change of venue may be granted to a nonadjacent county.

461. 1. *Lankster v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 888.

3. In *Adkins v. Com.*, 98 Ky. 539, it was held that where the commonwealth's attorney has filed his statement showing the necessity of removal, "the court may then act on its own personal knowledge" and remove the cause either to some adjacent county or to some other county most convenient.

Change to District Within County. — Where a county has been divided into two judicial districts, the court of one district may, in its discretion, on application, change the venue of an action either to the other district or to some other county of the state. *Kent v. State*, 64 Ark. 247.

4. An appellate court will not reverse a judgment and remand a cause in the absence of evidence tending to show that the appellant has not had an impartial trial, where the evidence does not clearly show that the change of venue was made without authority of law. *Williams v. Planters', etc., Nat. Bank*, (Tex. Civ. App. 1898) 44 S. W. Rep. 617.

462. 1. Where the Affidavits Are Conflicting as to what is the most con-

- 462.** Change to County Outside Circuit or District. — See note 3.
463. Court Must Have Jurisdiction. — See note 1.
464. Change in County Lines. — See note 1.
466. VII. ORDER — 1. Jurisdiction to Make. — See note 1.
 2. Requisites. — See note 2.
467. 3. Form and Sufficiency. — See note 2.
468. Waiver of Objections. — See note 1.
469. 4. Terms and Conditions. — See notes 3, 4, 5.

venient court for witnesses, and only forty-five out of two hundred and fifty defendants join in the motion for a change, the court does not abuse its discretion in refusing such motion. *Anaheim Water Co. v. Jurupa Land, etc., Co.*, 128 Cal. 568.

462. 2. Where there Are Several Defendants, but only one materially interested, the action may be changed to the county of the defendant interested. *State v. District Ct.*, 85 Minn. 283.

In *Minnesota*, where there are several defendants and the action is brought in a county where one or more of the defendants reside, the place of trial must be changed to the county to which a majority of the defendants unite in demanding that it shall go. *Chadbourne v. Reed*, 83 Minn. 447.

3. Change Out of District — Absence of Statutory Restrictions. — Under an *Arkansas* statute providing that a circuit judge may change the venue "to a county to which there is no valid objection, which, in his judgment, is most convenient to the parties and witnesses," such judge can grant a change to a county outside of his district. *Palatine Ins. Co. v. Evans*, 63 Ark. 241.

463. 1. See *Scott Hardware Co. v. Riddle*, 84 Mo. App. 275.

464. 1. Change of County Line Pending Action. — The fact that a new county is formed and courts are established in it does not authorize the court of a county in which actions are pending to transfer them to the new county because the subject of the litigation is situated in or the parties reside within the limits of such new county. *McNew v. Williams*, (Ky. 1896) 36 S. W. Rep. 687.

Where an action to foreclose a mortgage is brought in the county in which the land is situated, the creation of another county which includes the mortgaged land does not give the right to have the venue changed to a court in the new county, since *Const. Cal.*,

art. 6, § 5, declaring that all actions for the enforcement of liens shall be commenced in the county in which the real estate or some portion thereof is situated, does not require the action to be tried in that county. *Security L. & T. Co. v. Kauffman*, 108 Cal. 214.

466. 1. After Continuance. — Where an order is made after a continuance has been granted, it will be presumed that the continuance was set aside. *Hamilton v. State*, 40 Tex. Crim. 464.

2. Change Granted in Vacation. — Where a change is granted in vacation a written order should be made and filed with the clerk. *Collier v. Wilson*, 56 Mo. App. 420.

467. 2. Necessity of Signature of Judge. — In *Allen v. Voje*, 114 Wis. 1, it was held that where the substance of an oral order was written by the clerk upon his records, the entry was as complete as if written out and signed by the judge.

Recital of Stipulations Conceding Necessity of Witnesses. — In *Thompson v. MacKinnon*, 57 N. Y. App. Div. 329, where a change was ordered for the convenience of witnesses, it was held that the order should recite the stipulation made by the defendant's attorney conceding the necessity of certain witnesses.

468. 1. In *Allen v. Voje*, 114 Wis. 1, it was held that objections to the order are waived unless made before entering upon the trial.

469. 3. Requirement of Bond. — In *Ellis v. Fitzpatrick*, 3 Indian Ter. 656, it is held that a change of venue cannot be granted on condition that a bond be given by the defendant.

4. Consent to Reference. — In *L'Amoureux v. Erie R. Co.*, 62 N. Y. App. Div. 505, it was held that in granting an order for a change of venue, the court could not require the defendant to consent to a reference.

5. Payment of Alimony. — The court has no right to deny a change of venue because the applicant has not complied

- 470.** 5. Effect — Vesting Jurisdiction. — See note 2.
471. See note 1.
 Void Order. — See note 2.
472. Discharge of Bail. — See note 3.
473. 7. Rescission and Vacation. — See note 1.
476. VIII. PERFECTION OF CHANGE — 2. Record and Transcript
 — *b.* SUFFICIENCY OF TRANSCRIPT. — See note 3.
477. *c.* AUTHENTICATION. — See note 1.
478. See note 1.
480. 3. Fees and Costs — Failure to Pay Fees or Costs. — See note 2.
481. 4. Transmission and Filing. — See notes 2, 4.

with an order requiring him to pay alimony. *Maharry v. Maharry*, 5 Okla. 371.

470. 2. Appointment of Guardian. — In *Berry v. Berry*, 147 Ind. 176, it was held that in a proceeding for the appointment of a guardian, where a change of venue is awarded, the court to which the cause is sent must make the appointment.

471. 1. *State v. Gray*, (La. 1902) 33 So. Rep. 108.

2. *Cole v. Cole*, 89 Mo. App. 228.

Validity of Order Erroneously Made. — *McNew v. Martin*, (Ky. 1901) 60 S. W. Rep. 412.

472. 3. A Surety on an Appeal Bond is not released by a change of venue from the court to which the case was appealed. *Manson v. Coleman*, 86 Mo. App. 18.

473. 1. *Kansas*. — *Mudge v. Hull*, 56 Kan. 314.

Missouri. — *State v. Bragg*, 63 Mo. App. 22.

Rescission During Term. — The judge may, after allowing an application for a change of venue, during the same term and before transmission of the papers or a transcript of them, vacate the order granting a change, for the purpose of allowing the case to be heard before a judge *pro tem*. *Mudge v. Hull*, 56 Kan. 314.

Order Made in Vacation. — In Chicago, etc., *R. Co. v. Harrington*, 192 Ill. 9, it was held that an order made in vacation may be vacated.

476. 3. Sufficiency of Record — Proceeding upon Information. — Where copies of the information, the application for a change of venue, and an order granting the change, are transferred by the clerk, the record shows jurisdiction in the court to which the case is transferred. *State v. Foulk*, 59 Kan. 775, 52 Pac. Rep. 864.

Transcript of Justice. — A justice of the peace should designate in his transcript the justice to whom the case is sent. *Stow v. Shay*, 54 Kan. 574.

477. 1. Under Louisiana Statute. — In preparing papers for a transfer, under Rev. Laws La. (1897), §§ 1021, 1026, where a change of venue has been granted, there is no occasion for the clerk to certify to the original documents sent up. *State v. Daniels*, 49 La. Ann. 954.

Necessity to Name Offense. — A certificate of transfer need not name the offense with which the accused is charged. *Malloy v. State*, 35 Tex. Crim. 389.

478. 1. Presumption in Favor of Transcript Under Seal. — The presumption in favor of the regularity of a transcript under the seal of the court on the change of venue, is not overcome by proof that the signature of the clerk thereto is not in his own handwriting, since he may have adopted the signature, though made by another person. *Harwood v. State*, 63 Ark. 130.

Kind of Seal. — The fact that the seal does not conform in all respects to the design fixed by the statute does not affect the jurisdiction of the court to which the case is sent. *State v. Daniels*, 49 La. Ann. 954.

480. 2. Vacation of Order by Court Granting It. — Where the statute requires the applicant to pay a fee, and a change of venue is ordered without payment of such fee, the court which granted the change of venue cannot rescind the order and try the case. *Cunningham v. Current River R. Co.*, 165 Mo. 270.

481. 2. Duty of Clerk. — In *Nebraska*, in a criminal case, it is the duty of the clerk to transmit a transcript of the proceedings together with the

- 481.** Filing Transcript and Papers. — See note 5.
482. See note 1.
483. Correction of Defects in Record or Transcript. — See note 1.
484. Waiver of Objections for Irregularity. — See notes 2, 3.
485. See notes 1, 2.
487. IX. STATUS OF CAUSE AFTER ORDER — 2. Nature of Jurisdiction. — See note 2.
488. See note 1.
489. 3. Objections to Jurisdiction. — See note 1.
490. X. REMAND OF CAUSE — 1. Jurisdiction to Remand. — See note 6.

original indictment or information. *Barr v. State*, 45 Neb. 458.

481. 4. Wisconsin Statute. — In *F. Dohmen Co. v. Niagara F. Ins. Co.*, 96 Wis. 38, it was held that under Stat. Wis., § 2627, failure to transmit the papers within twenty days is ground for vacating the order.

5. In *Jones v. Bourbonnais*, (Tex. Civ. App. 1901) 60 S. W. Rep. 986, it was held that where the parties agreed to a transfer, on the entry of an order for such transfer in accordance with the *Texas* statute, the court to which the cause was transferred acquired jurisdiction though all the papers had not been transmitted when the trial was had.

482. 1. Extension of Time for Transmission. — The motion that the clerk be directed to transmit the papers, made after the expiration of the twenty days allowed for the transmission of papers by the *Wisconsin* statute, will not be treated as a motion for the extension of the time of transmission. *F. Dohmen Co. v. Niagara F. Ins. Co.*, 96 Wis. 38.

483. 1. Defects Supplied by Prosecuting Attorney. — In *State v. Bell*, 136 Mo. 120, it was held that the court may permit the prosecuting attorney on appeal to file an amended transcript to correct the inaccuracies of the clerk in certifying the original transcript.

Writ of Diminution. — On the suggestion of a diminution of the record it is the duty of the court to order a transmittal of the full transcript. *State v. Foulk*, 59 Kan. 775, 52 Pac. Rep. 864.

484. 2. *State v. Jennings*, 134 Mo. 277; *State v. Taylor* 132 Mo. 282.

3. *Minnesota*. — *State v. District Ct.*, (Minn. 1902) 92 N. W. Rep. 518.

Missouri. — *Levin v. Metropolitan St. R. Co.*, 140 Mo. 624.

485. 1. Continuance and Trial by Judge Pro Tem. — In *Missouri Pac. R.*

Co. v. Preston, 63 Kan. 819, it was held that where the parties are granted a continuance by a judge *pro tem*, called in to try the case, and trial is had without objections, they are estopped from denying his authority to act.

2. *Kansas*. — *Garden City v. Heller*, 61 Kan. 767; *Stow v. Shay*, 54 Kan. 574.

Michigan. — *Montmorency County v. Wiltse*, 125 Mich. 47.

487. 2. Partition. — In *Hazen v. Webb*, 65 Kan. 38, the court, quoting 4 ENCYC. OF PL. AND PR. 487, held that where a change of venue had been granted in a suit for partition, the court to which the action was sent could bring in all the joint property and all the parties interested therein, that an effectual decree might be entered.

Amendment of Information. — In *State v. Bartlett*, (Mo. 1902) 71 S. W. Rep. 148, it was held that an information cannot be amended in the court to which the action is sent.

488. 1. Allowance of Bill of Exceptions. — The court cannot allow an exception taken to the action of the court from which the venue is changed. *Bowring v. Wabash R. Co.*, 90 Mo. App. 324.

489. 1. Objection After Verdict. — In *State v. Kent*, 5 N. Dak. 516, it was held that the right to a change of venue having been established and the applicant having requested that the trial be had before a certain tribunal, and the trial having been had before that tribunal, such applicant could not, after verdict, be heard to question the jurisdiction of the court.

490. 6. *Penfield v. Vaughan*, 169 Mo. 371.

Second Change. — *Citizens' St. R. Co. v. Shepherd*, (Ind. App. 1901) 59 N. E. Rep. 349.

491. See notes 2, 4.

492. XI. APPEAL AND REVIEW — 1. Generally. — See note 5. See also APPEALS; CERTIORARI; ERROR, WRIT OF.

493. Who May Object. — See note 3.

Objections Below. — See note 4. See also EXCEPTIONS AND OBJECTIONS.

494. See note 4.

495. What Is Appealable. — See notes 2, 7.

496. What Will Be Reviewed. — See note 1.

491. 2. Remanded by Consent. — The court may, upon the consent of the accused and the prosecuting attorney, remand the cause to the county from whence it came. *State v. Jennings*, 134 Mo. 277.

4. Retention of Cause. — In *Williams v. Planters', etc.*, Nat. Bank, (Tex. Civ. App. 1898) 44 S. W. Rep. 617, it was held that where the record discloses that the venue has been changed upon the motion of one of the parties, for cause allowed by statute, and that the jurge making the change has ordered the cause to be transferred to the county, the court to which the cause is sent has no right to decline jurisdiction in the case.

492. 5. California. — Mandamus will not lie to compel a superior judge to hear and determine a motion for a change of venue. *Hennesy v. Nicol*, 105 Cal. 138.

Iowa. — Where the accused deposits money as bail with the clerk and takes a change of venue to another county, and the court erroneously orders the clerk of the former county to pay such money to the treasurer of that county, such error cannot be the ground of an independent action, the only remedy being by appeal, writ of error, certiorari, or some other appropriate proceeding. *Warren County v. Polk County*, 89 Iowa 44.

Montana. — In *State v. Smith*, 23 Mont. 329, the court, citing 4 ENCYC. OF PL. AND PR. 442, 443, 492, held that mandamus will not lie to compel a court to grant a change of venue on the ground of residence, since under Code Civ. Pro. Mont., § 1742, a plain, speedy, and adequate remedy is afforded by appeal.

Wisconsin. — Under the Wisconsin statute regulating appeals from orders changing the venue of actions, such orders are not appealable, and mandamus is an appropriate remedy to

review them. *State v. Dick*, 103 Wis. 407.

Petition. — In *State v. McKee*, 150 Mo. 233, it was held that a petition for mandamus to compel a court to take jurisdiction of a case which it has erroneously changed to another court, because the parties were not asked to agree on a special judge, must allege that there was present or available a person competent to act as special judge or that there was a requisite number of lawyers present from whom and by whom a special judge could be elected.

Habeas Corpus — Jurisdiction of Justice of Peace. — In *Ex p. Wright*, 119 Cal. 401, it was held that while the refusal of a justice of the peace to change the place of trial may have been erroneous, yet where the prisoner has an ample remedy by appeal habeas corpus will not lie.

493. 3. State v. Taylor, 132 Mo. 282.

4. Cross v. People, 66 Ill. App. 170; *State v. Taylor*, 132 Mo. 282; *State v. McKee*, 150 Mo. 233; *Huke v. St. Louis, etc.*, R. Co., 79 Mo. App. 680; *Green v. State*, 97 Tenn. 50; *Mott v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 368.

494. 4. Cross v. People, 66 Ill. App. 170.

495. 2. Snell v. Cincinnati St. R. Co., 60 Ohio St. 256; *Cutler v. Territory*, 8 Okla. 101.

7. See State v. Taylor, 132 Mo. 282, where it was held that an order remanding a cause is not the subject of appeal, the accused having agreed to such an order.

496. 1. Question of Fact. — Where the motion for a change of venue involves a question of fact as to residence, and the evidence is conflicting, a denial of the motion will not be disturbed on appeal. *Ludwig v. Harry*, 126 Cal. 377.

497. 2. Record — Bill of Exceptions. — See note 3. See also **BILLS OF EXCEPTIONS.**

498. See note 1.

3. Review. — See note 2.

499. See notes 1, 2.

Review of Discretion. — See note 3.

502. Abuse of Discretion. — See note 2.

497. 3. Mott v. State, (Tex. Crim. 1899) 51 S. W. Rep. 368. See also *State v. McKee*, 150 Mo. 233.

Where an Order Is Made During Vacation so that no exception can be taken, the aggrieved party may show by affidavit what occurred. *Penfield v. Vaughan*, 169 Mo. 371.

498. 1. Explanation by Judge. — The unsworn statement by the judge attached to a bill of exceptions cannot be used to support or disapprove the allegations contained in a motion for a change of venue or the affidavits attached thereto. *Gaines v. State*, 38 Tex. Crim. 202.

2. What May Be Considered. — In *Barnes v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 882, it was held that the evidence in connection with the verdict, as well as the charge of the court, may be considered in reviewing the action of the court below in denying a change of venue.

499. 1. Error in overruling the application for a change of venue is not rendered harmless by the fact that a trial was subsequently had before the court without the intervention of a jury. *Louisville, etc., R. Co. v. Martin*, 17 Ind. App. 679.

2. Kell v. Lund, 99 Iowa 153.

3. California. — *Stockton Combined Harvester, etc., Works v. Houser*, 103 Cal. 377.

Colorado. — *Doll v. Stewart*, (Colo. 1902) 70 Pac. Rep. 326.

Florida. — *Shepherd v. State*, 36 Fla. 374.

Illinois. — *Chicago, etc., R. Co. v. Harrington*, 192 Ill. 9; *Thomas Pressed Brick Co. v. Fowler*, 97 Ill. App. 80.

Indiana. — *Jones v. State*, 152 Ind. 318; *Hauk v. State*, 148 Ind. 238; *Masterson v. State*, 144 Ind. 240; *Conrad v. State*, 144 Ind. 290.

Iowa. — *State v. Williams*, 115 Iowa 97; *State v. Miner*, 107 Iowa 656; *Alverson v. Anchor Mut. F. Ins. Co.*, 105 Iowa 60; *Union Mill Co. v. Prenzler*, 100 Iowa 540; *State v. Edgerton*,

100 Iowa 63; *State v. White*, 98 Iowa 346; *State v. Hamil*, 96 Iowa 728; *State v. Weems*, 96 Iowa 426; *State v. LaGrange*, 94 Iowa 60; *State v. Helm*, 92 Iowa 540; *State v. Foster*, 91 Iowa 164; *State v. Belvel*, 89 Iowa 405; *State v. Crafton*, 89 Iowa 109.

Kansas. — *State v. Daugherty*, 63 Kan. 473.

Kentucky. — *Kentucky Timber, etc., Co. v. Daniels*, (Ky. 1899) 50 S. W. Rep. 1097.

Missouri. — *State v. Dyer*, 139 Mo. 199. See also *Gee v. St. Louis R. Co.*, 140 Mo. 314.

Montana. — *Harris v. Ramsey*, 16 Mont. 302.

Nebraska. — *Goldsberry v. State*, (Neb. 1902) 92 N. W. Rep. 906; *Argabright v. State*, 62 Neb. 402; *Welsh v. State*, 60 Neb. 101.

North Carolina. — *Lassiter v. Norfolk, etc., R. Co.*, 126 N. Car. 507.

Oklahoma. — *Pearce v. Territory*, (Okla. 1902) 68 Pac. Rep. 504; *Cutler v. Territory*, 8 Okla. 101; *Patswald v. U. S.*, 5 Okla. 351.

Oregon. — *State v. Pomeroy*, 30 Oregon 16.

Pennsylvania. — *Huntingdon County Line*, 14 Pa. Super. Ct. 571.

South Dakota. — *State v. Hall*, (S. Dak. 1902) 91 N. W. Rep. 325; *Fletcher v. Church*, 11 S. Dak. 537.

Texas. — *Gray v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 375; *Mott v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 368; *Gregory v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 752; *Nite v. State*, 41 Tex. Crim. 340; *Augustine v. State*, 41 Tex. Crim. 59.

Utah. — *State v. Carrington*, 15 Utah 480.

502. 2. Where the affidavits in support of a motion for a change of venue show that the contract sued upon was made in the county of the venue, an order changing the place of trial to the county where the corporation has its principal place of business will be reversed. *Whitney v. Sellers' Commission Co.*, 130 Cal. 188,

503. *Presumption.* — See note 1.

505. See note 1.

Refusal to Hear Application. — Where the action is one which the defendant is entitled to have tried in the county of his residence, the court has no discretion to refuse to hear an application for a change to such county, or to impose terms as a condition precedent to the hearing. *Hennessey v. Nicol*, 105 Cal. 138.

Change on Unverified Affidavit. — *Reddick v. Joseph*, 35 Fla. 65.

503. 1. *Alabama.* — *Daughdrill v. State*, 113 Ala. 7.

Missouri. — *State v. Callaway*, 154 Mo. 91.

Texas. — *Grooms v. State*, 40 Tex. Crim. 319.

As to Cause for Change in Adjoining Counties. — Where a court *ex mero motu* sends a case to a county not adjoining its own, it will be presumed that the same causes existed in the adjoining

counties that existed in the county from whence the case was sent. *Grooms v. State*, 40 Tex. Crim. 319.

Presumption that Change Was Made Ex Mero Motu. — Where the district attorney made a change of venue, and there was no order changing the venue, nor evidence in the bill of exceptions upon which the court may have acted, it was presumed, in *Hamilton v. State*, 40 Tex. Crim. 464, that the court changed the venue of its own motion, as authorized under Code Crim. Pro. Tex., art. 613.

505. 1. *Transcript.* — A presumption that a county clerk transmitted the papers by special messenger, as required by Annot. Code Miss., § 1412, is not overcome by the testimony of the clerk to whom the papers were sent that he received them by mail. *McDonald v. State*, 78 Miss. 369.

CHATTEL MORTGAGES.

508. I. LAW GOVERNING PROCEDURE — *Lex Fori*. — See note 3.

Lex Loci Contractus et Situs. — See note 4.

509. II. JURISDICTION OF JUSTICES OF PEACE. — See note 1.

See also AMOUNT IN CONTROVERSY; JUSTICES OF THE PEACE.

III. ISSUES OF LAW AND FACT. — See notes 2, 5.

IV. REMEDIES OF MORTGAGOR — 1. Legal. — See notes 9, 11, 12, 13.

508. 3. Shapard v. Hynes, (C. C. A.) 104 Fed. Rep. 449.

4. Armitage-Herschell Co. v. Potter, 93 Ill. App. 602. See also *Mabry v. Metropolitan Trust Co.*, 94 Ga. 619.

Conflict of Laws. — Where the *lex loci contractus et situs* is contrary to the policy of the *lex fori*, the latter will prevail even on questions affecting the validity of a mortgage. *Armitage v. Spahn*, 4 Pa. Dist. 270.

509. 1. Kiser v. Blanton, 123 N. Car. 400.

Splitting Cause of Action. — A mortgagee of chattels may sue in a justice's court for the possession of such portion of the chattels as do not exceed in value the justice's jurisdiction, though the value of all the chattels covered by the mortgage exceeds such jurisdiction. *Kiser v. Blanton*, 123 N. Car. 400.

In Georgia the jurisdiction of a justice of the peace to foreclose a chattel mortgage is determined by the amount of the principal of the debt secured. *De Vaughn v. Byrom*, 110 Ga. 904.

North Carolina — No Jurisdiction to Foreclose. — In North Carolina a justice of the peace has no jurisdiction of proceedings to foreclose a chattel mortgage; but an action by a mortgagee of chattels against the mortgagor for the possession of the chattels after default is not an action for foreclosure, but an action in the nature of replevin, and hence it may be brought before a justice of the peace. *Kiser v. Blanton*, 123 N. Car. 400.

2. The Legal Effect of a duly recorded chattel mortgage is a question of law. *Fahy v. Gordon*, 133 Mo. 414.

5. Campbell v. Doggett, (Miss. 1898) 23 So. Rep. 371.

9. Fields v. Copeland, 121 Ala. 644; *Weir Plow Co. v. Armentrout*, 9 Tex. Civ. App. 117; *Kohn v. Dravis, (C. C. A.)* 94 Fed. Rep. 288.

Book Accounts. — Where a mortgagor of chattels including book accounts is entitled under the mortgage until default made to possess, sell, and use the mortgaged property in the regular course of business, he may, at any time before default, maintain an action on such accounts. *Swan v. Thurman*, 112 Mich. 416.

11. See Matthews v. Granger, 96 Ill. App. 536; *Johnson v. Wise*, 66 Ill. App. 501.

12. Fields v. Copeland, 121 Ala. 644. See also *Donahoe v. Gillon*, 167 Mass. 24.

Conversion by Mortgagee — Seizure of Property. — A mortgagor of chattels may sue the mortgagee for conversion where the latter takes possession of the chattels before he is entitled thereto under the terms of the mortgage. *Johnston v. Robuck*, 104 Iowa 523.

Unlawful Sale by Mortgagee. — Where the mortgage provides for a public sale by the mortgagee upon default, and the mortgagee sells at a private sale, the mortgagor may sue for conversion. *Colby v. W. W. Kimball Co.*, 99 Iowa 321. See also *McCormick Harvesting Mach. Co. v. Preitauer, (Neb. 1902)* 91 N. W. Rep. 499.

Conversion by Mortgagee in Possession. — Where a mortgagee in possession makes such a sale of the property as amounts to a denial of the mortgagor's interest therein, the mortgagor may sue the mortgagee for conversion; and where, in such case, the value of the

509. Counterclaim. — See note 14. See also SET-OFF, COUNTERCLAIM, AND RECOUPMENT.

510. 2. Injunctions and General Equitable Relief — Generally. — See note 1.

Interference of Mortgagee. — See note 2.

511. 3. Redemption. — See notes 1, 4.

512. Contents of Bill. — See note 4.

property exceeds the mortgage debt, a tender of the mortgage debt is not a condition precedent to the right to maintain the action. *Burton v. Randall*, 4 Kan. App. 593; *Card v. Fowler*, 120 Mich. 646.

After Default. — A mortgagor of chattels cannot sue the mortgagee in an action at law for a conversion after default, the only remedy in such case being by an action to redeem. *Cody v. Springfield First Nat. Bank*, 63 N. Y. App. Div. 199.

Assumpsit will lie at the instance of a mortgagor of chattels against the mortgagee, for the value of the mortgaged property, where the mortgagee takes and holds such goods under invalid foreclosure proceedings. *Castner v. Darby*, 128 Mich. 241.

Trespass. — Where the mortgagee wrongfully seizes the mortgaged goods the mortgagor may sue him in trespass. *Robley v. Culwell*, 69 Ill. App. 272.

Possession Obtained in Wrongful Manner. — Where a mortgagee who is entitled to the possession of the mortgaged property obtains such possession in a wrongful manner, the possession itself is not thereby rendered wrongful, and the mortgagor cannot maintain an action for the conversion of the property. *Atkinson v. Burt*, 65 Ark. 316.

509. 13. See *Frankenthal v. Meyer*, 55 Ill. App. 405, wherein it was held that a mortgagor of chattels may maintain case for injury to his reversionary interest before default, but not thereafter.

In South Dakota the title to mortgaged chattels does not pass to the mortgagee; and hence, a mortgagor who has delivered the property to the mortgagee, and the mortgagee who is in possession, may both maintain separate and distinct actions against a stranger for the conversion of the property. *Jencks v. Murphy*, 15 S. Dak. 425.

14. Wrongful Seizure by Claim and Delivery. — In an action of claim and

delivery by the mortgagee against the mortgagor for the possession of the mortgaged chattels, a counterclaim for damages arising out of the seizure of the property is not admissible. *Satterthwaite v. Ellis*, 129 N. Car. 67.

510. 1. Where the Mortgage Is Invalid injunction will lie to restrain the foreclosure thereof. *Kindall v. Lincoln Hardware, etc., Co.*, (Idaho 1902) 70 Pac. Rep. 1056.

2. *Rolfe v. Burnham*, 110 Mich. 660; *Earle v. Gorham Mfg. Co.*, 2 N. Y. App. Div. 460.

511. 1. Only Remedy. — *Darrow v. Wendelstadt*, 43 N. Y. App. Div. 426. *Contra*, *Tobener v. Hassinbusch*, 56 Mo. App. 591, wherein it was held that a mortgagee may, after default, sue the mortgagor for the conversion of the equity of redemption.

Personal Representatives of deceased mortgagors of chattels may maintain a suit to redeem. *Hughes v. Harlam*, 166 N. Y. 427, *affirming* 37 N. Y. App. Div. 528.

Right to Redeem Inalienable. — A mortgagor of chattels cannot surrender his right to redeem them. *Hughes v. Harlam*, 160 N. Y. 427, *affirming* 37 N. Y. App. Div. 528.

4. Rhode Island Statute. — Under Pub. Stat. R. I., c. 176, § 11 (Gen. Laws R. I., c. 207, § 12), a suit to redeem chattels may be brought within sixty days after default, unless the property has been sold in pursuance of the mortgage, and the same limitation applies to a suit for an accounting after sale. But in cases where special equities require it, a suit to redeem or for an accounting may be maintained after expiration of the limitation. *Murphy v. Eddy*, 19 R. I. 41.

512. 4. Sufficiency of Complaint. — A complaint alleging that the defendant has wrongfully become possessed of chattels belonging to the plaintiff, under a pretended chattel mortgage or lien to secure a certain sum of money, and that the plaintiff is ready and willing to pay and has duly tendered the

512. V. REMEDIES OF MORTGAGEE — 1. Generally.— See note 7.**513. 2. Legal — a. FORM AND REQUISITES.** — See notes 1, 2, 3, 4.

defendant such sum; and praying, among other things, that the property be surrendered to the plaintiff, and that an accounting be taken to ascertain the sum due, is sufficient as a complaint to redeem the property. *Hughes v. Harlam*, 37 N. Y. App. Div. 528.

512. 7. *Smith v. Donahoe*, 13 S. Dak. 334.

Injunction is proper to prevent interference with or destruction of the property, where the mortgagee has no remedy at law by reason of not being entitled to possession. *Ukiah Bank v. Moore*, 106 Cal. 673.

513. 1. *Alabama*. — *Karter v. Fields*, 130 Ala. 430; *Belser v. Youngblood*, 103 Ala. 545.

Colorado. — *Burchinell v. Koon*, 25 Colo. 59.

Georgia. — *Harris v. Grant*, 96 Ga. 211; *Benton v. McCord*, 96 Ga. 393.

Illinois. — *Udell v. Slocum*, 56 Ill. App. 216.

Indiana. — *Conwell v. Jeger*, 21 Ind. App. 110.

Iowa. — *Gardner v. Roach*, 111 Iowa 413.

Montana. — *Reynolds v. Fitzpatrick*, 23 Mont. 52.

New York. — *Smith v. Smalley*, 19 N. Y. App. Div. 519.

North Dakota. — *Donovan v. St. Anthony, etc., Elevator Co.*, 7 N. Dak. 513.

Texas. — *Moore v. Masterson*, 19 Tex. Civ. App. 308; *Western Mortg., etc., Co. v. Shelton*, 8 Tex. Civ. App. 550.

Wisconsin. — *Koch v. Peters*, 97 Wis. 492.

United States. — *O'Brien v. Miller*, 117 Fed. Rep. 1000; *Shapard v. Hynes*, (C. C. A.) 104 Fed. Rep. 449.

A Mortgagee Not in Possession and not entitled thereto cannot maintain an action for the conversion of the property. *Barney Cavanaugh Hardware Co. v. Lewis*, (Fla. 1901) 31 So. Rep. 270; *McMillan v. Grayston*, 83 Mo. App. 425; *Little Rock Bank v. Fisher*, 55 Mo. App. 51; *Hill v. Campbell Commission Co.*, 54 Neb. 59; *Gregg v. Wittemann*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 90. See also *Moore v. Wood*, (Tenn. Ch. 1901) 61 S. W. Rep. 1063, wherein it was held that the remedy of a mortgagee of chattels, not

in possession nor entitled thereto, for the wrongful use of the property by another, is in equity by a bill *quia timet* to restrain the conduct causing the injury. Compare *Fouts v. Ayres*, 11 Tex. Civ. App. 338, wherein it was held that such a mortgagee may maintain an action for conversion against one who, knowing the rights of the mortgagee, takes possession of the property, and uses or disposes of it.

Statute of Limitations. — Where a third party takes possession of mortgaged chattels, but it is not apparent at the time that he intends to convert them, the statute of limitations will not begin to run against the mortgagee's cause of action for a conversion of such chattels until the mortgagee, in the exercise of due diligence, discovers the fraud. *Reid v. Matthews*, 102 Ga. 189.

A Chattel Mortgage Taken as Additional Security, the mortgage debt being already sufficiently secured by a mortgage on land, does not give the mortgagee a right of action against one who levies upon and sells the chattels. *Canfield v. Moore*, 16 Tex. Civ. App. 472.

2. *Strickland v. Minnesota Type-Foundry Co.*, 77 Minn. 210, citing 4 ENCYC. OF PL. AND PR. 513. See also the following cases:

Alabama. — *Henderson v. Murphree*, 124 Ala. 223; *Holst v. Harmon*, 122 Ala. 453; *Belser v. Youngblood*, 103 Ala. 545.

California. — *Ukiah Bank v. Moore*, 106 Cal. 673.

Illinois. — *Barchard v. Kohn*, 157 Ill. 579.

Kansas. — *Johnson v. Anderson*, 60 Kan. 578.

Michigan. — *Schmittziel v. Moore*, 120 Mich. 199; *Canfield v. Gould*, 115 Mich. 461.

Rhode Island. — *Phillips v. Shackford*, 21 R. I. 422.

Vermont. — *Drew v. Drew*, 68 Vt. 70.

Trover an Original and Independent Remedy. — The right of a mortgagee of chattels to maintain trover against an officer who has levied upon the mortgaged property is not dependent upon either the insolvency of the mortgagor or the lack of other security for the mortgage debt. *Huellmantel v. Vinton*, 113 Mich. 47.

514. Demand. — See note 1.

Trespass. — See notes 3, 4.

Money Had and Received. — See note 6.

513. 3. Hooper v. Birchfield, 115 Ala. 226; Powell v. Crawford, 110 Ala. 204; Foster v. Smith, 104 Ala. 248; Ukiah Bank v. Moore, 106 Cal. 673; Dawes v. Rosenbaum, 179 Ill. 112.

4. California. — Harper v. Gordon, 128 Cal. 489; Woodland Bank v. Duncan, 117 Cal. 412; Adlard v. Rodgers, 105 Cal. 327.

Colorado. — Crocker v. Burns, 13 Colo. App. 54.

Illinois. — Barchard v. Kohn, 157 Ill. 579; McCarthy v. Hetzner, 70 Ill. App. 480; Udell v. Slocum, 56 Ill. App. 216.

Minnesota. — Plano Mfg. Co. v. Hallberg, 61 Minn. 528.

Missouri. — Dixon v. Atkinson, 86 Mo. App. 24; Sink v. Loflin, 76 Mo. App. 463.

New Jersey. — Smith v. Koenig, 57 N. J. L. 486.

Oklahoma. — Brook v. Bayless, 6 Okla. 568.

South Dakota. — Coughran v. Sundback, 9 S. Dak. 483.

Wisconsin. — Aultman Co. v. McDonough, 110 Wis. 263.

United States. — Bradley v. Hargadine McKittrick Dry-Goods Co., (C. C. A.) 96 Fed. Rep. 914.

Adequate Remedy. — Jersey City Milling Co. v. Blackwell, 58 N. J. Eq. 122.

Mortgage Securing Several Debts. — Where a chattel mortgage is executed to secure several distinct debts due to several different persons, any one or more of the mortgagees entitled to possession may replevy the property from a stranger. Sloan v. Thomas Mfg. Co., 58 Neb. 713.

After-acquired Property. — A chattel mortgagee's right to maintain replevin for the possession of the mortgaged property does not extend to property acquired by the mortgagor after the execution of the mortgage, though such property be expressly included in the mortgage. The exclusive remedy in such case is in equity. Scudder v. Bailey, 66 Mo. App. 40.

The Right to Replevy Is Distinct from the Right to Foreclose; and hence a statute (Code Civ. Pro. Cal., § 726) providing that there shall be but one action to enforce any right secured by a mortgage will not prevent an action of replevin to enforce an agreement

that after foreclosure the mortgagee shall be entitled to possession. Harper v. Gordon, 128 Cal. 489.

514. 1. Johnson v. Anderson, 60 Kan. 578; Reynolds v. Fitzpatrick, 23 Mont. 52; Smith v. Smalley, 19 N. Y. App. Div. 519.

When Demand Necessary. — One who purchases in good faith, without actual notice, mortgaged chattels of the mortgagor in possession, if he has merely received the goods into his own possession, and has exercised no other dominion or control over them to the exclusion of the mortgagee or in defiance of his rights, is not liable for a conversion, without demand or refusal. Dean v. Cushman, 95 Me. 454; Jumska v. Andrews, 87 Minn. 515.

In an Action Against a Mortgagor for the Possession of mortgaged property by the payee of mortgage notes, demand for payment is not a condition precedent. Acme Harvester Co. v. Butterfield, 12 S. Dak. 91.

3. Henderson v. Murphree, 124 Ala. 223; Jordan v. Wells, 104 Ala. 383; Adlard v. Rodgers, 105 Cal. 327.

Property Taken in Exchange for Mortgaged Property. — The right of a mortgagee entitled to possession to maintain trespass extends even to the property for which the mortgagor has exchanged the mortgaged property, with his consent, and after the law day has passed. Jordan v. Wells, 104 Ala. 383.

4. **After Default and Possession Taken** the mortgagee may maintain an action on the case against one who injures the property. Frankenthal v. Meyer, 55 Ill. App. 405.

6. Gadsden First Nat. Bank v. Sproull, 105 Ala. 275.

Assumpsit — Common Counts. — A mortgagee of chattels cannot under the common counts in assumpsit recover the value of the mortgaged property from one who purchases it from the mortgagor, where the mortgage contains only the usual conditions; but where the mortgage expressly provides that any sale by the mortgagor shall be in the name of the mortgagee, and that his lien shall follow the property, the mortgagor in selling the property will be deemed to act as agent

514. *b. PARTIES PLAINTIFF.* — See note 7.

515. See note 1.

c. PARTIES DEFENDANT. — See note 2.

d. PLEADINGS — Complaint. — See note 9.

516. See note 1.

Answer. — See note 2.

3. Independent and Concurrent Remedies. — See notes 3, 4.

for the mortgagee, and the latter may recover the price under the common counts. *Flood v. Butzbach*, 114 Mich. 613.

514. 7. Joinder of Plaintiffs. — Mortgagees holding mortgages of various priority on the same goods, who are jointly in possession of them, may join in an action for the conversion of the property. *Trompen v. Yates*, (Neb. 1902) 92 N. W. Rep. 647.

515. 1. Gadsden First Nat. Bank v. Sproull, 105 Ala. 275; *Buckingham v. Dake*, (C. C. A.) 112 Fed. Rep. 258.

After Assignment of Mortgage Notes. — Under the principle that an assignment of mortgage notes operates as an assignment of the mortgage, the assignee of such notes is generally the proper party plaintiff in an action to recover the mortgaged property from one who wrongfully seizes them after such assignment; but where the assignment expressly reserves to the mortgagee the right to protect the property, he may sue in his own name even where the seizure is made after the assignment. *Ketcham v. George R. Barse Live-Stock Commission Co.*, 57 Kan. 771.

After Reassignment to Mortgagee. — Where before the trial of an action of replevin by a pledgee of mortgage notes against one who, after the pledging of such notes, seized such property, the pledgee has the property sold, credits the proceeds thereof on the mortgaged notes and also to the mortgagee's account, and then reassigns the notes to the mortgagee, such reassignment will not defeat the action. *Woodland Bank v. Duncan*, 117 Cal. 412.

2. Karter v. Fields, 130 Ala. 430; *Henderson v. Murphree*, 124 Ala. 223; *Holst v. Harmon*, 122 Ala. 453; *Hooper v. Birchfield*, 115 Ala. 226; *Powell v. Crawford*, 110 Ala. 294; *Foster v. Smith*, 104 Ala. 248; *Atkinson v. Burt*, 65 Ark. 316; *Woodland Bank v. Duncan*, 117 Cal. 412; *Adlard v. Rodgers*, 105 Cal. 327.

9. See, supporting the text, *Hill v. Campbell Commission Co.*, 54 Neb. 59.

Joinder of Actions. — In an action by a mortgagee of chattels on the mortgage notes against the mortgagor, or in an action to foreclose, the plaintiff may join a cause of action for the conversion of the property by third persons. *Cobb v. Barber*, 92 Tex. 309; *Parlin, etc., Co. v. Moore*, 25 Tex. Civ. App. 190; *Parlin, etc., Co. v. Miller*, (Tex. Civ. App. 1901) 60 S. W. Rep. 881. See also ACTIONS.

Mortgage as Exhibit. — *Diggs v. Way*, 22 Ind. App. 617.

Negating Satisfaction of Mortgage. — Where the mortgage notes, with credits indorsed thereon, are filed with the petition in an action in trover by the mortgagee, allegations that all credits on the notes have been indorsed thereon, and that the plaintiff has a just and lawful lien thereon, sufficiently allege the nonpayment of the notes as against an objection to the introduction of evidence under the petition. *Johnson v. Anderson*, 60 Kan. 578.

516. 1. Compliance with Recording Acts must be alleged. *Diggs v. Way*, 22 Ind. App. 617; *Conwell v. Jeger*, 21 Ind. App. 110; *Cope v. Minnesota Type Foundry Co.*, 20 Mont. 67.

2. Alabama Statute. — Under Code Ala. 1886, as amended by Acts 1892-93, p. 1127 (Civ. Code Ala. 1896, § 1477), any matter of defense which would be available against an action on the mortgage debt may be pleaded against an action by the mortgagee for the recovery of the mortgaged property. *Hooper v. Birchfield*, 115 Ala. 226; *Powell v. Crawford*, 110 Ala. 294; *Foster v. Smith*, 104 Ala. 248.

3. Where Property Has Been Assigned for the Benefit of Creditors. — Although, under *Burns's Annot. Stat. Ind.* (1894), § 2911, a mortgagee cannot foreclose a chattel mortgage upon property which, subsequent to the execution of the mortgage, has been assigned to a trustee for the benefit of the mort-

517. See notes 2, 3.

4. Election of Remedies — Attachment. — See note 4.

518. 5. Foreclosure — a. NECESSITY FOR. — See note 4.

c. CUMULATIVE METHODS. — See note 6.

d. DEMAND AND REQUISITES TO RIGHT OF ACTION.

— See note 7.

519. e. STATUTORY ACTIONS — Generally. — See note 2.

Pleadings. — See note 6.

gagors, until he, the mortgagee, has returned any payments on the mortgage debt which he may have received from such trustee, he may without returning such payments obtain a personal judgment against the mortgagor for the balance of the mortgage debt remaining after crediting the mortgagor with the amount received from the trustee. *M. Rumley Co. v. Moore*, 151 Ind. 24.

516. 4. Extent Proceedings Against Delinquent Tax Collector. — The issuing of an extent against a delinquent town tax collector does not, without more, bar the town from foreclosing chattel mortgages given by such collector to secure his official bonds covering the delinquency embraced in the extent. *Perry v. Shumway*, 73 Vt. 191.

517. 2. Barchard v. Kohn, 157 Ill. 579; *Desany v. Thorp*, 70 Vt. 31.

3. Idaho Statute. — Under Rev. Stat. Idaho, § 4520 (Code Civ. Pro. Idaho, § 3331), providing that there shall be but one action to recover a debt secured by a chattel mortgage, the two remedies prescribed by § 3390 are exclusive; these remedies being by affidavit and notice, or by action in the District Court. *Rein v. Callaway*, (Idaho 1901) 65 Pac. Rep. 63.

Mortgage on Household Goods — Ohio Statute. — Under 91 Ohio Laws 339 (Bates's Annot. Stat. Ohio 1897, § 4155-1), providing that no chattel mortgage on the necessary household goods, etc., shall be foreclosed except in the court of record, a mortgagee of such goods whose mortgage does not come within any of the exceptions cannot have the mortgaged property sold under an execution issued upon the judgment of the magistrate for the mortgage debt. *Maloney v. Kinney*, 7 Ohio Dec. 420.

4. Montana. — Under Code Civ. Pro. Mont. (1887), § 358 (Code Civ. Pro. Mont. 1895, § 1290), providing that there shall be but one action to enforce a debt secured by a mortgage, which

action shall be in conformity with the provisions of the act, a mortgagee cannot waive the security and sue for the debt. *Largey v. Chapman*, 18 Mont. 563, following *Barbieri v. Ramelli*, 84 Cal. 154.

518. 4. Frankenthal v. Meyer, 55 Ill. App. 405; *Western Realty Co. v. Musser*, (Mo. App. 1902) 71 S.W. Rep. 100.

6. Barchard v. Kohn, 157 Ill. 579; *Meeker v. Waldron*, 62 Neb. 689; *Pettee v. John Deere Plow Co.*, 11 Okla. 467. See also *Desany v. Thorp*, 70 Vt. 31.

Idaho Statute. — A power of sale given by a chattel mortgage to the mortgagee in the event of default is invalid, under Rev. Stat. Idaho, § 4520, providing that there shall be but one action for a debt secured by a chattel mortgage; such a mortgage must be foreclosed, as provided by § 3390, either by affidavit or notice, or by action in the District Court. *Rein v. Callaway*, (Idaho 1901) 65 Pac. Rep. 63.

7. Budweiser Brewing Co. v. Caparelli, (N. Y. City Ct. Gen. T.) 16 Misc. (N. Y.) 502; *Lacy v. Gentry*, (Tex. Civ. App. 1900) 56 S.W. Rep. 949.

Assignment for Benefit of Creditors.

— Where the mortgaged property is assigned for the benefit of creditors of the mortgagor, the mortgagee cannot foreclose until he has paid back any payments on his debt which he may have received from the trustee to whom the assignment was made. *M. Rumley Co. v. Moore*, 151 Ind. 24.

519. 2. Meeker v. Waldron, 62 Neb. 689.

Waiver of Statutory Method. — The statutory method may, in the absence of statutory provision to the contrary, be waived by the mortgagor. *Marseilles Mfg. Co. v. Perry*, 62 Neb. 715; *Lexington Bank v. Wirges*, 52 Neb. 649; *Dowie v. Christen*, 115 Iowa 364; *Geiser Mfg. Co. v. Krogman*, 111 Iowa 503; *Myers v. Snyder*, 96 Iowa 107.

6. Georgia Statute — Requisites of Foreclosure. — A mortgage on personal

590. *f. EQUITABLE FORECLOSURE — (1) Generally.* — See note 2.

591. *(2) Parties Plaintiff.* — See note 5.

property is not foreclosed until the mortgagee, his agent or attorney, makes affidavit of the amount of principal and interest due on the mortgage, annexes such affidavit to the mortgage, files the same with an officer authorized to issue an execution thereon, and has an execution duly issued. 2 Code Ga., §§ 2753, 2760. The making of the affidavit alone does not constitute a foreclosure. *DeVaughn v. Byrom*, 110 Ga. 904.

Affidavit of Illegality. — In the statutory proceeding to foreclose a chattel mortgage by levy of execution, an affidavit of illegality alleging facts showing failure of consideration for the mortgage notes, and also setting up a set-off, is sufficient as against a motion to strike. *Garner v. Cohen*, 99 Ga. 78.

Return of Execution. — An execution signed by a justice of the peace, commanding the levying officers addressed to have the money "at our next justice court," is returnable to the justice's court of the district in which that magistrate presides. *Adams v. Goodwin*, 99 Ga. 138.

Filing Papers. — Where an affidavit to foreclose a chattel mortgage and the mortgage itself have been handed to a justice of the peace, this is a sufficient "filing" of these papers with that officer. *Adams v. Goodwin*, 99 Ga. 138.

Iowa Code — Transfer and Enjoinder of Proceedings. — *McCormick Harvesting Mach. Co. v. De La Mater*, 114 Iowa 382.

Method of Foreclosure. — Under *McClain's Code Iowa*, § 4523 (*Code Iowa*, § 4273), a chattel mortgage may be foreclosed by notice and sale, as provided in the statute, unless a stipulation to the contrary has been agreed upon between the parties, or such mortgage may be foreclosed by action in the proper court. *Gibson v. McIntire*, 110 Iowa 417.

Arkansas Statute. — The failure to comply with *Sand. & H. Dig. Stat. Ark.*, § 5110, requiring a mortgagee of chattels to file with the mortgagor a verified statement of the mortgage debt, before replevying the property from the mortgagor, is a matter of defense, which if not pleaded in the

action of replevin is waived. *Atkinson v. Burt*, 65 Ark. 316.

Idaho Statute. — Under *Rev. Stat. Idaho 1887*, §§ 3390, 3391 (*Civ. Code Idaho*, §§ 2824, 2825), and other sections connected therewith, a chattel mortgage is foreclosed by affidavit and notice to foreclose, upon which the sheriff, acting as upon an ordinary execution, levies upon the property, gives notice and proceeds to sell as directed by the statute. In such case the sheriff need not look beyond the affidavit and notice for his authority to make the levy and sale; and after the levy has been made he must proceed to sell as directed by the statute, notwithstanding that after the levy an attachment or execution against the property is placed in his hands, the remedy of the attachment or execution credited in such case being by proceedings under *Rev. Stat.*, § 3396. *Blumauer-Frank Drug Co. v. Branstetter*, (*Idaho 1895*) 43 *Pac. Rep.* 575.

Washington Statute. — Under *Ball. Annot. Codes & Stat. Wash. (1897)*, §§ 5871, 5872, authorizing the foreclosure of chattel mortgages by the service of a certain notice by the "sheriff or other proper officer," such foreclosure cannot be made by the service of the notice by a constable. *Jacobson v. Aberdeen Packing Co.*, 26 *Wash.* 175; *Pickle v. Smalley*, 21 *Wash.* 473.

590. 2. *Barchard v. Kohn*, 157 Ill. 579.

Collateral Attack for Want of Jurisdiction. — Where the court has jurisdiction to foreclose mortgages in general, and in the particular case has jurisdiction of the persons of the defendants, its judgment foreclosing the mortgage cannot be collaterally attacked on the ground that the property covered by the mortgage was not a proper subject thereof. *Dubuque v. Stieh*, 16 *Wash.* 641.

591. 5. *Assignment of Separate Portions to Different Persons.* — Where a debt secured by a chattel mortgage is split up, and one portion assigned to one person and the other portion to another, in a foreclosure suit by one assignee the other assignee should be made a party either plaintiff or defend-

522. (3) *Parties Defendant* — *Mortgagor or Assignee.* — See note 3.

Persons Claiming Interest. — See note 8.

523. See note 1.

524. (5) *Interveners.* — See note 1.

(6) *Pleadings* — *Bill.* — See note 3.

525. See notes 1, 2.

Prayer. — See note 10.

ant, or he should intervene; but non-joinder of the other assignee is not a jurisdictional defect, and hence a third party claiming the mortgaged property cannot complain of the nonjoinder, except to the extent of protesting against being charged with costs in two suits instead of one. *Avery v. Popper*, (Tex. 1898) 48 S. W. Rep. 572, *affirmed* 92 Tex. 337.

522. 3. *Weir v. Rathbun*, 12 Wash. 84.

8. *Oxsheer v. Watt*, (Tex. Civ. App. 1897) 42 S. W. Rep. 121; *Mittenthal v. Heigel*, (Tex. Civ. App. 1895) 31 S. W. Rep. 87.

523. 1. *Personal Jurisdiction as to Defendants.* — Where an action to foreclose a chattel mortgage is brought in the county where the mortgage notes are payable, the court has jurisdiction of all necessary and proper parties though they reside in another county. See *Sayles Rev. Civ. Stat. Tex.*, art. 1198, § 5 (*Rev. Stat. Tex.*, art. 1194, § 5). *Oxsheer v. Watt*, (Tex. Civ. App. 1897) 42 S. W. Rep. 121.

524. 1. See *Pitts Agricultural Works v. Baker*, 11 S. Dak. 342. *Contra Central Trust Co. v. Worcester Cycle Mfg. Co.*, 86 Fed. Rep. 35, wherein it was held that if there are any persons not parties to the suit having rights in the property described in the mortgage which are superior to the rights of the mortgagee, they cannot, against the complainant's objection, force themselves into the suit.

Diverse Citizenship in Federal Courts. — See also *Lillienthal v. McCormick*, (C. C. A.) 117 Fed. Rep. 89.

3. *Compare Baldwin v. Boyce*, 152 Ind. 46, wherein a complaint, which showed only by inference that the mortgage debt was unpaid, was held sufficient.

Filing Mortgage as Exhibit. — A chattel mortgage being the foundation of a suit to foreclose it, must, under *Bullitt's Civ. Code Ky.* (1895), § 120, be filed with the petition as an exhibit.

Day, etc., Lumber Co. v. Mack, (Ky. 1902) 69 S. W. Rep. 712.

Compliance with Recording Acts must be averred. *Baldwin v. Boyce*, 152 Ind. 46; *Stengel v. Boyce*, 143 Ind. 642.

Supplemental Complaint. — Where a prior mortgagee is a party defendant to a suit to foreclose a chattel mortgage, a cause of action against such prior mortgagee for conversion of the mortgaged property, acquired by assignment from the mortgagor subsequent to the execution of the foreclosure suit, cannot be asserted by a supplemental complaint. *Shepard, etc., Lumber Co. v. Hurd*, 55 N. Y. App. Div. 627.

Duplidity. — A petition to foreclose a chattel mortgage securing several distinct notes states a single cause of action. *Richardson v. Opelt*, 60 Neb. 180.

525. 1. *Description of Property.* — See also *Baldwin v. Boyce*, 152 Ind. 46.

Allegation of Description Not Jurisdictional. — In *Day, etc., Lumber Co. v. Mack*, (Ky. 1902) 69 S. W. Rep. 712, it was held that while a petition to foreclose a chattel mortgage may be subject to a demurrer if it does not describe the property, if the court has jurisdiction of the defendant's person, such a petition will, in the absence of a demurrer, be sufficient to sustain a judgment if the judgment sufficiently describes the property.

2. *Omission Cured.* — The failure of a complaint in a foreclosure action to show that the mortgage debt is due is cured if the mortgage filed with the complaint shows such fact. *Baldwin v. Boyce*, 152 Ind. 46.

10. *Meyer v. Thomas*, 131 Ala. 111; *Valley Nat. Bank v. H. B. Claflin Co.*, 108 Iowa 504; *Alexander v. Houston*, (Miss. 1902) 31 So. Rep. 211; *O'Donnell v. Rock Springs First Nat. Bank*, 9 Wyo. 408; *Stillwell-Bierce, etc., Co. v. Williamston Oil, etc., Co.*, 80 Fed. Rep. 68; *Central Trust Co. v. Worcester Cycle Mfg. Co.*, (C. C. A.) 93 Fed. Rep.

- 526.** Answer. — See note 3.
 Cross-bill. — See note 5.
 Reply. — See note 6.

527. (7) *Proceeding to Decree* — Decree. — See notes 4, 6.

528. VI. REMEDIES OF JUNIOR MORTGAGEES. — See notes 1, 3, 4.

712. See also *Hall v. Glass*, 123 Cal. 500.

526. 3. Payments must be specially pleaded or set up in the answer. *Tatum v. Yahn*, 130 Ala. 575.

5. See, supporting the text, *Pacific Invest Co. v. Ross*, 131 Cal. 8.

Set-offs can be pleaded only by way of a cross-bill. *Tatum v. Yahn*, 130 Ala. 575.

Cross-complaint Asserting Prior Mortgage. — A cross-complaint in an action to foreclose a chattel mortgage, asserting a mortgage prior to that of the complainant, but failing to show that the property described in the cross-complainant's mortgage is the same as that described in the complainant's, is subject either to a demurrer or to a motion to strike. *Zumpfe v. Kelley*, 150 Ind. 634.

6. **Where Reply Necessary.** — If another mortgagee, made a defendant in an action to foreclose, sets up a counterclaim asking for affirmative relief, the plaintiff must reply to such counterclaim, otherwise he admits it. *McCrea v. Hopper*, 35 N. Y. App. Div. 572.

527. 4. *Stockham Bank v. Alter*, 61 Neb. 359. See also *Alexander v. Houston*, (Miss. 1902) 31 So. Rep. 211.

6. **Where the Mortgagor Has Parted with His Interest** in the property, in a suit to foreclose he is not a necessary party, and the rendition of a personal judgment is not essential to the validity of the decree. *Weir v. Rathbun*, 12 Wash. 84.

528. 1. **Deficiency Judgment.** — By statute in *California* it seems that a junior mortgagee has a right to a personal judgment against the mortgagor, upon proof that the junior mortgage is worthless, because the property is insufficient to pay the senior mortgagee. *Redlands Hotel Assoc. v. Richards*, 125 Cal. 569.

3. *McCrea v. Hopper*, 35 N. Y. App. Div. 572.

The Senior Mortgage May Be Attacked in a Suit to Foreclose It by a junior mortgagee who has been made a party defendant, on the ground that the senior mortgage does not cover the

property claimed by the junior mortgagee, and the latter need not ask for foreclosure of his mortgage. *Modesto Bank v. Owens*, 121 Cal. 223.

Cross-bill by Junior Mortgagee. — A junior mortgagee, made a defendant in foreclosure proceedings by the senior mortgagee, may by a cross-bill attack the validity of the senior mortgage. *Hartney v. Jordan*, 100 Iowa 646.

4. *Johnson v. Anderson*, 60 Kan. 578.

Several Actions for Same Conversion — *Where First Recovery Is for Full Value of Property.* — Where the purchaser of mortgaged chattels mortgages them, and thereafter they are converted by a third person, for which conversion the second mortgagor recovers a judgment against the tortfeasor for the full value of the property, the latter may maintain a suit to enjoin the second mortgagee from suing him for the same conversion, the second mortgagor being insolvent; and in such suit the court may determine the rights of all the parties to the recovery for the conversion, and, such recovery having been paid into court, may order the distribution thereof according to the respective rights of the parties therein. *Field v. Early*, 167 Mass. 449.

Where First Recovery Is Less than Value of Property. — Where a judgment recovered by a senior mortgagee for the conversion of chattels covered by the mortgage is for less than the value of such chattels, a junior mortgagee of such chattels may maintain an action against the tortfeasor for the same conversion. *Huellmantel v. Vinton*, 116 Mich. 621.

Where the Junior Mortgage Is Executed After Default under the Senior, the junior mortgagee acquires a mere equity of redemption which will not support an action of claim and delivery, the only remedy being in equity to redeem before sale, or after sale for an accounting. *Martin v. Jenkins*, 51 S. Car. 42.

Conversion by Senior Mortgagee — *Remedy of Junior Mortgagee* — A junior mortgagee of chattels may tender a senior mortgagee thereof the amount

528. VIII. INTERESTS OF ATTACHING CREDITORS — 1. Attachment — a. GENERALLY. — See notes 6, 7.

of the latter's debt, and if the senior mortgagee refuse the tender and thereafter convert the mortgaged property, the junior mortgagee may sue him in trover for the value of the property in excess of the first mortgage lien. *Schmittziel v. Moore*, 120 Mich. 199. See also *Clendenen v. Hawk*, 8 N. Dak. 419; *Lovejoy v. Merchants' State Bank*, 5 N. Dak. 623.

Recoupment in Action by Junior Mortgagee. — Where the junior mortgagee of chattels sues the senior mortgagee for a conversion thereof, the senior mortgagee may recoup the value of his special interest in the property. *Clendenen v. Hawk*, 8 N. Dak. 419; *Lovejoy v. Merchants' State Bank*, 5 N. Dak. 623.

Conversion of Surplus After Satisfaction of Senior Mortgage. — Trover may be maintained by a junior mortgagee against the officer making the sale under the senior mortgage for the conversion by such officer of the surplus of the proceeds of such sale remaining after the satisfaction of the first mortgage. *Smith v. Donahoe*, 13 S. Dak. 334.

Where a Junior Mortgagee Replevies the Property, the senior mortgagee, if not a party to the action, need not assert his claim to the property in such action, but may maintain a separate action of replevin against the junior mortgagee after the latter has obtained possession of the property. *Smith v. Simper*, 8 Ohio Cir. Dec. 308.

528. 6. *Fahy v. Gordon*, 133 Mo. 414; *Moore v. Calvert*, 8 Okla. 358.

After Default and Possession Taken the interest of the mortgagor being equitable only, the goods cannot be taken and sold upon an execution against him. *Frankenthal v. Meyer*, 55 Ill. App. 405.

Motion to Dissolve. — A mortgagee of chattels in possession thereof at the time an attachment is levied thereon by the mortgagor's creditors may move to dissolve the attachment. See Gen. Stat. Kan. (1899), § 4823. *Symms Grocer Co. v. Lee*, 9 Kan. App. 574.

Intervention. — A mortgagee entitled to possession of the mortgaged property may assert such right as against attaching creditors of the mortgagor, by intervention in the attachment

proceedings. *Huizer v. Beck*, 55 Mo. App. 668.

T. Pollock v. Douglas, 56 Mo. App. 487.

Statutes Giving the Right. — *Act 21 Gen. Assem. Iowa, c. 117, § 1* (Code Iowa, § 3905), requiring the creditors of a chattel mortgagor to make a sufficient deposit to cover the mortgage debt before attaching such chattels, is for the sole benefit of the mortgagee, and the mortgagor cannot object if the mortgagee waives the benefit of the statute. *Willson v. Felthouse*, 90 Iowa 315. See also *Haydock v. Patton*, 92 Iowa 247.

Under Pub. Stat. R. I., c. 208, § 4 (Gen. Laws R. I., c. 254, § 4), personal estate when mortgaged and in the possession of the mortgagor, and while redeemable at law or in equity, may be attached on mesne process against the mortgagor, in the same manner as his other personal estate. *Good v. Rogers*, 19 R. I. 1.

Under Stat. Okla. (1893), §§ 3270, 3280, mortgaged chattels may be levied on and sold for the mortgagor's debts, but the purchaser is not entitled to possession until he has satisfied the mortgage; and if the officer sells the property without satisfying the mortgage, the mortgagee may sue him on his bond, or may sue the purchaser for conversion or for the recovery of the specific chattels. *Moore v. Calvert*, 8 Okla. 358; *Hixon v. Hubbell*, 4 Okla. 224.

Under Rev. Stat. Tex., Art. 2296 (Rev. Stat. Tex. 1895, § 2353), creditors of a chattel mortgage may attach and sell the mortgaged property subject to the mortgage, the mortgagee being entitled to possession until the satisfaction of the mortgage. *Lapowski v. Taylor*, 13 Tex. Civ. App. 624.

Effect of Condition Against Alienation. — A provision in a chattel mortgage giving the mortgagee right to possession upon the sale or attempted sale of the property by the mortgagor includes involuntary alienations; and hence, where the mortgage contains such a provision, the property is not attachable by the mortgagor's creditors, though until breach of the condition against sale the mortgagor is given a

532. *c. ACTIONS BY ATTACHING CREDITORS — Form of Remedy.* — See note 11.

533. *Parties.* — See note 5.

2. Garnishment. — See note 7.

IX. INTERESTS OF ASSIGNEES FOR BENEFIT OF CREDITORS.

— See note 8.

534. *XII. ACTIONS FOR PENALTIES.* — See notes 3, 4, 5.

XIII. OFFENSES AND INDIOTMENTS. — See note 6.

535. See notes 1, 2, 3.

definite right of possession. *State v. Althaus*, 60 Mo. App. 122; *Smith v. Koenig*, 57 N. J. L. 486.

Levy Limited to Mortgagor's Interest.

— Even where the mortgagor has a definite right of possession, a levy for his debt must be confined to his equity of redemption and the right to the use of the property until the mortgagee's right to foreclose has accrued. *Mabry v. Metropolitan Trust Co.*, 94 Ga. 619.

Mortgagor in Possession After Default.

— Where the mortgagee is allowed to retain possession of the mortgaged property for some time after his default, an attachment may be levied thereon for his debts, and such attachment will take precedence over the mortgage. *Hewitt v. General Electric Co.*, 164 Ill. 420.

532. *11. Suit in Equity.* — A creditor of a mortgagor of chattels, who has levied on the mortgaged property, may maintain a suit in equity to establish the priority of his lien over the mortgage. *Robinson v. Hawley*, 45 N. Y. App. Div. 287. See also CREDITORS' BILLS.

533. *5.* See, supporting the text, *Cleveland v. Peoples' Nat. Bank*, (Tex. Civ. App. 1899) 49 S. W. Rep. 523.

7. *Meyer v. Miller*, 51 Neb. 620. See also *Gore v. Brucker*, 94 Wis. 65. *Contra*, *McCord, etc., Mercantile Co. v. Bettles*, 58 Mo. App. 384.

8. See, supporting the text, *MacFarlane v. Richardson*, 56 N. J. Eq. 191.

534. *3.* See *Dotham Guano Co. v. Ward*, 132 Ala. 380; *Hoffman v. Knight*, 127 Ala. 149.

4. Joinder of Causes. — In an action of debt for failure to enter satisfaction of mortgages, several counts for separate penalties for such failure in regard to separate properties and different mortgages may be joined. *Hoffman v. Knight*, 127 Ala. 149.

Conditional Sales — Kansas Statute. — *Gen. Stat. Kan. (1889)*, § 3916, subd. 1,

relating to title and conditional sale notes, and providing that such notes, when deposited in the office of the register of deeds, shall be subject to the law applicable to the filing of chattel mortgages, does not render such notes when so filed subject to the law providing penalties for the failure to satisfy chattel mortgages. *Curd v. Bown*, 3 Kan. App. 553.

5. Clearwater Bank v. Kurkowski, 45 Neb. 1.

6. Venue. — Under *Sand. & H. Dig. Stat. Ark.*, § 2082, providing that where the place of the crime is not named in the indictment, the indictment will be deemed to charge it as committed within the court's jurisdiction, no venue need be laid in an indictment for moving mortgaged property from the county where the mortgage lien was created and exists; and an allegation as to the place where the mortgage was recorded will be treated as surplusage. *Hampton v. State*, 67 Ark. 266.

535. *1.* *Keyes v. People*, 100 Ill. App. 163.

Allegation of Execution and Delivery.

— An indictment alleging that the defendant, naming him, "having theretofore, to wit, on June 22, 1895, executed and delivered" to the prosecutor, naming him, "a valid mortgage, in writing," did, etc., sufficiently alleges the execution and delivery. *Haile v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 999.

Mortgage as Exhibit. — It is not necessary to set out the mortgage in the indictment, either *in hac verba* or according to its substance. It is sufficient to describe the mortgage by giving the date, parties, owner at the time of the offense, and a description of the property. *Jones v. State*, 35 Tex. Crim. 565.

2. Allegation of Filing and Recording.

— As between the parties to a mortgage, an allegation of the filing and

536. See notes 1, 2.

Certainty — Commencement and Conclusion. — See note 3.

recording of such mortgage is, in the absence of anything in the statute indicating that it was intended to be restricted to filed or recorded mortgages, unnecessary. *Hampton v. State*, 67 Ark. 266; *State v. Barnett*, 65 Ark. 80.

535. 3. Contra. — *State v. Crawford*, 64 Ark. 194.

536. 1. The Manner of Disposal should be stated with sufficient particularity to give the defendant notice of what he is charged with having done. But this need not be stated in the charging part of the indictment. It is sufficient if the manner of disposal appear from the whole indictment. *State v. Crawford*, 64 Ark. 194.

Missouri Statute. — Rev. Stat. Mo. (1889), § 3570 (Rev. Stat. Mo. 1899, § 1933), relating to fraudulent sales of mortgaged chattels, covers sales in fraud of the rights of purchasers of the mortgaged property as well as in fraud of the mortgagee's rights; and hence an indictment under such statute failing to allege fraud upon the mortgagee is not deficient if it allege fraud upon purchasers of the property. *State v. Munsen*, 72 Mo. App. 543.

2. State v. Munsen, 72 Mo. App. 543.

Indiana Statute. — Under Burns's Annot. Stat. Ind. (1894), § 2033, providing for the punishment of "a mortgagor of personal property in posses-

sion of the same, who, without the written consent of the owner of the claim secured by the mortgage, removes any of the property mortgaged out of the county where it was situated at the time it was mortgaged, or secretes or converts the same or any part thereof to his own use, or sells the same or any part thereof to any person without informing him of the existence of the mortgage," an information against a mortgagor charging him with an unlawful sale of the mortgaged property need not allege that the sale was without the written consent of the owner of the mortgage debt. *State v. Pepin*, 22 Ind. App. 373.

3. Variance — Mortgage Covering More Property than Indictment. — As it is not necessary to set out the mortgage by an exhibit, if the mortgage when produced covers the articles set out in the indictment, although it may contain other items, there is no variance. *Jones v. State*, 35 Tex. Crim. 565.

As to Name of Mortgagee. — Where the indictment describes the mortgage as executed and delivered to a certain person, naming him, the addition of the word "trustee" to the name of such person as given in the mortgage does not constitute a variance. *Sweat v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 265.

CITATIONS

IN PROBATE PROCEEDINGS.

538. II. DISTINCTION BETWEEN CITATION, NOTICE, AND SUMMONS. — See note 6.

539. IV. IN WHAT CASES USED — 1. **Wills.** — See note 3.
2. **Executors and Administrators.** — See notes 4, 5.

540. 3. Trustees and Guardians. — See note 7.
V. FORM AND REQUISITES. — See note 11.

541. VI. MISCELLANEOUS — **Amendments.** — See note 3.
Defects — **How Waived.** — See note 4.

538. 6. Notification of Foreign Heirs by Judge. — Act No. 64, Laws Mich. 1897 (How. Annot. Stat. Mich., Supp. § 6812), which compels a probate judge to notify foreign heirs if a petition has been filed for the probate of a will or for letters of administration, is not in conflict with How. Annot. Stat. Mich., § 5801, which provides for the issue of a general citation in such cases. *Rice v. Hosking*, 105 Mich. 303.

539. 3. In Maryland, whether or not a proper citation has been issued as required by statute is a question for the Orphans' Court, and it is not one upon which the issues of probate will be tried by the Circuit Court. *Stanley v. Safe Deposit, etc., Co.*, 88 Md. 401.

4. See *Unforsake's Succession*, 48 La. Ann. 546.

5. *Stanley v. Safe Deposit, etc., Co.*, 88 Md. 401; *Nazro v. Long*, 179 Mass. 451.

New York Statute. — Under Code Civ. Pro. N. Y., § 2732, subd. 12, the representatives of the aunts and uncles of a deceased party should be cited to the probate of his will. *Matter of Healy*, (Surrogate Ct.) 27 Misc. (N. Y.) 352.

540. 7. Guardian's Sureties. — Where a guardian is cited to make a compulsory accounting it is not necessary to include in the same citation the sureties of such guardian. *Eberle v. Schilling*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 195. Compare *Gilbert v. Gilbert*, 7 Ohio Cir. Dec. 58, in which case it was held that where a guardian was cited and failed to appear, a default

judgment could not be enforced against his sureties, as they had no notice. See also *Scharmann v. Schoell*, 38 N. Y. App. Div. 528.

11. **A Substantial Compliance with the Statute** in regard to citations in probate matters is sufficient. *Southwick v. Probate Ct.*, 18 R. I. 402.

Names of Parties. — The citation required by Rev. Stat. Tex., art. 1600, must contain the names of all the parties to the suit, and an omission of a single party defendant is fatal. *Hunt v. Atchison, etc., R. Co.*, (Tex. Civ. App. 1894) 28 S. W. Rep. 460.

541. 3. Matter of Georgi, (Surrogate Ct.) 35 Misc. (N. Y.) 685; *Griffin's Estate*, 9 Pa. Dist. 248.

Power of Court to Issue New Citation. — Where a defective citation has been issued, after a lapse of a year the court still retains jurisdiction to order a new and sufficient citation. *San Francisco Protestant Orphan Asylum v. Superior Ct.*, 116 Cal. 443.

4. *Smith v. Smith*, 13 Colo. App. 295; *Penn Tobacco Co. v. Leman*, 109 Ga. 428; *Johnson L. & T. Co. v. Burr*, 7 Kan. App. 703.

The Waiver of a Citation in probate proceedings must be of a formal character and will not arise on implication. *Bird Canning Co. v. Cooper Grocery Co.*, 24 Tex. Civ. App. 412.

Exceptions. — Defects of a citation are waived when appellant does not take exceptions thereto in the court below. *Marshall v. Marshall*, (Tex. Civ. App. 1895) 30 S. W. Rep. 578. See also **EXCEPTIONS AND OBJECTIONS**,

541. Alias Citations. — See note 5.
Service. — See note 7.

541. 5. *Tipton v. Richardson*, (Ky. 1900) 54 S. W. Rep. 738.

7. *Westmeyer v. Gallenkamp*, 154 Mo. 28; *Matter of Scharmann*, 49 N. Y. App. Div. 278.

A Mere Letter from an Attorney Waiving the Notice of filing a brief in a probate proceeding will not waive the service of the citation required by law. *Bird Canning Co. v. Cooper Grocery Co.*, 24 Tex. Civ. App. 412.

Service on Party Not Named. — The service of the citation on a party not

named therein does not confer jurisdiction upon the court to render a judgment against the person so served. *Matter of Georgi*, (Surrogate Ct.) 35 Misc. (N. Y.) 685. But *compare* *Matter of Murphy*, 48 N. Y. App. Div. 211.

Death of Party. — If a party named in a citation dies before he is served, the same citation served upon his personal representative is insufficient. *Matter of Georgi*, (Surrogate Ct.) 35 Misc. (N. Y.) 685.

CIVIL DAMAGE ACTS.

543. II. NATURE AND FORM OF ACTION. — See note 2.

III. DECLARATION, COMPLAINT, OR PETITION — 1. Parties

— *a. PLAINTIFFS* — Joinder of Wife and Children. — See notes 3, 4, 5.

544. See note 1.

Joinder of Husband and Wife. — See notes 3, 4.

b. DEFENDANTS — Joinder of Sellers. — See note 5.

543. 2. *Campbell v. Harmon*, 96 Me. 87.

3. *Jury v. Ogden*, 56 Ill. App. 100; *Gardner v. Day*, 95 Me. 558.

4. *Wright v. Tipton*, 92 Tex. 168.

Compromise and Settlement. — When a mother brings an action for herself and her minor children on the ground that she and they have been damaged by reason of the unlawful sale of liquor to her husband, she has no right to compromise or settle the case without the consent of the court. *Zimmerman v. Smiley*, 62 Neb. 204.

5. Divorced Wife as Plaintiff. — The fact that a wife in whose favor a cause of action existed for the intoxication of her husband subsequently obtained a divorce does not prevent her from maintaining an action. *Nordin v. Kjos*, 13 S. Dak. 497.

544. 1. *Johnson v. McCann*, 61 Ill. App. 110; *Jury v. Ogden*, 56 Ill. App. 100; *Stafford v. Levinger*, (S. Dak. 1902) 91 N. W. Rep. 462.

Minor Children may bring an action against a saloon keeper and the sureties of his bond for furnishing liquors to their father when he is a confirmed drunkard. *Bloedel v. Zimmerman*, 41 Neb. 695.

3. *Qualls v. Sayles*, 18 Tex. Civ. App. 400; *Kruger v. Spachek*, 22 Tex. Civ. App. 307. See also *Reath v. State*, 16 Ind. App. 146.

A Widow may sue for damages sustained by her on account of the sale of beer to her minor son. *Frobese v. Peavy*, (Tex. Civ. App. 1897) 43 S. W. Rep. 900.

A Father May Sue, under Rev. Stat. Tex., art. 3380, although he consents to the sale of liquor to his minor son,

but the burden of proof is upon him to show that he was aggrieved by the violation of the provisions of this act. *Edgett v. Finn*, (Tex. Civ. App. 1896) 36 S. W. Rep. 830.

Intervention of Administrator. — The action for damages for the death of a minor under the Civil Damage Act may be maintained in the name of the parent without the intervention of an administrator of the estate of the deceased. *Fitzgerald v. Donohoe*, 48 Neb. 852.

4. *Jury v. Ogden*, 56 Ill. App. 100.

Mother Without Joining Father. — A mother may maintain an action for the illegal sale of liquors to her son without joining his father as a party plaintiff. *McMaster v. Dyer*, 44 W. Va. 644. See also *Peavy v. Goss*, 90 Tex. 89.

Services of Wife to Husband. — A statute of *Illinois* which provides that a wife cannot recover for services rendered to her husband should not be so construed as to take from her a cause of action against a saloon keeper who has sold her husband intoxicating liquors in violation of law, thereby compelling her constant attendance upon him during the time of his intoxication. *McVey v. Williams*, 91 Ill. App. 144.

In Massachusetts any person whose means of support is injured by the intoxication of another may maintain an action against the person or persons liable for such intoxication. *McNary v. Blackburn*, 180 Mass. 141.

5. *Coleman v. People*, 78 Ill. App. 210; *Keller v. Lincoln*, 67 Ill. App. 404; *Faivre v. Manderschied*, (Iowa 1902) 90 N. W. Rep. 76.

545. Joinder of Seller and Surety on His Bond. — See note 2.

546. Joinder of Seller and Owner of Premises. — See note 1.

2. Allegations — *a.* CAUSE OF INTOXICATION. — See note 3.

547. *b.* ACTION AGAINST OWNER — KNOWLEDGE OF UNLAWFUL SALE. — See note 1.

548. *d.* INJURIES RESULT OF INTOXICATION. — See note 3.

549. *e.* PROXIMATE CAUSE. — See note 1.

550. *j.* CHARGING INJURY — How Set Forth. — See note 3.

Special Damages Specially Alleged. — See note 4.

551. [IV. ANSWER. — An affirmative defense to be available

545. 2. *Stanley v. Leahy*, 87 Ill. App. 465; *Baecher v. State*, 19 Ind. App. 100; *Schiek v. Sanders*, 53 Neb. 664; *Gran v. Houston*, 45 Neb. 813.

Separate Bonds. — In *Franklin v. Frey*, 106 Mich. 76, it was held under How. Annot. Stat. Mich., § 2283, *c*3, that the principals and sureties on separate bonds may join as defendants in one action.

546. 1. **Mortgagee.** — A mortgagee of a dram shop is not an "owner" within the provisions of *Starr & Curt*. Annot. Stat. Ill. (1896), c. 43, § 10, making the owners of the building in which the liquor is sold liable jointly with the saloon keeper. *Bell v. Cassem*, 158 Ill. 45.

3. *Wanock v. People*, 187 Ill. 116; *McVey v. Williams*, 91 Ill. App. 144; *Munz v. People*, 90 Ill. App. 647.

Good Faith of Seller. — In *Texas* in an action for the sale of intoxicating liquors to a minor, it is not necessary for the plaintiff to allege that the liquor dealer did not make the sales described in the petition in good faith. *Lucas v. Johnson*, (Tex. Civ. App. 1901) 64 S. W. Rep. 823.

Allegations of Time. — In an action by a wife to recover damages for the sale of liquor to her husband, it is sufficient designation of the time at which the sales were made to allege that said sales were made in the spring and summer of a certain year. *Carrier v. Bernstein*, 104 Iowa 572.

547. 1. **Knowledge of General Condition.** — When an action is brought against a saloon keeper to recover damages caused by the unlawful sale of intoxicating liquors to a certain person, the petition must allege that the saloon keeper knew at the time he sold the liquors the general condition of the person, that is, whether he was

drunk or sober at the time such sale was made. *Bissell v. Starzinger*, 112 Iowa 266.

548. 3. **Allegations of Separate Sales.** — A complaint which sets out sales of intoxicating liquors at different times is not bad for duplicity, as the action is continuous. The liability is not based upon the single act, but upon continuous ones. *Wood v. Lentz*, 116 Mich. 275; *Brandt v. State*, 17 Ind. App. 311; *Smiser v. State*, 17 Ind. App. 519.

549. 1. *Munz v. People*, 90 Ill. App. 647; *State v. Knotts*, 24 Ind. App. 477; *McNary v. Blackburn*, 180 Mass. 141; *Roach v. Kelly*, 194 Pa. St. 24.

Sufficient Complaint. — A complaint which alleges that a liquor dealer sold liquor to a minor, and that said minor became intoxicated and crazed by the liquor so obtained and thereafter wandered into a river and was drowned, sufficiently specified facts which made the selling of the liquor the proximate cause of the drowning. *Boos v. State*, 11 Ind. App. 257. See also *Wall v. State*, 10 Ind. App. 530.

550. 3. *Burkman v. Jamieson*, 25 Wash. 606.

Allegation of Loss of Means of Support. — Where the action was founded upon the injury to the means of support of the plaintiff because of the sale of liquors to her son, allegations that by reason of the habitual intoxication of the son he was unable to obtain employment, and that plaintiff thereby lost her means of support, are sufficient. *Lossman v. Knights*, 89 Ill. App. 437.

4. In Iowa under Code, § 1557, it is not necessary to allege special damages, but if the facts at the trial show that the plaintiff sustained special damages they may be recovered. *Miller v. Hammers*, 93 Iowa 746.

must be specially pleaded, and cannot be taken advantage of under a general denial. See note 2a.]

551. 2a. *Gran v. Houston*, 45 Neb. 813, holding that in an action by a wife her consent or acquiescence to the giving or sale of liquors to her husband is matter constituting an affirmative defense which cannot be shown under a general denial.

Allegations of Good Faith. — In *Lucas v. Johnson*, (Tex. Civ. App. 1901) 64 S. W. Rep. 823, the court said: "The good faith of appellants in making the

sales to the minor was a defense to the suit which, to have been available, must have been pleaded."

Issue as to Illegality of Sale. — In *Goodman v. Haile*, 59 Ohio St. 342, it was held that a denial that defendant unlawfully sold liquor in a building leased by him does not deny the fact that liquor was sold on the premises, but tenders an issue only as to the illegal character of the sale.

CIVIL RIGHTS ACTS.

552. See note 1.

553. II. INDICTMENT — 1. Under United States Statutes —
b. UNDER ACT 1870 — For Conspiracy. — See note 1.

554. 2. Under State Acts — Must Follow Statute. — See note 1.

552. 1. The Indiana Civil Rights Act, which is an exact copy of an act of Congress of 1875, is not unconstitutional because the said act of Congress has been so declared. *Fruchey v. Eagleson*, 15 Ind. App. 88.

553. 1. Rev. Stat. U. S., § 5508. — An indictment under § 5508 of the Revised Statutes charging the defendants with conspiring to intimidate certain voters, on account of their race, color, and previous condition of servitude, in the free exercise and enjoyment of the right to vote at an election, is not objectionable because it does not charge, in terms, that the right injured is "the right not to be discriminated against on account of race," etc. If such discrimination be in substance and effect charged, it is sufficient, although the word "discriminated" is not used in making the accusation. *U. S. v. Lackey*, 99 Fed. Rep. 952.

554. 1. Arkansas. — An indictment charging that the defendant agent did unlawfully and wilfully fail and refuse to keep open a separate waiting-room for the African race, as provided by law, does not allege the same offense as another indictment charging that, certain persons of the African race occupying the waiting rooms set aside and provided for the white race, the defendant did wilfully neglect to assign said passengers and persons of the African race to the rooms provided for and used by the African race, and did unlawfully neglect to eject said persons of the African race from said rooms so provided for the white race; and, therefore, one indictment cannot be substituted for the other. *State v. Welbon*, 66 Ark. 510.

Indiana. — In an action to recover a penalty for the alleged violation of the Civil Rights Act, a complaint is sufficient which avers that the plaintiff

was denied full and equal privileges and enjoyments of the accommodations, advantages, etc., of the inn or hotel, with other persons, without stating what were the accommodations, advantages, and privileges that were denied. *Fruchey v. Eagleson*, 15 Ind. App. 88.

And, where the plaintiff is an infant, the complaint need not allege that the meals and lodgings applied for were necessities, when it particularly alleges that the sole reason for such refusal was because of his color. *Fruchey v. Eagleson*, 15 Ind. App. 88.

Kentucky. — An indictment charging the defendant railroad company with failure to furnish separate coaches for both white and colored passengers, and also with failure to have each car bear, in some conspicuous place, appropriate words in plain letters, indicating the race for which such car was intended, is not defective as charging two offenses. *Chesapeake, etc., R. Co. v. Com.*, (Ky. 1899) 51 S. W. Rep. 160.

Ohio. — In an action under the Civil Rights Act for damages for the refusal of a theatre ticket agent to sell a negro tickets to the parquet of said theatre on account of the race and color of the applicant, a petition which contained no averments that the lessees of said theatre did the act complained of, or that the ticket agent was authorized by them to do such act, or that he was acting within the scope of his authority therein, was held to state no cause of action. *Anderson v. Rawlings*, 10 Ohio Cir. Dec. 112.

Utah. — A complaint in an action by a colored juror against another juror to recover damages because of the refusal of the latter to serve on the jury with the former, fails to show any language, act, or conduct on the part

of the defendant which is actionable. *McPherson v. McCarrick*, 22 Utah 232.

Exclusion of Negroes from Grand Jury.

— In *Florida* the proper remedy to be taken by a person under indictment who claims that he was discriminated against in the selection of the grand jurors, on account of his race and color, is not by a motion to quash the indictment, but by a plea in abatement. *Tarrance v. State*, (Fla. 1901) 30 So. Rep. 685.

In *North Carolina* the proper remedy

is by motion to quash the indictment. *State v. Peoples*, 131 N. Car. 784.

In *Texas*, when the defendant has had no opportunity to challenge the grand jury, the objection to the constitution thereof may be taken either by plea in abatement or by motion to quash the indictment before pleading in bar. *Smith v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 97.

See also *State v. Brownfield*, 60 S. Car. 509; *Carter v. State*, 39 Tex. Crim. 352; *Carter v. Texas*, 177 U. S. 442, reversing 39 Tex. Crim. 345.

CODE PLEADING.

556. I. INTRODUCTORY—Main Object of Code Pleading.—See note 1.

557. Rule of Construction.—See note 1.

558. New System.—See note 1.

II. ALLEGING FACTS.—See note 2. See also **LEGAL CONCLUSIONS.**

556. 1. "It is the office of a pleading under the code procedure to state issuable facts, to show what was done or what was not done, so that looking to the acts and omissions stated, the court may, by applying the law thereto, determine whether a cause of action or a defense has been shown. It is not proper, omitting the facts, to state their supposed legal force or effect." *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14.

557. 1. California.— "It is not what a pleading is called, but the facts which it sets up, that determines its character. Its character and sufficiency will be determined by the court from the facts alleged in it." *McDougald v. Hulet*, 132 Cal. 154.

Georgia.—In *Teasley v. Bradley*, 110 Ga. 497, the court said. "Since the passage of the uniform procedure act of 1887 (Civil Code, § 4833), a plaintiff is required only to set forth his cause of action plainly, fully, and distinctly, and in an orderly way, and it is not incumbent upon him to classify or characterize his cause of action. If under the well-settled rules of law he has a legal cause of action, he will be given such remedies as are in law appropriate to his case and embraced within the scope of his prayer. If under the principles of equity he is entitled to relief, he will be given such relief as his evidence may justify and his prayer may call for."

Indiana.—If the allegations of a pleading are sufficient, the name by which it is called will not be controlling. *Dreyer v. Hart*, 147 Ind. 604.

558. 1. Arkansas.—In *Pine Bluff Water, etc., Co. v. Pine Bluff*, 62 Ark. 106, the court said: "The 'Code of Practice in Civil Cases' and its amendments * * * were not intended as

an amendment of the system of pleading and practice prevailing at the time of its adoption, but as a substitute for 'any case provided for by' it 'or inconsistent with its provisions.'"

Indiana.—The common-law rule as to the mode of stating the facts has not been changed under the code practice, but, on the contrary, has been emphasized by express enactment of the legislature. *Logansport v. Kihm*, (Ind. 1902) 64 N. E. Rep. 595; *Speeder Cycle Co. v. Teeter*, 18 Ind. App. 474. See also **LEGAL CONCLUSIONS.**

2. McInerney v. Virginia Carolina Chemical Co., 118 Fed. Rep. 653, wherein the court said: "The rule governing all code pleading—complaint and answer—is that the facts relied upon be stated in a clear and concise manner, and from the facts so stated the legal conclusion is drawn."

California.—*Peckham v. Watsonville*, (Cal. 1902) 71 Pac. Rep. 169; *Callahan v. Broderick*, 124 Cal. 80; *Simons v. Bedell*, 122 Cal. 341; *McCaughy v. Schuette*, 117 Cal. 223.

Colorado.—*People v. Brown*, 23 Colo. 425; *Catlin v. Christie*, 15 Colo. App. 291.

Connecticut.—*Hill v. Fairhaven, etc.*, R. Co., 75 Conn. 177.

Idaho.—*Ollis v. Orr*, (Idaho 1899) 56 Pac. Rep. 162; *Kelly v. Perrault*, (Idaho 1897) 48 Pac. Rep. 45.

Indiana.—*Frain v. Burgett* 152 Ind. 55, wherein the court said that whether a pleading is or is not sufficient depends upon the substantive facts, and not upon the mere conclusion of the pleader, and that general statements of facts, as a rule, are controlled by specific facts disclosed in the pleading; *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158; *Repp v. Leshner*, 27 Ind. App. 360; *Hunting-*

ton *v.* Boyd, 25 Ind. App. 250; Cleveland, etc., *R. Co. v. Shrum*, 24 Ind. App. 96; Taggart *v.* Kem, 22 Ind. App. 271.

Indian Territory. — Kemp *v.* Jennings, (Indian Ter. 1901) 64 S. W. Rep. 616; Cox *v.* Swofford Bros. Dry Goods Co., 2 Indian Ter. 61.

Iowa. — Kelly *v.* Fejervary, 111 Iowa 693; Robinson *v.* Berkey, 100 Iowa 136.

Kansas. — Atchison, etc., *R. Co. v. Atchison Grain Co.*, (Kan. 1902) 70 Pac. Rep. 933, in which case it was said that the essential facts of a cause of action or defense should be unequivocally alleged, and that where the averments are conditional, contingent, or conjectural, they are insufficient. Iretton *v.* Iretton, 59 Kan. 92; Townsend *v.* Burr, 9 Kan. App. 810.

Kentucky. — Bennett *v.* Lewis, (Ky. 1902) 66 S. W. Rep. 523; Lexington *v.* Board of Education, (Ky. 1901) 65 S. W. Rep. 827; Overlay *v.* Given, (Ky. 1899) 52 S. W. Rep. 1059; Brookville *R. Co. v.* Byron, (Ky. 1899) 50 S. W. Rep. 530; Wakefield *v.* Georgetown First Nat Bank, (Ky. 1897) 40 S. W. Rep. 921; Ryan *v.* Middlesborough Town Land Co., 106 Ky. 181; Shirley *v.* Stephenson, 104 Ky. 518.

Minnesota. — Esch *v.* White, 82 Minn. 462; Carlson *v.* Presbyterian Board of Relief, 67 Minn. 436.

Missouri. — Mallinckrodt Chemical Works *v.* Nemnich, 169 Mo. 388; Nagel *v.* Lindell R. Co., 167 Mo. 89; Sidway *v.* Missouri Land, etc., Co., 163 Mo. 342; Hand *v.* St. Louis, 158 Mo. 204; Schiffman *v.* Schmidt, 154 Mo. 204; Wetmore *v.* Crouch, 150 Mo. 671; Placke *v.* Union Depot R. Co., 140 Mo. 634.

Nebraska. — Bennett *v.* Bennett, (Neb. 1902) 91 N. W. Rep. 409; State *v.* Osborn, 60 Neb. 415; Wabaska Electric Co. *v.* Wymore, 60 Neb. 199; Woodward *v.* State, 58 Neb. 598; Markey *v.* School Dist. No. 18, 58 Neb. 479.

New York. — Witherbee *v.* Meyer, 168 N. Y. 641; Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377; McKee *v.* Jessup, 62 N. Y. App. Div. 143; Bush *v.* Coler, 60 N. Y. App. Div. 56, *affirmed* 170 N. Y. 587; Waite *v.* Aborn, 60 N. Y. App. Div. 521; Sampson *v.* Grand Rapids School Furniture Co., 55 N. Y. App. Div. 163; Gruen *v.* Prabody Education Fund, 51 N. Y. App. Div. 605, *reversing* 29 Misc. (N. Y.) 203; Kent *v.* North Tarrytown, 50 N. Y.

App. Div. 502; Park, etc., *Co. v. National Wholesale Druggists' Assoc.*, 30 N. Y. App. Div. 508; Sbarboro *v.* Health Dept., 26 N. Y. App. Div. 177; Frank *v.* Forgotston, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 816; Grob *v.* Metropolitan Collecting Agency, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 314; Villias *v.* Stern, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 380, wherein it was said that whatever else may be inserted in the pleading by way of allegation, beyond the statement of facts sufficient to constitute a cause of action, may be disregarded as surplusage, as the rules of pleading require only that a good cause of action appear; Henriques *v.* Osborn Memorial Home, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 653; Van Dyke *v.* Gardner, (N. Y. City Ct. Gen. T.) 21 Misc. (N. Y.) 542; Ralli *v.* Equitable Mut. F. Ins. Co., (Supm. Ct. App. T.) 16 Misc. (N. Y.) 357.

Ohio. — Shaw *v.* Foley, 62 Ohio St. 30; Kerr *v.* Bellefontaine, 59 Ohio St. 446; Fargo Gas Light, etc., *Co. v.* Greer, 10 Ohio Cir. Dec. 164.

South Carolina. — Timmonsville Bank *v.* Fidelity, etc., *Co.*, 120 Fed. Rep. 315.

South Dakota. — Iowa, etc., Telephone Co. *v.* Schamber, 15 S. Dak. 588.

Washington. — Livingstone *v.* Lovgren, 27 Wash. 102; Bay View Brewing Co. *v.* Grubb, 24 Wash. 163, the court holding that the law does not countenance pleading conclusions instead of alleging facts under the provisions of the code, but when the fact embodies a conclusion, the provisions of the code are not violated; Harris *v.* Halverson, 23 Wash. 779.

Wisconsin. — South Milwaukee Co. *v.* Murphy, 112 Wis. 614; Benolkin *v.* Guthrie, 111 Wis. 554.

Pleading Written Instruments. — Under the rules of code pleading it is not necessary to set out *in hac verba* written instruments sued on. They may be set out according to their legal effect. Anderson *v.* Gaines, 156 Mo. 664; Timmonsville Bank *v.* Fidelity, etc., *Co.*, 120 Fed. Rep. 315.

Distinction Between Affidavit and Pleading. — In an affidavit the evidence establishing a fact and not a conclusion of fact drawn from the evidence must be set forth, while a pleading need contain simply a statement of fact and not the evidence to establish it. Spies *v.* Munroe, 35 N. Y. App. Div. 527.

COGNOVIT.

560. I. DEFINITION AND GENERAL PRINCIPLES. — See note 1.

563. III. WHEN GIVEN. — See note 2.

564. V. JUDGMENT — 1. When and How Entered. — See notes 3, 4.

560. 1. Utah. — The entry of judgment by *cognovit actionem* can exist only by statutory authority, and is not recognized by the statutes of Utah. *Utah Nat. Bank v. Sears*, 13 Utah 172.

Release and Waiver of Errors by Cognovit. — A cognovit following a power contained in a warrant of attorney and expressly releasing all errors intervening in entering judgment is conclusive against the defendant after judgment, unless for lack of jurisdiction in the court to enter judgment, or of power under the warrant to confess the judgment. *Krickow v. Pennsylvania Tar Mfg. Co.*, 87 Ill. App. 653.

A Cognovit Given by a Minor is, it seems, binding upon him, unless in his application to open judgment he offers to do equity himself. *Krickow v. Pennsylvania Tar Mfg. Co.*, 87 Ill. App. 653.

Name of Defendant. — A cognovit confessing judgment against "A. Bernstein & Company, a corporation," was held not to authorize the entry of a judgment against A. Bernstein. *Bernstein v. Curran*, 99 Ill. App. 179.

Verbal Authority to enter judgment is not an appearance in the action or a power of attorney to confess judgment. *Siskiyou County Bank v. Hoyt*, 132 Cal. 81.

The Caption of a cognovit is not such an essential part thereof that the judgment must be voided by reason of a defective recital therein. *Cassem v. Brown*, 74 Ill. App. 346; *Browne v. Cassem*, 74 Ill. App. 305.

One Cognovit for Several Causes of Action. — Where the defendant gave several notes, each accompanied by a warrant of attorney, and the several causes of action arising thereupon were joined in one action, it was held that judgment might be confessed upon the filing of one cognovit covering all the

notes. *Odell v. Reynolds*, (C. C. A.) 70 Fed. Rep. 656.

563. 2. In Kentucky an answer signed and sworn to before the suit is begun is, in effect, only a power of attorney to confess judgment, and does not give to the court jurisdiction of the person of the defendant or authorize judgment. *Aultman, etc., Co. v. Mead*, (Ky. 1901) 60 S. W. Rep. 294; *Hudson v. McMahon*, (Ky. 1899) 50 S. W. Rep. 259.

In Texas no acceptance, waiver of service, or agreement for judgment can lawfully be made until after suit is filed. *O'Neal v. Clymer*, 21 Tex. Civ. App. 386.

Cognovit Signed Before Date of Judgment. — The fact that a cognovit is signed and sworn to on the evening preceding the day on which the judgment can be entered under the warrant of attorney, when it is not, in fact, filed until said latter day, will not render the judgment invalid. *Blake v. State Bank*, 178 Ill. 182, *affirmed* 78 Ill. App. 166.

564. 3. In Illinois it seems that a judgment on a cognovit may be entered in vacation by the clerk, but not by the court through its judge. *Pond v. Simons*, 17 Ind. App. 84. See also *Cassem v. Brown*, 74 Ill. App. 346; *Browne v. Cassem*, 74 Ill. App. 305; *Shepherd v. Wood*, 73 Ill. App. 486.

Before Return of Citation. — The court may enter judgment on the day a petition is filed, the citation served, and confession of judgment made, although the citation requires the defendant to appear at the next succeeding term. *Cruger v. Sullivan*, 11 Tex. Civ. App. 377.

4. In Illinois the established practice in case of the confession of a judgment in vacation in a court of record requires the plaintiff to file with the

565. 2. Against Copartners. — See note 3.

clerk of the court a declaration upon his cause of action, the warrant of attorney authorizing the confession of judgment, an affidavit proving the execution thereof, and a cognovit, whereupon the clerk enters judgment. *Desnoyers Shoe Co. v. Litchfield First Nat. Bank*, 188 Ill. 312.

In the case of a judgment entered in open court by virtue of a power con-

tained in a lease, the filing of the declaration, lease, and warrant of attorney, an affidavit of its execution, and the cognovit, present a case of jurisdiction. *Fields v. Brown*, 188 Ill. 111.

565. 3. See *Cassem v. Brown*, 74 Ill. App. 346; *Browne v. Cassem*, 74 Ill. App. 305; *Davenport Mills Co. v. Chambers*, 146 Ind. 156.

COMMITMENTS.

567. I. DEFINITION. — See note 1.

568. II. COMMITMENTS FOR TRIAL — 1. When Made. — See note 2.

570. III. AUTHORITY AND JURISDICTION. — See note 3.

571. See note 1.

IV. WARRANT OF COMMITMENT, OR MITTIMUS — 1. Necessity of — In Writing. — See note 2.

572. See note 1.

567. 1. A Commitment Is a Warrant, order, or process by which a court or magistrate directs a ministerial officer to take a person to prison and detain him there. *People v. Hagan*, 170 N. Y. 46; *Howard v. U. S.*, (C. C. A.) 75 Fed. Rep. 986.

A Mittimus After Conviction is, in criminal cases similar to an execution after judgment in a civil case. It is a final process for carrying into effect the final judgment of the court. *Scott v. Spiegel*, 67 Conn. 349.

568. 2. *In re* Crandall, 59 Kan. 671.

To Next Ensuing Term. — In *Texas* the accused may be committed by a justice of the peace to the next ensuing term of the District Court, although the District Court is then in session, if the grand jury for the term has been discharged by that court. *Ex p. Glasgow*, (Tex. Crim. 1901) 64 S. W. Rep. 1053.

Commitment of Witness. — An examining magistrate has no authority under Code Crim. Pro. N. Y., §§ 215, 216, to commit a witness for failing to give "a written undertaking" with sureties that he will forfeit a stated sum if he fails to appear at the trial, when the magistrate has no reason to believe from the proof that such witness is not an accomplice in the commission of the crime charged. *People v. Pettit*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 280.

570. 3. Magistrate. — In *Minnesota* a magistrate should not hold the accused to await the action of the grand jury when the evidence does not show that any offense has been committed

except one of which a justice of the peace has jurisdiction, and there is no grand jury in session at the time, and one will not be impaneled in the near future. To do so is an abuse of power in the committing magistrate, and the accused is entitled to redress by habeas corpus. *State v. Sargent*, 71 Minn. 28.

Court of Common Pleas. — In *Ohio* the authority of the Court of Common Pleas to commit the defendant in a bastardy proceeding for failure to comply with an order requiring him to give bond for the maintenance of the child and payment of the costs is not confined to the time or term at which the order is made. *Alling v. State*, 10 Ohio Cir. Dec. 260.

571. 1. See *Hall v. State*, 130 Ala. 139.

2. Transcript in Lieu of Mittimus. — In *Ohio*, where a prisoner is brought from one city to another to serve a term in the workhouse, a mittimus is not necessary when the officer bringing the prisoner has a transcript. *In re Workhouse*, 5 Ohio Dec. 574. Compare *Edis v. Butler*, 11 Ohio Dec. 245.

572. 1. *Bugbee v. Boyce*, 68 Vt. 311, holding that an officer is justified in executing a warrant of commitment that is good upon its face.

A Copy of an Order or Warrant of Commitment furnished by a United States marshal or clerk to the warden of a penitentiary is merely evidence of the judgment and sentence of the court and the mittimus issued thereunder, and Rev. Stat. U. S., § 1028, makes this evidence of a regular court judgment and mittimus sufficient authority and protection to the warden. The warden

572. Verbal Warrant. — See note 3.

573. 2. Requisites of — a. AS TO FORM — (1) Generally. — See notes 4, 5.

575. (5) Indorsement of Order of Commitment on Depositions. — See note 2.

576. b. AS TO SUBSTANCE — (1) Generally. — See notes 2, 3.

577. (2) Jurisdiction and Authority. — See note 1.

is not required to go beyond this copy in satisfying himself of the validity of the sentence against the prisoner. Howard v. U. S., (C. C. A.) 75 Fed. Rep. 986.

572. 3. Lunenberger v. State, 74 Miss. 379.

Commitment After Adjournment of Court.

— A judgment of conviction is not void because a justice of the peace fails to issue a writ of commitment on the day of its rendition, and though his court is adjourned it is his duty on demand of the people to issue a writ of commitment, although the period of the sentence has expired, as the judgment of conviction can be satisfied only in this way. Mann v. People, 16 Colo. App. 475.

Mittimus Within Reasonable Time After Sentence. — A justice of the peace may, within any reasonable time after conviction and sentence, issue a mittimus to enforce his judgment, even though his court has been adjourned without day. While the judicial officer could no longer act, the ministerial officer remains and may lawfully perform that duty. Scott v. Spiegel, 67 Conn. 349.

One Hundred and Five Days After Judgment. — The failure of a justice to issue a mittimus immediately or within a reasonable time upon the defendant's failure to pay or replevy a fine adjudged against him does not render the mittimus void if issued one hundred and five days after judgment. Pritchett v. Cox, 154 Ind. 108.

573. 4. Must Be Certified. — In New York a certificate of conviction must be made by the magistrate before whom the case is tried or by the clerk of the county with whom it is filed, as provided by Code Crim. Pro. N. Y., § 723, otherwise it is void. People v. Whitney, (County Ct.) 22 Misc. (N. Y.) 226.

5. A Mittimus Is Not Void because of an irregularity in omitting the seal of the court. Webber v. Harding, 155 Ind. 408.

575. 2. California. — A case will not be reversed because there is no formal commitment from the justice of the peace running to the sheriff, as required by Pen. Code Cal., §§ 876, 877. It is sufficient that the defendant was originally committed to the custody of the sheriff by an order indorsed upon a warrant of arrest and afterwards by an order indorsed upon the complaint. The question whether the sheriff is properly holding the defendant is material only during the time that the officer is so holding him. People v. Sehorn, 116 Cal. 503.

Where Amended Outside of Precinct. — Where a defective certificate of a committing magistrate indorsed upon the depositions taken at the examining trial was permitted to be amended by the District Court at the county seat outside of the precinct of the committing magistrate and outside of the precinct where the examination was had, it was held not to be error, as the jurisdiction of justices of the peace in preliminary examinations is not limited to the precincts for which they are elected. State v. McGann, (Idaho 1901) 66 Pac. Rep. 823.

576. 2. Sufficiency of Mittimus. — Where the record shows that the mittimus sets forth the offense, the plea, and the order that the respondent give recognizance or stand committed until the order is performed, it conforms, substantially, to Pub. Laws R. I., c. 598, § 20 (Gen. Laws R. I., c. 229, § 20). Douglass v. Barber, 18 R. I. 459.

3. Probable Cause. — Where the committing magistrate used the word "suspect" instead of "believe" in certifying an offense which had been committed, and that there was just cause to "suspect" the accused to be guilty thereof, it was held to be a sufficient finding of probable cause. People v. Sutherland, 104 Mich. 468.

577. 1. People v. Wilson, 88 Hun (N. Y.) 258; People v. Whitney, (County Ct.) 22 Misc. (N. Y.) 226; Com. v. May, 24 Pa. Co. Ct. 546.

577. (3) *Proceedings Before Magistrate or Court.* — See note 2.

(4) *Recital of Offense.* — See notes 3, 4.

578. See notes 1, 2.

579. See note 1.

(5) *Conclusion — Term of Commitment.* — See note 4.

Compare *People v. Workhouse*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 639.

Warrant Held Sufficient. — A warrant of commitment which shows that a person was charged with having been found intoxicated and with having refused to disclose where the liquor was obtained, after a conviction under Rev. Laws Vt., § 3812, as amended by Acts 1888, No. 36 (Stat. Vt. 1894, § 4477), is sufficient to show that the justice had jurisdiction to issue the warrant of commitment for such failure to disclose, under No. 127 Acts 1884, No. 127. *Bugbee v. Boyce*, 68 Vt. 311.

577. 2. *Kittery v. Dixon*, 96 Me. 368.

3. See *People v. State Reformatory*, etc., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 233.

Language of Statute. — A commitment which states that the accused is held as a "disorderly person," is sufficient, as the statute defines who "disorderly persons" are. *Matter of Newkirk*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 404.

4. See *People v. Webster*, 86 Hun (N. Y.) 68.

Insufficient Commitment. — A warrant of commitment stating merely that the accused is charged with violating a certain section of a statute which denounces different acts is insufficient in the absence of any statement of a particular act. *People v. Hagan*, 170 N. Y. 46.

A Statement of Specific Facts in Detail in a commitment for trial is unnecessary. It is sufficient to state with reasonable clearness the nature of the offense with which the person is charged and conclusions of fact, in general language, justifying his detention on such charge. *State v. Huegin*, 110 Wis. 189, citing 4 ENCYC. OF PL. AND PR. 577, 578.

578. 1. Essential Elements. — It is sufficient to set out the essential parts of the judgment, to wit: the guilt of the defendant, the amount of the fine determined, and that it is adjudged that he be committed to jail until the

fine and costs are paid in full. *Funderburk v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1059, which case was decided under Code Crim. Pro. Tex., art. 977.

A General Description of the Crime for which the prisoner is committed is all that the statute contemplates. *In re Thayer*, 69 Vt. 314.

The Date of an Offense is one of the essential particulars of the description thereof, and is required to be inserted in a certificate of conviction. *Matter of Brown*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 692.

2. See *People v. Sloan*, 39 N. Y. App. Div. 265; *People v. Wood*, (County Ct.) 66 N. Y. Supp. 1123.

A Certificate of Conviction for Petit Larceny is sufficient in *New York*, without stating the person from whom the property was taken or specifying the articles stolen. *People v. Markell*, (County Ct.) 22 Misc. (N. Y.) 607, which case was decided under Code Crim. Pro. N. Y., § 721.

579. 1. Where the Proceeding Is a Summary One, had before a justice of the peace sitting as a magistrate, the common-law rule applies, and the evidence upon which it was had must appear. But under Gen. Stat. N. J., p. 2497, par. 97, this rule does not apply in summary convictions in police courts of cities of the first class. *Kolb v. Boonton*, 64 N. J. L. 163.

4. *People v. Anthony*, (Supm. Ct. App. Div.) 25 Civ. Pro. (N. Y.) 410. See also *People v. Webster*, 92 Hun (N. Y.) 378.

Where Statute Limits Term. — It is well to specify the extent of the imprisonment to be imposed upon the defendant, in the event of his failure to pay the fine and costs, but failure to do so is immaterial where the statute limits and makes certain the extent of the punishment. *Ex p. Brady*, 70 Ark. 376.

Where Commitment Is Merely Coercive. — Where the commitment is not punitive, but purely civil and coercive in character, to compel restitution or performance to the party injured, it should

580. 3. Defective Warrant — *a.* EFFECT OF. — See note 1.

581. *b.* AMENDMENT OF. — See note 1.

V. REVIEW ON HABEAS CORPUS — Jurisdiction. — See note 3.

582. Probable Cause. — See note 1.

in terms be for a time no longer than sufficient to compel the performance of the act required. *Clark v. Parker*, 70 Ill. App. 233.

580. 1. Matter of Landreth, 55 Kan. 147, holding that another warrant may be issued; *In re Thayer*, 69 Vt. 314.

Where the Defendant Is Committed for the Nonpayment of Alimony the commitment is fatally defective, unless either it or the order authorizing it specifies the amount of alimony to be paid, and the amount of costs. *Jernee v. Jernee*, 54 N. J. Eq. 657.

Error in Degree of Offense. — Where the defendant is committed to await the action of a grand jury on the charge of grand larceny, and the matter is referred by that body to a court of special sessions to be disposed of as petit larceny, and he is convicted of that crime, he is not entitled to his discharge on habeas corpus because the committing magistrate erred in sending the case to the grand jury, instead of to a court of special session. *People v. Hayes*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 163.

A Clerical Error in the Date of a Warrant of Commitment, such as inserting March 15, 1885, when it is apparent that it should have been 1895, is immaterial. Error, irregularity, or want of form is no objection; nor is any defect which may be amended or cured by a further entry on motion. *People v. Markell*, 92 Hun (N. Y.) 286. See also *Com. v. Peach*, 170 Pa. St. 173.

The Formal Words "Against the Form of the Statute in That Case Made and Provided" need not appear in the commitment. If the commitment shows that the accused is held for trial for a criminal offense, the unavoidable inference is that the act charged took place, if at all, contrary to law. *State v. Huegin*, 110 Wis. 189.

Defective Copy of Mittimus. — A prisoner's detention is not rendered unlawful by reason of a defect in the copy of the mittimus furnished to the warden by the marshal in delivering the prisoner, as provided by Rev. Stat. U. S., § 1028. *Howard v. U. S.*, (C. C. A.) 75 Fed. Rep. 986.

581. 1. Compare *People v. Webster*, 92 Hun (N. Y.) 378.

3. *Ex p. Foote*, 70 Ark. 12; *McFarland v. Donaldson*, 115 Ga. 567; *State v. Matter*, 78 Minn. 377; *Ex p. Neet*, 157 Mo. 527; *Ex p. Smith*, 135 Mo. 223; *People v. New York State Reformatory*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 92; *People v. Flynn*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 90; *Matter of Casey*, 27 Wash. 686; *In re Lewis*, 114 Fed. Rep. 963.

The Inquiry on a Writ of Habeas Corpus ordinarily relates to the question of jurisdiction only, and while the proceeding may be entirely legal in form, the want of jurisdiction will render it void. But where the proper jurisdiction is established, the proceedings will stand the test of the writ, however irregular they may have been. *In re Fitton*, 68 Vt. 297. See also *Miskimins v. Shaver*, 8 Wyo. 392.

The defendant is not entitled to a writ of habeas corpus to review the warrant of commitment on the ground that the accused was illegally or forcibly brought within the jurisdiction of the court. If the court has competent jurisdiction of the crime with which the accused stands charged, full force will be given to the judgment notwithstanding the arrest was made without a warrant. *People v. City Prison* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 635.

Legality of Judgment of Court Martial. — The sentence of a court martial, when approved by the reviewing authority of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of the power possessed by the court martial. *Carter v. McClaughry*, 183 U. S. 365.

582. 1. *Idaho Statute*. — Rev. Stat. Idaho, § 8354, subsec. 7, authorizes the issuance of a writ of habeas corpus and discharge of the prisoner, when the commitment is "without reasonable or proper cause," even if the proceedings and commitment be regular upon their face. *In re Levy*, (Idaho 1901) 66 Pac. Rep. 806.

Review of Evidence. — Where there

582. VI. COMMITMENTS OF MINORS — Approval of. — See note 3. .

is evidence tending to show probable cause, the court cannot, on habeas corpus, weigh the evidence to determine the guilt or innocence of the accused. *In re Chamberlin*, 62 Kan. 866, 61 Pac. Rep. 805; *In re Gilmore*, 61 Kan. 857, 58 Pac. Rep. 961.

582. 3. Commitment Signed by Judge — Entry of Record. — Where a minor appears in open court with counsel and enters a plea of guilty to a charge of grand larceny, and the court withholds

sentence and releases him during good behavior, but afterwards commits him to a reform school, a commitment setting out the facts is not void because it is not entered on the order books of the court in the absence of a demand by the parent or guardian to have it so entered, as a commitment signed by the judge is itself a record of the proceedings, whether entered on the order books or not. *Lee v. McClelland*, 157 Ind. 84.

COMPLAINTS AND PETITIONS

IN CODE PLEADING.

588. I. INTRODUCTORY — 2. Contents. — See note 3.

591. II. TITLE — 2. Designation of Court. — See note 1.

592. 3. Naming County. — See note 1.

4. Specifying Names of Parties. — See note 2.

594. Repeating Names in Body of Complaint. — See note 1.

595. 6. Representative Parties (see also PARTIES TO ACTIONS) — *a. GENERALLY.* — See note 2.

596. Allegations in Body Control. — See note 2.

588. 3. Kansas. — A petition states a cause of action when it contains, in accordance with Code Civ. Pro. Kan., § 87, the name of the court, the county in which the action is brought, the name of the parties plaintiff and defendant, followed by the word "petition," a statement of the facts constituting the cause of action, in ordinary and concise language and without repetition, and a demand of the relief to which the plaintiff supposes himself entitled. *Kemper v. Lord*, 6 Kan. App. 64.

591. 1. Citizens' St. R. Co. v. Shepherd, (Ind. App. 1902) 65 N. E. Rep. 765.

Addressing Petition to Court. — In *Texas* it is preferable to address the petition to the court or judge, but failure to do so will not render the petition open to exception. *Hall v. Johnson*, (Tex. Civ. App. 1897) 40 S. W. Rep. 46.

592. 1. See *Goldstein v. Marx*, 73 N. Y. App. Div. 545; *Fisher v. Ogden*, 12 N. Y. App. Div. 602; *Hall v. Johnson*, (Tex. Civ. App. 1897) 40 S. W. Rep. 46.

2. Entitled in Estate. — In *Matter of Clary*, 112 Cal. 292, a petition which stated all the elements of a bill in equity for an accounting and was answered on the merits, without objection to the form of the proceeding, was held not to be objectionable in that it was entitled in an estate, instead of being in form an independent action.

Christian Name. — Objection that a party plaintiff is designated by the initials of his Christian name may be

made at any time before judgment, even in the District Court on appeal; and although it is the better practice to call the attention of the court to the defect by motion, yet it may be raised by plea as well. *Small v. Sandall*, 48 Neb. 318. See also NAMES.

594. 1. *Eiseley v. Taggart*, 52 Neb. 658; *Deadwood First Nat. Bank v. Hattenbach*, 13 S. Dak. 365. See also *Hall v. Johnson*, (Tex. Civ. App. 1897) 40 S. W. Rep. 46.

595. 2. See *Craighead v. Bruff*, (Tex. Civ. App. 1900) 55 S. W. Rep. 764.

596. 2. Indiana. — See *Hall v. Ferguson*, 24 Ind. App. 532.

Kentucky. — *Clift v. Newell*, 104 Ky. 396, in which case the court held that the fact that defendant was characterized in the caption as "guardian" was immaterial when the petition stated a sufficient cause of action against him individually.

Nebraska. — *Bennett v. Bennett*, (Neb. 1902) 91 N. W. Rep. 409, in which case the court said that a plaintiff who describes himself as guardian of another will be taken to sue in his representative, and not in his personal capacity, where the allegations of the petition and the nature of the action show clearly that such was his intent, notwithstanding the petition falls to say expressly that he sues as guardian. See also *Andres v. Kridler*, 47 Neb. 585, and *Thomas v. Carson*, 46 Neb. 765, holding that where a complaint states a cause of action in favor of the plaintiff personally, or against the de-

599. *c.* TRUSTEES, OFFICERS, COMMISSIONERS, TAXPAYERS, ETC. — See note 1.

600. 9. Partners. — See note 1.

III MANNER OF STATING CAUSE OF ACTION — 1. Introductory. — See notes 2, 4.

Material Allegations. — See note 6.

fendant personally, superadded words, such as "agent," "executor," "trustee," or "director" should be rejected as *descriptio personæ*.

New York. — See *Smith v. Mingey*, 72 N. Y. App. Div. 103.

599. 1. Trustees. — *Morrow v. Shober*, 19 Ind. App. 127.

600. 1. Deadwood First Nat. Bank *v. Hattenbach*, 13 S. Dak. 365.

Where the Firm Name Appears in the Caption and the names of the partners are found in the first part of the petition, there is a sufficient compliance with the requirement of the code. *Bryant v. Cheek*, (Ky. 1897) 41 S. W. Rep. 776; *Bryant v. Mack*, (Ky. 1897) 41 S. W. Rep. 774.

2. Alter v. Cincinnati, 7 Ohio Dec. 368, wherein the court said: "It is the office of pleadings to bring before the senses of the court those facts whereon a litigant claims he is entitled to redress or protection; so that the court contemplating the facts averred can say whether the law has an application for that condition of circumstances which entitles the claimant to the relief asked." See also *Sampson v. Grand Rapids School Furniture Co.*, 55 N. Y. App. Div. 163; *Bulger v. Coyne*, 20 N. Y. App. Div. 224; *Iowa, etc., Telephone Co. v. Schamber*, 15 S. Dak. 588.

Legal Fictions. — There is no rule requiring fictions to be pleaded. It may be that to some extent fictitious averments are still permitted, but they are certainly not required. Neither the letter nor the spirit of the code requires a party to plead what is not true. *Ball v. Beaumont*, 59 Neb. 631.

Justice's Court. — In *Missouri* the only appreciable difference between the statement of facts required in the Circuit Court and that required in a justice's court is that in the former the statement must be "plain and concise." *Sidway v. Missouri Land, etc., Co.*, 163 Mo. 342.

Items. — A complaint seeking to recover for work and labor performed and material furnished is sufficient if

filed therewith is a bill of particulars setting forth the amount of material furnished and the work and labor done. *Parker Land, etc., Co. v. Reddick*, 18 Ind. App. 616. See also **BILLS OF PARTICULARS.**

When the body of the complaint states a good cause of action, specifying its nature, not upon a general account of several items, but upon one item alone which is set out, it cannot, under the code, be objected to on demurrer on the ground that no bill of particulars is made a part of it. *Canon v. Castleman*, 24 Ind. App. 188.

Complaints Attacking Statutes. — One who calls in question the constitutionality of a statute must clearly and distinctly allege in what respect the law is violative of the constitution. *Laffitte v. Burke*, 113 Ga. 1000.

The question of the sufficiency of a complaint assailing the validity of a statute relating to the improvement of streets, and a resolution passed by the board of public works aiming to carry the statute into effect, must be determined by reference to the provisions of the statute, and not by the character of the averments of the complaint concerning the legal effect of the resolution. *Indianapolis v. Holt*, 155 Ind. 222.

4. Mallinckrodt Chemical Works v. Nemnich, 169 Mo. 388, wherein the court said that the "defendant was entitled to a statement of the constitutive facts which compose plaintiff's cause of action." See also *McLean v. Lewiston*, (Idaho 1902) 69 Pac. Rep. 478; *Sutton v. Todd*, 24 Ind. App. 519.

Common-law Rules Applied. — See *Logansport v. Kihm*, (Ind. 1902) 64 N. E. Rep. 595.

6. Stating Cause of Action — Colorado. — *Lozier v. Hannan*, 12 Colo. App. 59. *Connecticut.* — *Hill v. Fair Haven, etc., R. Co.*, 75 Conn. 177.

Kansas. — *Kemper v. Lord*, 6 Kan. App. 64, in which case the court said that a petition containing all the requirements of the code states a cause of action, even where there is also

601. 2. Character of Action. — See note 1.

Theory of Complaint. — See note 2.

much therein which might be stricken out on proper motion.

New York. — *Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451 [*affirming* 24 N. Y. App. Div. 273]; *Clifford v. Braun*, 71 N. Y. App. Div. 432; *Acker v. Richards*, 63 N. Y. App. Div. 305; *Gruen v. Peabody Education Fund*, 51 N. Y. App. Div. 605.

North Carolina. — *Manning v. Roanoke, etc.*, R. Co., 122 N. Car. 824.

Ohio. — *Fargo Gas Light, etc., Co. v. Greer*, 10 Ohio Cir. Dec. 164.

Washington. — *Harris v. Halverson*, 23 Wash. 779.

Wisconsin. — *Benolkin v. Guthrie*, 111 Wis. 554; *South Bend Chilled Plow Co. v. George C. Cribb Co.*, 97 Wis. 230.

A Failure to State a Cause of Action Against Some of the Defendants in the complaint will not make the complaint bad as to all defendants where it states a cause of action against others. *Armstrong v. Dunn*, 143 Ind. 433. See also *Hume v. Howard*, (Tex. Civ. App. 1898) 48 S. W. Rep. 202.

Distinction Between Legal and Equitable Actions in Framing Complaint. —

"While the code prescribes but one form of action by means of which every remedy must be sought, and does not recognize any distinction between actions for equitable relief and those in which damages or a money judgment only are sought, yet in framing a complaint there necessarily is a grave distinction between the two classes of actions. In the one class, where damages only are sought for a breach of contract or for tort, the rules require only a statement of the relation of the parties, the ultimate facts showing the right, and showing the breach of the right, such allegations as may be necessary to show a right to enhanced or other damages which do not necessarily flow from the act complained of, and a demand of relief to which the party considers himself to be entitled. Ordinarily such a complaint may well be made plain and concise, but when equitable relief is sought there must be from the necessity of the case greater latitude in the allegations of the complaint. The nature of the relief itself frequently requires, not only that the ultimate facts from which the right to relief arises should be stated, but that facts which are somewhat col-

lateral should be laid before the court so that the precise relief required to give the party what he is entitled to and the way in which that relief shall be granted may be understood. For that reason, in actions of that nature greater latitude and liberality are allowed in the preparation of pleading than in other actions, and the power to strike out matter which is claimed to be irrelevant should be used with reluctance and caution." *John D. Parks, etc., Co. v. National Wholesale Druggists' Assoc.*, 30 N. Y. App. Div. 508.

601. 1. Name Not Controlling. — If the allegations of a pleading are sufficient, the name by which it may be called will not control. *Dreyer v. Hart*, 147 Ind. 604; *Hollenbeck v. Ristine*, 105 Iowa 488.

Name Not Necessary. — As the code has abolished all forms of action, the plaintiff is not required to say what his cause of action is or to give to it a name such as it would have had at common law. *Freeman v. Trickett*, 6 Kan. App. 83.

Prayer. — The rule that "a complaint must proceed upon some definite theory and must be good upon the theory upon which it proceeds" does not require that the plaintiff must be entitled to all the relief asked for in the complaint to render it sufficient. *Yorn v. Bracken*, 153 Ind. 492. See also PRAYERS FOR RELIEF.

2. California. — See *Estrella Vineyard Co. v. Butler*, 125 Cal. 232.

Georgia. — *Pitts v. Smith*, 108 Ga. 37, in which case a petition declaring that the defendant was indebted to the plaintiffs on an open account, but also containing other allegations indicating a purpose to declare for damages arising from a breach of contract, was held to be bad for duplicity. See also *Selfert v. Sheppard*, 111 Ga. 814.

Indiana. — *Mark v. North*, 155 Ind. 575.

Kansas. — *Grentner v. Fehrenschild*, 64 Kan. 764, in which case the court said: "If the petition is not drawn upon a single and definite theory, or there is such a confusion of theories alleged that the court cannot determine from the general scope of the pleading upon which of several theories a recovery is sought, it is insufficient."

- 602.** Alternative Averments. — See note 1.
603. At Law or in Equity. — See note 1.
604. Tort or Contract. — See note 1.
605. 3. Relates to What Time. — See note 1.

Texas. — In Texas the plaintiff may seek to recover both upon an express contract and upon *quantum meruit*, and recover as the evidence may show. *Fant v. Andrews*, (Tex. Civ. App. 1898) 46 S. W. Rep. 909.

Facts Sufficient to Sustain Judgment. — See *Tiffin Glass Co. v. Stoehr*, 54 Ohio St. 157; *Damon v. Leque*, 14 Wash. 253.

602. 1. In California a cause of action arising out of the same transaction may be separately stated in different ways, even though the separate statements are inconsistent with each other. *Stockton Combined Harvester, etc., Works v. Glens Falls Ins. Co.*, 121 Cal. 167.

In Kentucky the complaint may allege alternatively the existence of one or another fact, but not the liability of one or another defendant. *Louisville, etc., R. Co. v. Ft. Wayne Electric Co.*, (Ky. 1900) 55 S. W. Rep. 918; *Brown v. Illinois Cent. R. Co.*, 100 Ky. 525. See also *Owensboro City R. Co. v. Hill*, (Ky. 1900) 56 S. W. Rep. 21.

The plaintiff will not be allowed to allege that the defendant is indebted either on contract or in tort, but that the plaintiff does not know which. *Southern Lumber Co. v. Wireman*, (Ky. 1897) 41 S. W. Rep. 297.

Where a petition contains alternative allegations and one of them is insufficient, a demurrer to the petition must be sustained. *Linck v. Louisville, etc., R. Co.*, 107 Ky. 370.

In Texas the petition may be framed in a double aspect and pray for alternative relief, and it is immaterial that one count is inconsistent with or contradicted by another. Each count must be tested by its own averments. *Harris v. Warlick*, (Tex. Civ. App. 1897) 42 S. W. Rep. 356. See also *Clay County Land, etc., Co. v. Skidmore*, 26 Tex. Civ. App. 472; *San Antonio Waterworks Co. v. White*, (Tex. Civ. App. 1898) 44 S. W. Rep. 181.

When Alternative Pleading Allowed. — See *Murphy v. Quigley*, 11 Ohio Cir. Dec. 638.

603. 1. See *Squiers v. Thompson*, 73 N. Y. App. Div. 552; *Parker v. Pullman*, 36 N. Y. App. Div. 208;

Turner v. Bayles, 5 N. Y. App. Div. 623; *Skilton v. Payne*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 332.

Relief Determined by Prayer. — Where the plaintiff elects to frame his complaint as stating a right to equitable relief and demands such relief, but the facts stated are insufficient to entitle him thereto, a demurrer will be sustained although the facts stated are sufficient to constitute a legal cause of action; and, conversely, a demurrer will be sustained if the defendant erroneously demands legal relief when the facts stated entitle him to equitable relief only. *Wisner v. Consolidated Fruit Jar Co.*, 25 N. Y. App. Div. 362. See also PRAYERS FOR RELIEF.

Relief Follows Facts Pleaded — *Georgia.* — *Teasley v. Bradley*, 110 Ga. 497, in which case it was said that "since the passage of the uniform procedure act of 1887 (Civil Code, § 4833), a plaintiff is required only to set forth his cause of action plainly, fully, and distinctly, and in an orderly way, and it is not incumbent upon him to classify or characterize his cause of action. If under the well-settled rules of law he has a legal cause of action, he will be given such remedies as are in law appropriate to his case and embraced within the scope of his prayer. If under the principles of equity he is entitled to relief, he will be given such relief as his evidence may justify and his prayer may call for."

New York. — *Goldberg v. Kirschstein*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 249; *Goldberg v. Finkelstein*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 809.

Ohio. — See *Kerr v. Bellefontaine*, 59 Ohio St. 446.

South Carolina. — *Simon v. Sabb*, 56 S. Car. 38; *Bolt v. Gray*, 54 S. Car. 95; *Charleston Bank v. Dowling*, 45 S. Car. 677.

604. 1. See *Foote v. Ffoulke*, 55 N. Y. App. Div. 617.

605. 1. *Keene v. Newark Watch Case Material Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 6; *Citizens Bank v. Corkings*, 10 S. Dak. 98, both cases citing 4 ENCYC. OF PL. AND PR. 605.

Residence. — An allegation of the resi-

- 606.** 4. *Positiveness*. — See note 1.
 6. *Inducement*. — See note 2.
607. 8. *Surplusage*. — See note 1.
 9. *Aider and Pleading Over*. — See note 2.
608. *Supplied by Answer*. — See note 2.
609. *Waiver*. — See note 1.
610. *Cured by Verdict*. — See note *a*.
 11. *Exhibits*. — See note *1a*.
611. 14. *Common Counts*. — See note 1.

dence of the defendant is presumed to refer to his residence at the time of the commencement of the action, unless controlled by other allegations showing that a different date was intended. *John W. Simmons Co. v. Costello*, 63 N. Y. App. Div. 428.

606. 1. *Left to Inference*. — A complaint is sufficient if the facts directly alleged, together with those which, by fair and reasonable intendment, may be implied from the direct allegations, state a cause of action. *Wenk v. New York*, 171 N. Y. 607. See also *Booz v. Cleveland School Furniture Co.*, 45 N. Y. App. Div. 593; *Rosselle v. Klein*, 42 N. Y. App. Div. 316; *Trueb v. New York Asbestos Mfg. Co.*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 482; *Duryee v. Friars*, 18 Wash. 55.

Recital. — A complaint alleging facts by way of recital, when they should have been alleged directly, is not bad when not specially demurred to. *George H. Fuller Desk Co. v. McDade*, 113 Cal. 360.

2. *Bolt v. Gray*, 54 S. Car. 95, holding that evidentiary matters pleaded as a part of the history of the case may be stricken out on motion, but do not render the complaint subject to demurrer. See also *Block v. Standard Distilling, etc., Co.*, 10 Ohio Dec. 409.

607. 1. *Bunker v. Osborn*, 132 Cal. 480; *Roberts v. Glass*, 112 Ga. 456; *Moore v. Kelly, etc., Co.*, 111 Ga. 371; *New Albany v. Armstrong*, 22 Ind. App. 15, holding that improper averments will not make a complaint bad, if the remaining averments are sufficient in law; *Robinson v. Brown*, 166 N. Y. 159; *Vedder v. Leamon*, 70 N. Y. App. Div. 252; *Doyle v. American Wringer Co.*, 60 N. Y. App. Div. 525; *Tripp v. Smith*, 50 N. Y. App. Div. 499; *Deering v. Schreyer*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 618; *Villias v. Stern*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 380.

2. *Reply*. — The complaint and reply, when not repugnant, should be read together, to determine the intent of the pleader. *Patterson v. Patterson*, 40 Oregon 560; *Lavery v. Arnold*, 36 Oregon 84.

608. 2. *Missouri*. — *Ricketts v. Hart*, 150 Mo. 64; *L. Bauman Jewelry Co. v. Bertig*, 81 Mo. App. 393.

Montana. — *Lynch v. Bechtel*, 19 Mont. 548.

North Carolina. — *Lockhart v. Bear*, 117 N. Car. 298.

609. 1. *Where the Defendant Answers*, after the overruling of his demurrer to the complaint as ambiguous and uncertain, he waives such objection, and it cannot avail him upon appeal. *Lynch v. Bechtel*, 19 Mont. 548.

610. *a. Mangu v. Bullion, etc., Min. Co.*, 15 Utah 534.

1*a.* In *Stephens v. American F. Ins. Co.*, 14 Utah 265, the court held that a complaint based upon a fire-insurance policy annexed thereto was sufficient, although it did not state a cause of action otherwise than by reference to the exhibit. *Miner, J.*, in a dissenting opinion, quoted 4 ENCYC. OF PL. AND PR. 610, and said: "I am aware of some decisions tending to sustain the view adopted by the court, but I do not think such a practice a proper one to be followed and adopted in this state to the extent indicated in the opinion of the court."

611. 1. *In Connecticut* the common counts can be used only when one or more of them furnish "an appropriate general statement of the cause of action." *Goodrich v. Stanton*, 71 Conn. 418. See also *Baxter v. Camp*, 71 Conn. 245. They can never follow a special count. *McNamara v. McDonald*, 69 Conn. 484.

Contra. — *Penn. Mut. L. Ins. Co. v. Conoughy*, 54 Neb. 123, wherein the court held that the practice of adding a common count in a pleading is one not contemplated by the code.

- 613.** 17. Evidence. — See note 1.
614. 18. Anticipating Defense. — See note 2.
615. Payment. — See note 4. See also PAYMENT.
 19. Notice and Scierter. — See note 6.
616. 20. Ownership and Possession. — See note 1.
618. 21. Fraud. — See note 1.
 23. Value. — See note 3. See also AMOUNT IN CON-

TROVERSY.

24. Damages. — See note 4.

619. IV. SEPARATE STATEMENT OF SEVERAL CAUSES OF ACTION
 — 1. Introductory. — See note 1.

613. 1. *California*. — Simons v. Bedell, 122 Cal. 341.

Connecticut. — Connecticut Hospital v. Brookfield, 69 Conn. 1.

Idaho. — McLean v. Lewiston, (Idaho 1902) 69 Pac. Rep. 478.

Nebraska. — Jaques v. Dawes, (Neb. 1902) 92 N. W. Rep. 570; Blatcky v. Miller, (Neb. 1902) 91 N. W. Rep. 523; Markey v. School Dist. No. 18, 58 Neb. 479.

New York. — Waite v. Aborn, 60 N. Y. App. Div. 521.

Ohio. — Kerr v. Bellefontaine, 59 Ohio St. 446.

614. 2. Little Nestucca Road Co. v. Tillamook County, 31 Oregon 1, *cit- ing* 4 ENCYC. OF PL. AND PR. 614. See also the following cases:

California. — Concannon v. Smith, 134 Cal. 14, wherein it was said that while the plaintiff is not bound to anticipate defenses that might be pleaded to his action, his doing so will not render his complaint bad on general demurrer.

Indiana. — Western Union Tel. Co. v. Henley, 157 Ind. 90; Sutton v. Todd, 24 Ind. App. 519, holding that while a plaintiff is not bound to anticipate a defense, yet if he states a valid defense without avoiding it, he destroys his cause of action.

Kansas. — Frick Co. v. Carson, 3 Kan. App. 478.

615. 4. "Wholly Owing and Unpaid" is an allegation equivalent to a direct allegation of nonpayment. Tomlinson v. Ayres, 117 Cal. 568.

6. See Western Union Tel. Co. v. Henley, 157 Ind. 90.

Scierter. — The rule that a plaintiff is not required to allege matters which are peculiarly within the knowledge of a defendant has no application where the matter is such that its affirmation is essential to the apparent or *prima*

facie right of recovery of the party pleading. Reed v. Louisville, etc., R. Co., 104 Ky. 603. See also Chesapeake, etc., R. Co. v. Venable, (Ky. 1901) 63 S. W. Rep. 35.

616. 1. See McKee v. Jessup, 62 N. Y. App. Div. 143.

Nebraska Statute. — Under Code Civ. Pro. Neb., § 129, relating to an action brought upon an instrument for the payment of money only, a petition drawn by the original party to the instrument in suit, or the owner by assignment or indorsement, is sufficient, without any averment of extrinsic facts to show the right or title to it. Pollock v. Stanton County, 57 Neb. 399.

A Right Dependent upon Present Ownership is not alleged by alleging the ownership at a time past. Erwin v. Central Union Telephone Co., 148 Ind. 365.

618. 1. Nagel v. Lindell R. Co., 167 Mo. 89; Schiffman v. Schmidt, 154 Mo. 204; H. B. Claffin Co. v. Simon, 18 Utah 153.

3. **When Allegation Unnecessary**. — In an action to recover the consideration for a deed or grant, the failure of the plaintiff to allege in his complaint that such deed or grant is of no value is immaterial, when facts are alleged from which this appears as a necessary conclusion. Richter v. Union Land, etc., Co., 129 Cal. 367.

4. Luby v. Bennett, 111 Wis. 613, *cit- ing* 4 ENCYC. OF PL. AND PR. 618. See also Toledo Electric St. R. Co. v. Tucker, 7 Ohio Cir. Dec. 169.

619. 1. *Alabama*. — Clements v. Alabama G. S. R. Co., 127 Ala. 166; Henry v. Carlton, 113 Ala. 636, hold- ing that a plaintiff may aver a trespass upon land and a trespass upon the person in the same count, and recover for both, but only when the averments

- 619.** 2. Mode of Separation. — See note 3.
620. 3. Each Count to Be Complete. — See note 1.
 Matters of Mere Inducement. — See note 2.
622. Indiana. — See note 1.
623. V. PRAYER. — See PRAYERS FOR RELIEF.

are such as to show but one transaction.

Connecticut. — *Maisenbacker v. Concordia Soc.*, 71 Conn. 369, holding that "several causes of action may be stated in a single count when such causes of action are not separate and distinct from each other; that is, separable from each other 'by some distinct line of demarcation.'"

Iowa. — *Chicago, etc., R. Co. v. Haywood*, 102 Iowa 392, in which case it was held that if more than one cause of action is pleaded in a separate count or division, and no objection is made, recovery may be had on all, but in such event it must appear that this was intended.

New York. — *DeLery v. Rogers*, 71 N. Y. App. Div. 99; *Egan v. Butterworth*, 66 N. Y. App. Div. 480; *Westheimer v. Musliner*, 46 N. Y. App. Div. 96; *Waite v. Sabel*, 44 N. Y. App. Div. 634; *Scharf v. Warren-Scharf Asphalt Paving Co.*, 5 N. Y. App. Div. 439; *Overbagh v. Oathout*, 90 Hun (N. Y.) 506; *Farrington v. Muchmore*, (Supm. Ct. Spec. T.) 68 N. Y. Supp. 857.

Texas. — But see *Kleinsmith v. Hamlin*, (Tex. Civ. App. 1901) 60 S. W. Rep. 994.

Utah. — *Johnston v. Meaghr*, 14 Utah 426, holding that the plaintiff cannot, in the same count, rely upon two or more distinct matters, each of which, taken independently of the other, amounts to a good cause of action.

619. 3. Paragraphs. — A complaint purporting to set out in a separate paragraph "a separate and second cause of action," but which in fact contains but one cause of action, will be sustained

and such words disregarded. *Murray v. Murray*, 115 Cal. 266.

Defendant's Remedy. — Where a petition contains several causes of action, the trial court should, on motion of the defendant, require them to be separately numbered. *Building, etc., Assoc. v. Cameron*, 48 Neb. 124.

620. 1. *Hatfield v. Sisson*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 255; *Cooper v. Portner Brewing Co.*, 112 Ga. 894, in each of which cases the court cited 4 ENCYC. OF PL. AND PR. 620. In the latter case it was held that each count must set forth a complete cause of action in distinct and orderly paragraphs, numbered consecutively, and not referring to any other count in any way for the purpose of making paragraphs of the latter a part of the former by adoption or reference. See also *Wallace v. Jones*, 68 N. Y. App. Div. 191; *H. B. Claflin Co. v. Simon*, 18 Utah 153.

2. *Aulbach v. Dahler*, (Idaho 1896) 43 Pac. Rep. 322; *Realty Revenue Guaranty Co. v. Farm, etc., Pub. Co.*, 79 Minn. 465.

Form of Objection. — A repetition of parts of one cause of action merely by reference thereto in other causes of action separately stated cannot be objected to upon a general demurrer. *Sly v. Palo Alto Gold Min. Co.*, 28 Wash. 485.

A Written Agreement once set forth in the petition need only be referred to clearly and distinctly in stating a second cause of action. *Ramsey v. Johnson*, 7 Wyo. 392.

622. 1. *Corbey v. Rogers*, 152 Ind. 169.

CONDITIONS PRECEDENT.

- 628. II. OF PLEADING OF PERFORMANCE IN GENERAL — 1.**
Necessity for Pleading. — See notes 1, 2.
629. 2. Excuses for Nonperformance — In General. — See note 2.
630. Repudiation of Contract. — See note 1.
631. Waiver of Performance. — See notes 2, 3.
632. 3. How Pleased — a. AT COMMON LAW — In General. — See note 1.
633. b. UNDER STATUTES. — See note 3.

628. 1. Little Nestucca Road Co. v. Tillamook County, 31 Oregon 2, citing 4 ENCYC. OF PL. AND PR. 628, and supporting the text thereof. See also Schleicher v. Montgomery Light Co., 114 Ala. 228.

2. Boden v. Maher, 95 Wis. 65, citing 4 ENCYC. OF PL. AND PR. 627. See also the following cases:

Alabama. — Ingram v. Bussey, 133 Ala. 539.

California. — Laffey v. Kaufman, 134 Cal. 391.

Georgia. — Lester v. Stephens, 113 Ga. 495.

Illinois. — Nordlinger v. Ostagat, 66 Ill. App. 661.

Indiana. — Magic Packing Co. v. Stone-Ordean Wells Co., 158 Ind. 538; Gullett v. Gullett, 28 Ind. App. 670.

Missouri. — Ricketts v. Hart, 73 Mo. App. 647.

Nebraska. — William Deering Co. v. Claypool, (Neb. 1902) 89 N. W. Rep. 373; Moore v. Omaha L. Assoc., 62 Neb. 497.

New York. — Sullivan v. Fraternal Societies, etc., Union, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 578.

Oregon. — Faber v. Hougham, 36 Oregon 428.

629. 2. People's Bldg., etc., Assoc. v. Reynolds, 17 Ind. App. 453; Meech v. National Acc. Soc., 50 N. Y. App. Div. 144, both cases citing 4 ENCYC. OF PL. AND PR. 629. See also Ingram v. Bussey, 133 Ala. 539; Ricketts v. Hart, 73 Mo. App. 647; William Deering Co. v. Claypool, (Neb. 1902) 89 N. W. Rep. 373.

630. 1. Horner v. Clark, 27 Ind.

App. 6; Smith v. Wetmore, 167 N. Y. 234; Bowen v. Young, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 547; Green v. American Cotton Co., 112 Fed. Rep. 743.

Notice Renouncing Contract. — Berthold v. St. Louis Electric Constr. Co., 165 Mo. 280; Sloss Marblehead Lime Co. v. Smith, 5 Ohio Cir. Dec. 79; Davis v. Grand Rapids School-Furniture Co., 41 W. Va. 717.

631. 2. Supporting the text: Crafton v. Carmichael, (Ind. App. 1902) 64 N. E. Rep. 627; Stern v. McKee, 70 N. Y. App. Div. 142; Love v. Rempe, (Tex. Civ. App. 1898) 44 S. W. Rep. 681.

3. Long Creek Bldg. Assoc. v. State Ins. Co., 29 Oregon 569, citing 4 ENCYC. OF PL. AND PR. 631. See also the following cases:

Illinois. — Monahan v. Fitzgerald, 62 Ill. App. 192.

Indiana. — New Telephone Co. v. Foley, 28 Ind. App. 418. See also Supreme Tribe of Ben Hur v. Hall, 24 Ind. App. 316.

Nebraska. — Anders v. Life Ins. Clearing Co., 62 Neb. 585.

New York. — Tribune Assoc. v. Eisner, etc., Co., 70 N. Y. App. Div. 172; Schnaier v. Nathan, 31 N. Y. App. Div. 225; Keeler v. Fischer-Hansen, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 324.

632. 1. Laclede Constr. Co. v. Tudor Iron Works, 169 Mo. 137.

633. 3. Vice v. Brown, 22 Ind. App. 345; Darnell v. Keller, 18 Ind. App. 103; Cupples v. Alamo Irrigation, etc., Co., 7 Kan. App. 692; Mil-

634. See note 1.

635. *Specific Averment Not Prohibited.* — See note 2.

III. PARTICULAR INSTANCES OF CONDITIONS PRECEDENT—

1. *Arising in Agreement* — *a.* ANTECEDENT CONSIDERATION. — See note 4.

b. MUTUAL COVENANTS. — See notes 5, 6.

636. *d.* CONCURRENT ACTS — TENDER — *In General.* — See note 4.

638. See note 1.

640. *f.* NOTICE AND PROOFS OF LOSS IN CONTRACTS OF INSURANCE — *In General.* — See notes 3, 4.

641. See note 1.

643. *g.* CERTIFICATES OF ARCHITECTS AND ENGINEERS. — See notes 2, 3.

644. *Pleading Excuses.* — See note 1.

645. *h.* REFERENCE TO UMPIRE OR TO ARBITRATORS. — See note 2.

i. CONTRACT TO PERFORM WORK SATISFACTORILY. — See note 4.

646. *f.* PERFORMANCE UPON CONTINGENCY. — See note 1.

k. DEMAND. — See note 2.

647. 2. *Arising by Implication of Law* — *a.* DEMAND OR REQUEST GENERALLY. — See notes 1, 2.

waukeec Mechanics' Ins. Co. v. Winfield, 6 Kan. App. 527; *Anders v. Life Ins. Clearing Co.*, 62 Neb. 585.

634. 1. *Cupples v. Alamo Irrigation, etc., Co.*, 7 Kan. App. 692, *citing* 4 ENCYC. OF PL. AND PR. 634. See also *Vail v. Pennsylvania F. Ins. Co.*, 67 N. J. L. 422.

635. 2. *Kenney v. Bevilheimer*, 158 Ind. 653.

4. *Faber v. Hougham*, 36 Oregon 428, *quoting* 4 ENCYC. OF PL. AND PR. 635. See also *Ricketts v. Hart*, 73 Mo. App. 647.

5. *Laffey v. Kaufman*, 134 Cal. 391; *Sayre v. Mohny*, 35 Oregon 141; *Eberz v. Heisler*, 12 Pa. Super. Ct. 388.

6. *Laffey v. Kaufman*, 134 Cal. 391; *Eberz v. Heisler*, 12 Pa. Super. Ct. 388. See also *Madison First Nat. Bank v. Spear*, 12 S. Dak. 108.

636. 4. *Pursley v. Good*, 94 Mo. App. 382.

638. 1. *Bowen v. Young*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 547.

640. 3. *California Sav. Bank v. American Surety Co.*, 87 Fed. Rep. 118, *citing* 4 ENCYC. OF PL. AND PR. 640.

4. *Meech v. National Acc. Soc.*, 50 N. Y. App. Div. 144.

641. 1. *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296; *Meech v. National Acc. Soc.*, 50 N. Y. App. Div. 144, both cases *citing* 4 ENCYC. OF PL. AND PR. 641.

643. 2. *Compare Happel v. Marasco*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 314.

3. *McConnell v. Hewes*, 50 W. Va. 33, *citing* 4 ENCYC. OF PL. AND PR. 643. See also *Essex v. Murray*, (Tex. Civ. App. 1902) 68 S. W. Rep. 736; *Boden v. Maher*, 95 Wis. 65.

644. 1. *McConnell v. Hewes*, 50 W. Va. 33, *citing* 4 ENCYC. OF PL. AND PR. 644.

645. 2. *Ball v. Doud*, 26 Oregon 14. 4. *Childs Lumber, etc., Co. v. Page*, 28 Wash. 128, *citing* 4 ENCYC. OF PL. AND PR. 645.

646. 1. *Husenetter v. Gullikson*, 55 Neb. 32; *Inda v. McInnis*, 25 Nev. 235.

2. *Oswald v. Moran*, 8 N. Dak. 111, *citing* 4 ENCYC. OF PL. AND PR. 646, note 2.

647. 1. *Merrett v. Ritter*, 158 Ind. 491; *Bertha v. Sparks*, 19 Ind. App. 431. See also *Pakas v. Hollingshead*, (N. Y. City Ct. Gen. T.) 60 N. Y. Supp. 991.

648. *How Pleaded at Common Law.* — See note 2.

649. *b. DEMAND AND NOTICE IN ACTIONS ON COMMERCIAL PAPER* — (1) *Action Against Maker.* — See note 3.

650. (2) *Action Against Indorser.* — See note 2.

653. *d. NOTICE.* — See note 2.

655. *3. Statutory Conditions Precedent* — *a. GENERAL RULE.* — See note 1.

b. ACTION AUTHORIZED BY STATUTE. — See note 2.

657. See note 2.

c. PENAL ACTIONS. — See note 3.

d. PRESENTATION OF CLAIM TO EXECUTOR OR ADMINISTRATOR. — See note 4.

658. *f. PRESENTATION AND DISALLOWANCE OF CLAIM* — (1) *Generally.* — See note 2.

Action on Contract to Pay Property. — On a contract to pay property, an action for the value of the property cannot be maintained until there has been a demand made for the property and a refusal or failure to deliver it, unless it is made to appear that such demand would have been futile. *Ingram v. Bussey*, 133 Ala. 539.

Sufficiency of Allegation. — An allegation of a refusal implies a previous demand, and is equivalent to an allegation of a demand and a refusal. *Brossard v. Williams*, 114 Wis. 89.

Actions by Mortgagees for Conversion of Mortgaged Property. — See CHATTEL MORTGAGES.

647. 2. Supporting the text: *Citizens' Bank v. Los Angeles Iron, etc., Co.*, 131 Cal. 187; *Hanna v. McLaughlin*, 158 Ind. 292; *Johnson v. Anderson*, 60 Kan. 578; *National Bank v. Thurber*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 13.

Where Demand Would Be Useless. — *Whitcomb v. Stringer*, (Ind. App. 1902) 64 N. E. Rep. 636. See also *Ward v. Montgomery*, 67 Ill. App. 346.

Answer Dispensing with Demand. — *Thompson v. Whitney*, 20 Utah 1, *citing* 4 ENCYC. OF PL. AND PR. 648.

648. 2. *Arnold v. Hart*, 176 Ill. 442, *citing* 4 ENCYC. OF PL. AND PR. 648.

649. 3. *Erdman v. Hardesty*, 14 Colo. App. 395.

Note Payable on Demand. — *Slingo v. Steele-Wedeles Co.*, 82 Ill. App. 139.

650. 2. *Colorado.* — *Erdman v. Hardesty*, 14 Colo. App. 395.

653. 2. *Bank of Commerce v. Scofield*, 125 Cal. 156.

655. 1. *Casey, etc., Mfg. Co. v. Weatherly*, 101 Tenn. 318; *Chas.*

Baumbach Co. v. Laube, 99 Wis. 171; *Stern v. La Compagnie Generale Transatlantique*, 110 Fed. Rep. 996, in all of which cases 4 ENCYC. OF PL. AND PR. 655 was *cited*. See also *Howison v. Oakley*, 118 Ala. 215; *Caulfield v. Finnegan*, 114 Ala. 39.

2. *Crandall v. Lyon*, 188 Ill. 86; *Oswald v. Moran*, 8 N. Dak. 111, both cases *citing* 4 ENCYC. OF PL. AND PR. 655.

Action Against Officer for Failure to Release Property. — In an action against an officer for refusing to release property upon the tender of a bond as required by Code Ala. (1886), § 1474 (Civ. Code Ala. 1896, § 2717), an allegation in the complaint that the plaintiff tendered "a proper forthcoming bond to said constable as provided by section 2717 of the Code of Alabama" sufficiently alleges the tender of a bond for the amount, with the sureties, and with the conditions required by the statute. *Elrod v. Hamner*, 120 Ala. 463.

657. 2. *Crandall v. Lyon*, 188 Ill. 86.

3. *Oswald v. Moran*, 8 N. Dak. 111, *citing* 4 ENCYC. OF PL. AND PR. 657.

4. *Tichenor v. Wood*, (Ky. 1902) 70 S. W. Rep. 837; *Jones v. Rich*, 20 Mont. 289. *Contra*, *Durbrow v. Epens*, 65 N. J. L. 10.

658. 2. *Jewell v. Ithaca*, 72 N. Y. App. Div. 220, *affirming* 36 Misc. (N. Y.) 499; *Luke v. El Paso*, (Tex. Civ. App. 1900) 60 S. W. Rep. 363; *O'Donnell v. New London*, 113 Wis. 292.

Admissions of Answer. — Where the complaint alleges the presentation of a duly verified claim for damages to a city council, on a certain date, and sets

659. (2) *Notice of Injuries and Statement of Claim.* — See note 2.

660. See note 1.

g. PERFORMANCE, HOW PLEADED — Under Codes. — See note 4.

661. IV. OBJECTION FOR FAILURE TO PLEAD PERFORMANCE —

1. At Any Stage of Action. — See notes 1, 2.

3. General Demurrer. — See note 5.

4. Plea or Answer. — See note 6.

out the claim *in hac verba*, an admission in the answer that the claim described in the complaint was filed admits everything that goes to the description of the claim. *Durham v. Spokane*, 27 Wash. 615.

659. 3. Constitutionality of Statute. — A city charter provision requiring the filing of a statement of a claim against the city for personal injuries, as a condition precedent to the right to sue for such injuries, will be upheld so far as it is reasonable and tends to the due administration of justice. *Born v. Spokane*, 27 Wash. 719; *Durham v. Spokane*, 27 Wash. 615.

Nature of Requirement. — A requirement that a notice of a claim for injuries against a municipality must be filed with the municipal corporation within a certain time is more in the nature of a statute of limitations than of a condition precedent. *Troschansky v. Milwaukee Electric R., etc., Co.*, 110 Wis. 570.

660. 1. Parsons v. Ft. Worth, 26 Tex. Civ. App. 273.

4. Where the Objection Is Made for the First Time on Appeal, an allegation of the performance of a statutory condition precedent is sufficient if such performance may be inferred therefrom. *Colorado Fuel, etc., Co. v. Four Mile R. Co.*, 29 Colo. 90.

661. 1. O'Connor v. Fond du Lac, 109 Wis. 253.

On Appeal. — Where the performance of conditions precedent is essential to the cause of action, the objection that a complaint does not allege the performance of such conditions may be raised for the first time on appeal. *Ball v. Doud*, 26 Oregon 14.

2. Distinction Between Conditions Relating to Remedies and Those Relating to Rights. — Objection for failure to allege a condition precedent to a remedy is waived unless raised by demurrer or answer, whereas conditions precedent to rights go to the jurisdiction of the

court or to the cause of action, and hence an objection for failure to allege performance of such a condition may be raised at any stage of the proceedings. *O'Connor v. Fond du Lac*, 109 Wis. 253; *Wuerfler v. Grand Grove*, (Wis. 1902) 92 N. W. Rep. 433.

Sufficiency of Allegation — Objection for First Time on Appeal. — Where objection to the sufficiency of an allegation of the performance of a condition precedent is made for the first time on appeal, the allegation will be construed more liberally than it would be if it had been objected to below, and if performance may be inferred therefrom it will be held to be sufficient. *Colorado Fuel, etc., Co. v. Four Mile R. Co.*, 29 Colo. 90.

5. Oswald v. Moran, 8 N. Dak. 111, citing 4 ENCYC. OF PL. AND PR. 661. See also *O'Donnell v. New London*, 113 Wis. 292; *Parsons v. Ft. Worth*, 26 Tex. Civ. App. 273. Compare *Troschansky v. Milwaukee Electric R., etc., Co.*, 110 Wis. 570.

Insufficiency of Demand. — Where a demand is in fact alleged its insufficiency cannot be raised by demurrer, insufficiency of demand being a matter of defense. *Citizens' Bank v. Los Angeles Iron, etc., Co.*, 131 Cal. 187.

Actions for Assault and Battery — Rhode Island Statute. — An objection that a petition in a civil action for assault and battery does not allege that criminal proceedings have been instituted as required by Gen. Laws R. I., c. 233, § 16, cannot be raised by demurrer, but must be raised by a plea in abatement or upon the trial on the merits. *Harford v. Carroll*, 21 R. I. 515.

6. Grounds Not Specified in Plea. — Upon a plea of nonperformance of conditions precedent, only the matters specified in the plea as constituting the nonperformance will be considered. *Coffin v. Black*, 67 Ark. 219.

662. 7. Defect Cured by Verdict. — See note 3.

663. V. PLEA OR ANSWER TO ALLEGATION OF PERFORMANCE —
Under Codes — See note 1.

Replication to Plea of Nonperformance.
— Where the defendant pleads the nonperformance by the plaintiff of conditions precedent, the plaintiff may reply by alleging facts showing that such nonperformance was attributable to the defendant. *Western Assur. Co. v. Hall*, 120 Ala. 547.

662. 3. Performance Proved.— Sayre
v. Mohney, 35 Oregon 141.

663. 1. Kansas. — Under Gen. Stat. Kan. (1889), § 4205 (Gen. Stat. 1897, c. 95, § 122), the performance of conditions precedent may be alleged generally, and such allegations cannot be controverted by a general denial. The defendant must set out specifically the condition relied on by him, and the breach thereof. *Kahnweiler v. Phenix Ins. Co.*, (C. C. A.) 67 Fed. Rep. 483.

CONFESSION AND AVOIDANCE.

664. I. DEFINITION. — See note 2.

665. II. REQUISITES AS TO SUBJECT-MATTER — 1. In General. — See note 1.

2. Plea in Discharge — a. DEFINITION. — See note 2.

b. IN ACTIONS EX CONTRACTU. — See note 3.

666. 3. Plea in Justification or Excuse — a. DEFINITION. — See note 2.

b. TECHNICAL REQUIREMENTS. — See notes 1, 2.

668. c. APPLICATION TO ACTIONS EX CONTRACTU AND EX DELICTO. — See note 4.

669. III. REQUISITES AS TO QUALITY — 1. General Rule. — See note 1.

664. 2. De Lissa v. Fuller Coal, etc., Co., 59 Kan. 319 [*citing* 4 ENCYC. OF PL. AND PR. 664 *et seq.*]; **Willets Mfg. Co. v. Chosen Freeholders,** 60 N. J. L. 29.

665. 1. Nichols v. Cecil, 106 Tenn. 455.

2. Nichols v. Cecil, 106 Tenn. 455.

3. Accord and Satisfaction. — **Snyder v. Witt,** 99 Tenn. 618.

Arbitrament. — **Gardner v. Newman,** (Ala. 1902) 33 So. Rep. 179, holding that the award given under an arbitrament is conclusive and operates by way of estoppel on the parties, and may be pleaded in bar whether the award is made under a statute or under the common law.

Payment. — **Ketelman v. Chicago Brush Co.,** (Neb. 1902) 91 N. W. Rep. 282; **Connecticut Mut. L. Ins. Co. v. Dunscomb,** 108 Tenn. 724; **Nichols v. Cecil,** 106 Tenn. 455.

666. 2. Nichols v. Cecil, 106 Tenn. 455 [*citing* 4 ENCYC. OF PL. AND PR. 666]; **Willets Mfg. Co. v. Chosen Freeholders,** 60 N. J. L. 29.

If the plea does not, by fair intentment, confess the doing of the acts complained of, it is bad as a justification. **Willets Mfg. Co. v. Chosen Freeholders,** 60 N. J. L. 29.

In pleading justification, it should appear by direct averment or by necessary implication from the facts alleged that the acts justified are those complained of. **Pyle v. Peyton,** 146 Ind. 90.

Avoidance in Law. — **Nichols v. Cecil,** 106 Tenn. 455.

667. 1. Home F. Ins. Co. v. Johansen, 59 Neb. 349 [*citing* 4 ENCYC. OF PL. AND PR. 667]; **Barker v. Barth,** 88 Ill. App. 23; **Jackson v. Independent School Dist.,** 110 Iowa 313; **Johnson v. Hesser,** 61 Neb. 631; **Willets Mfg. Co. v. Chosen Freeholders,** 60 N. J. L. 29; **Snyder v. Witt,** 99 Tenn. 618.

Sufficient Confession. — It is sufficient where the plea confesses by using the words "if plaintiffs have any cause of action it is," etc. **Snyder v. Witt,** 99 Tenn. 618.

2. Baker v. Sears, 2 Kan. App. 617; **Hanson v. Diamond Iron Min. Co.,** (Minn. 1902) 92 N. W. Rep. 447; **White v. Eddy,** 19 R. I. 108; **Geo. R. Dickinson Paper Co. v. Mail Pub. Co.,** (Tex. Civ. App. 1895) 31 S. W. Rep. 1083.

Implied Confession. — Under the common-law rule that whatever is not denied is confessed, there may be an implied confession. **Snyder v. Witt,** 99 Tenn. 618.

668. 4. In Trespass to Real Property, a plea that seeks to justify an entry must admit it either expressly or tacitly. **Willets Mfg. Co. v. Chosen Freeholders,** 60 N. J. L. 29.

669. 1. Fish v. Farwell, 160 Ill. 236; **Corrigan v. Rockefeller,** 8 Ohio Dec. 14.

If the Plea Does Not Give Color, it is demurrable. **Wiley v. National Wall Paper Co.,** 70 Ill. App. 543.

671. IV. REQUISITES AS TO FORM — 1. Generally. — See note 4.

672. 2. Conclusion. — See note 1.

V. REPLICATION. — See note 4.

In Trespass Quare Clausum Fregit. — Willets Mfg. Co. v. Chosen Freeholders, 60 N. J. L. 29.

671. 4. Willets Mfg. Co. v. Chosen Freeholders, 60 N. J. L. 29.

672. 1. Griffith v. Adams, 95 Md. 170.

Verification. — There is nothing in the nature or effect of a plea of discharge in insolvency which can take it out of the operation of the provisions requiring a verification. Griffith v. Adams, 95 Md. 170.

A plea setting up in bar an adjudication in bankruptcy prior to the commencement of the suit and that the cause of action declared upon accrued to the plaintiff prior to such adjudication is bad where it concludes to the

country instead of with a verification. Elsbree v. Burt, (R. I. 1902) 53 Atl. Rep. 60.

4. Where an action was brought for breach of warranty in the sale of a machine, and the defendant pleaded as a settlement and a waiver that the plaintiff gave a note after knowledge of the workings of the machine, and no reply was filed, it was held that only the fact of settlement was in issue, and if the plaintiff wished to show that the defendant requested him to hold the machine for a longer trial, he should have replied by admitting the facts and pleading in avoidance the request to hold the machine. Kinkead v. McCormick Harvesting Mach. Co., 106 Iowa 222.

CONSOLIDATION OF ACTIONS.

676. III. AT COMMON LAW AND UNDER CODES — 1. Power to Consolidate Inherent Power. — See note 1.

Codes. — See note 2.

677. 2. Conditions Essential at Common Law. — See note 1.

676. 1. Power to Consolidate Independently of Statutes. — In *Aultman Co. v. Ferguson*, 8 S. Dak. 458, *citing* 4 ENCYC. OF PL. AND PR. 676, the court said: "Independently of statutes, it would seem that courts ought not, by stipulation of counsel, to be deprived of their inherent power 'to make orders which will expedite business, and prevent costs and a multiplicity of suits, when one action will answer the purposes of justice.'" See also *White v. Interstate Bldg., etc., Assoc.*, 106 Ga. 146; *Horne v. Harness*, 18 Ind. App. 214; *Field v. Lang*, 89 Me. 454.

But an action which is improperly brought, and of which the court has no jurisdiction, cannot be consolidated with a pending action. *Willard Mfg. Co. v. Tirney*, 130 N. Car. 611.

On Probate of One of Two Wills. — On appeal to the Superior Court from orders of the Court of Ordinary admitting to probate one of two wills purporting to be the last will of a testatrix and refusing to probate the other, the question involved in the two cases being which, if either, was the last will of the testatrix, it was held that, in view of the complications which might arise from separate trials and the facility with which the whole matter might be determined by a consolidation of the two cases, each duly numbered and docketed, the trial judge had discretion to issue an order consolidating them, and in this way dispose of all issues involved by a judgment binding and conclusive upon all parties. *Roulett v. Mulherin*, 100 Ga. 591.

To Remove Cloud on Title and Foreclose Mortgage. — It is proper to consolidate the suit of an administrator to remove a cloud from the title to property by reason of a mortgage and a suit of the mortgagee to foreclose the mortgage.

Phillips v. Watkins Land Mortg. Co., 90 Tex. 195.

2. Smith v. Smith, 22 Colo. 480, which case was decided under Mills's Annot. Code Colo. (1896), § 20, the court *citing* 4 ENCYC. OF PL. AND PR. 676. See also the following cases:

Arkansas. — *Meehan v. Watson*, 65 Ark. 216.

New York. — *American Grocery Co. v. Flint*, 5 N. Y. App. Div. 263.

Texas. — *Carpenter v. Hannig*, (Tex. Civ. App. 1896) 34 S. W. Rep. 774; *Corbett v. Provident Nat. Bank*, 23 Tex. Civ. App. 602.

Wisconsin. — *Gross v. Milwaukee Mechanics' Ins. Co.*, 92 Wis. 656.

Where Different Land Titles Are Involved in two suits between the same parties, the fact that the plaintiff's title to the tracts sued for is not the same in both suits affords no reason why the title to both tracts should not be litigated in one suit under the order of consolidation, the charge of the court distinctly indicating to the jury the difference between such titles. *Mixon v. Farris*, 20 Tex. Civ. App. 253.

When Statutory Authority Necessary. — A consolidation of two proceedings which are not of exactly similar scope should not be attempted in the absence of express statutory authority and jurisdiction. *Matter of Wood*, (Surrogate Ct.) 34 Misc. (N. Y.) 209.

677. 1. Eagle Gold Min. Co. v. Bryarly, 28 Colo. 262; *Van Laer v. Kansas Triphammer Brick Works*, 56 Kan. 545.

South Dakota. — Where several parties appealed from the order of a town board relative to the laying out of a highway, it was held that a refusal of the court to sustain a motion to consolidate the several cases was not error, the parties to the appeals being differ-

678. 4. When Courts Will Refuse — a. OUSTER OF JURISDICTION. — See note 2.

680. 5. Actions in Different Courts. — See note 1.

683. 6. Proceedings for Consolidation — c. AT WHAT STAGE MOTION TO BE MADE — Under Codes. — See note 2.

7. As Exercise of Discretion — a. IN GENERAL. — See note 4.

ent. *Williams v. Turner Tp.*, 15 S. Dak. 182.

Action Against Garnishee and Main Action in Attachment. — An action against a garnishee cannot be consolidated with the main action in attachment in which the garnishee was summoned. *Adler-Goldman Commission Co. v. Bloom*, 62 Ark. 616.

Suit in Equity and Action at Law. — A suit in equity by grantors to set aside a deed and an action at law by the grantee sounding in damages cannot be consolidated though growing out of the same transaction. *Anderson v. Gaines*, 156 Mo. 664.

Numerous Suits for Delinquent Taxes. — Where the county attorney filed twenty-two actions in the District Court against "unknown owners" for delinquent taxes, penalties, etc., against twenty-two tracts of land separately assessed, and after notice by publication the owners intervened, setting up ownership of all the surveys, and moved for a consolidation, it was held that there was no error in a refusal of consolidation, as the property had been separately assessed; but that a consolidation would have followed as a matter of right had it appeared that all the surveys had been assessed together in the name of the interveners, or to "unknown owners." *Watkins v. State*, (Tex. Civ. App. 1901) 61 S. W. Rep. 532.

Where Causes Are Intimately Connected. — It is not error to consolidate an action to recover the statutory penalty for charging and receiving usurious interest with an action to settle a partnership, although the two actions are such as should not ordinarily be joined, when it appears that the payments charged to be usurious are sums credited to the plaintiff by sales of partnership cattle and that the two causes are intimately connected. *Herring v. Herring*, (Tex. Civ. App. 1899) 51 S. W. Rep. 865.

678. 2. Want of Jurisdiction. — In *Gillin v. Canary*, (Supm. Ct. App. T.) 26 Civ. Pro. (N. Y.) 230, citing 4 ENCYC.

OF PL. AND PR. 678, the court said: "If, notwithstanding the consolidation, the court below had awarded judgment within the statutory limit, a different question would have been presented. The fact that the consolidation was had on the application of the defendant, and that he gained a benefit from it, however much it may justify unfavorable comment, does not estop him from raising the question of jurisdiction; for whenever there is a want of authority to hear and determine the subject-matter of the controversy, or to render the judgment, an adjudication upon the merits is a nullity."

680. 1. Necessary Conditions. — But as an essential condition of the exercise of this power, it must appear that the two actions are against the same defendants as well as on causes of action which may be joined. *Isear v. Daynes*, 1 N. Y. App. Div. 557.

City Court of New York City. — Under Code Civ. Pro. N. Y., §§ 817, 818, 3347, the City Court of the City of New York has the power to remove to itself and consolidate with an action pending there another action brought in the Municipal Court of such city between the same parties, where the causes are identical in nature and capable of proof by the same evidence. *Curley v. F. & M. Schaefer Brewing Co.*, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 131.

683. 2. Eckenroth v. Egan, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 508.

When Motion Should Be Made. — If a consolidation is desired, a motion therefor should be made before the trial and judgment. It is too late after the trial, even if proper in the first instance, when no good reason appears for not urging it sooner. *Needham Piano, etc., Co. v. Hollingsworth*, (Tex. Civ. App. 1897) 40 S. W. Rep. 750.

4. Consolidation by Consent for Purpose of Trying Together. — Two suits in favor of the same plaintiffs, pending in the same court and against different defendants, may, by consent of counsel, be consolidated to the extent of trying

686. See note 1.

687. b. USUALLY ALLOWED WHEN NO DEFENSE INTENDED. — See note 1.

688. c. NOT REVIEWABLE ON APPEAL. — See note 1.

689. IV. CONSOLIDATION IN EQUITY — 1. Power of Court in General. — See note 1.

690. 2. When Consolidation Allowed — a. IN GENERAL. — See note 1.

692. 3. Identity of Parties Not Essential. — See note 1.

them together before the same jury and at the same time, when the issues involved in them and the evidence relative thereto are so nearly identical as to render a consolidation and trial together practical. *Walker v. Conn.*, 112 Ga. 314.

Where Affidavit Develops Issues. — By Code Civ. Pro. N. Y., § 817, an order of consolidation is discretionary with the court; and an order consolidating two actions on motion by the defendants on the strength of affidavits, which sufficiently set forth the issues to be raised, prior to the interposition of answers, is a proper exercise of the court's discretion. *Perkins v. Merchants' Lithographing Co.*, (N. Y. City Ct. Gen. T.) 21 Misc. (N. Y.) 516.

Where No Costs Have Attached. — *Bates's Annot. Stat. Ohio* (1897), § 5120, providing for consolidation of actions, is intended simply to save costs, and not to give to either party any advantage in the prosecution of either action. Where no costs have attached, no complaint can be made of the court's refusal to order a consolidation. *Brigel v. Creed*, 65 Ohio St. 40.

686. 1. Jones v. Witousek, 114 Iowa 14, *citing* 4 ENCYC. OF PL. AND PR. 684 *et seq.*

687. 1. Consolidation Denied Where Different Questions Are Involved. — In *Mason v. Evening Star Newspaper Co.*, 35 Misc. (N. Y.) 77, the court said: "To justify a consolidation of two actions, it is not sufficient to show that they are between the same parties and that the causes of action are such as may be joined in one complaint. So much must be shown, at all events, and until it is shown no occasion arises for the court to exercise its discretion. In order to call into operation the discretion of the court in favor of the motion to consolidate, the defendant must go further, and show either that no defense is intended or that the questions which will arise are substantially the

same in both actions. When different questions are to be litigated, it is usual for the court to deny the application."

688. 1. Wolters v. Rossi, 126 Cal. 644; *Mills v. Paul*, (Tex. Civ. App. 1895) 30 S. W. Rep. 242.

Failure to Move for Severance. — Even where the consolidation was improper in the first instance, the appellee is in no position to complain of it after more than twelve months have elapsed since the entry of the order without a motion on his part for a severance. *Traders' Nat. Bank v. Fry*, 14 Tex. Civ. App. 403.

Failure to Object. — Consolidation of suits being a matter of practice and resting largely within the discretion of the trial judge, the party who complains in reference thereto should show the exercise of reasonable diligence on his part to prevent that of which he complains. One seeking to set aside an order of consolidation, made at another term some seven months before, ought to show that he objected and protested against the order when made, or present a reasonable excuse for failing to object. *Scott v. Farmers', etc., Nat. Bank*, (Tex. Civ. App. 1902) 66 S. W. Rep. 485.

689. 1. Drye v. Grundy, (Ky. 1896) 35 S. W. Rep. 119; *McKittrick v. McKittrick*, 43 W. Va. 117.

When Duty of Court to Make Order. — Even in the absence of a motion for consolidation by either party, when it comes to the knowledge of a court of equity that the subject-matter of two suits is substantially identical, it is not erroneous, but commendable, in the court to order a consolidation. *India Rubber Co. v. C. J. Smith, etc., Co.*, 75 Ill. App. 222.

690. 1. Taylor v. Standard Brick Co., 66 Ohio St. 360, *citing* 4 ENCYC. OF PL. AND PR. 690.

692. 1. Identity of Subject-matter. — The important inquiry in equity is with respect to the identity of the

695. 6. Consolidation of Law and Equity Causes. — See note 2.

696. VI. CONSOLIDATION OF APPEALS — 1. Suits on Distinct Causes of Action. — See note 3.

698. VII. CONSOLIDATION IN FEDERAL COURTS — 1. General Rule. — See note 1.

subject-matter. The aim is to bring all parties in interest before the court, and a consolidation of suits will be had without a special regard to the identity of the parties. *P. Cox Shoe Co. v. Adams*, 105 Iowa 402, *citing* 4 ENCYC. OF PL. AND PR. 692.

Arizona. — Where it appears that two suits relate to the same subject-matter and where the record shows that the plaintiffs in the one suit became on their own motion interveners in the other, the court may order the consolidation of the two suits although they are not "by the same plaintiff against the same defendant," nor "by the same plaintiff against several defendants," as provided by Rev. Stat. Ariz. (1887), par. 918 (Rev. Stat. Ariz. 1901, par. 1564). Such consolidation is fairly within the discretion conferred by Rev. Stat. Ariz. (1887), par. 727 (Rev. Stat. Ariz. 1901, par. 1345), providing that "the court may determine any controversy between parties before it, when it can be done without prejudice to the rights of the others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in." *London, etc., Bank v. Abrams*, (Ariz. 1898) 53 Pac. Rep. 588.

Illinois — *Rights of Various Lienholders Affected.* — *Springer v. Kroeschell*, 161 Ill. 358.

Ohio. — *Bates's Annot. Stat. Ohio* (1897), § 5120, is mandatory that on motion of the defendant the several actions shall be consolidated, if it appear that the actions, not causes of action, could have been and should be joined. The power of consolidation is not confined to identity of parties and causes of action which might be joined in the same petition under the rules of pleading, but it authorizes the consolidation of all actions which might be joined, either at law or in equity, for convenience of trial, for preventing multiplicity of suits, or to save costs. *Taylor v. Standard Brick Co.*, 66 Ohio St. 360, *citing* 4 ENCYC. OF PL. AND PR. 690, 692.

695. 2. Consolidation of Actions at Law and Amendment into Bill in Equity. — When, through a misapprehension, plaintiffs have brought three separate actions at law to enforce a cause of action which can be enforced only by one bill in equity, the court has power to consolidate the actions and amend the consolidated action into a bill in equity. *Smith v. Butler*, 176 Mass. 38.

Equitable Action to Set Aside Tax Deed and Forcible Detainer. — Under Code Iowa 1873, §§ 2630, 2734 (Code Iowa 1897, §§ 3545, 3644), an equitable action to set aside a tax deed and permit redemption from a sale for taxes, and a suit for forcible entry and detainer of the real property involved in the former suit, though pending in the same court and at the same time, cannot be consolidated. *Hodowal v. Yearous*, 103 Iowa 32.

696. 3. *Hicks v. Walker*, 105 Ga. 480; *Erwin v. Ennis*, 104 Ga. 861; *Western Assur. Co. v. Way*, 98 Ga. 746; *Roach v. Baker*, 145 Ind. 330; *Mohr v. Cochran*, 20 Tex. Civ. App. 183.

698. 1. *The Eliza Lines*, (C. C. A.) 114 Fed. Rep. 307.

Creditors' Bill and Foreclosure Against Railroad. — The duty of the court to consolidate causes, where no one will be injured thereby, is plainly suggested by Rev. Stat. U. S., § 921. A common instance of the exercise of the power thereby granted is the consolidation of a creditors' bill and a foreclosure bill against the same insolvent railroad corporation. *Continental Trust Co. v. Toledo, etc., R. Co.*, 82 Fed. Rep. 642.

Suits in Equity and Actions at Law. — In *Toledo, etc., R. Co. v. Continental Trust Co.*, (C. C. A.) 95 Fed. Rep. 497, the court said: "Section 921, Rev. Stat. U. S., applies as well to suits in equity as suits at law. * * * Such consolidation is primarily but an expedient adopted for saving costs and delay. Each record is that of an independent suit, except in so far as the evidence in one is, by order of the court, treated as evidence in both. The consolidation does not change the rules of equity pleading, nor the rights of

699. VIII. TAXATION OF COSTS — 1. Power Is Discretionary. — See note 4.

701. IX. EFFECT OF CONSOLIDATION — 1. Where All Parties Consent. — See note 1.

702. 2. On Trial — a. IN GENERAL. — See note 2.

703. b. CHALLENGES. — See note 1,

the parties, as those rights must still turn on the pleadings, proofs, and proceedings in their respective suits." See also 4 ENCYC. OF PL. AND PR. 691.

699. 4. Statutory Costs Taxed in Each Case. — Where separate and distinct actions against separate and distinct persons and property have been brought, their consolidation for the convenience of the parties at the trial does not have the effect of making them one action in the sense that only one judgment should be entered, but separate judgments are required, and the statutory costs should be taxed in each of the cases. *Gray's Harbor Boom Co. v. McAmman*, 21 Wash. 465.

701. 1. Consolidation by Consent of Parties. — Where several cases pending at the same time in the lower court were tried as one, the same evidence, by consent, was received in all the cases, and in effect all were treated as one suit, it was held that they were for all practical purposes consolidated, although no formal order of consolida-

tion was entered, and that on appeal the suits should be treated as one case and as if an order of consolidation had been made, even though there was a departure from technical precision. *Bramell v. Adams*, 146 Mo. 70.

702. 2. Depositions Taken Before Consolidation. — Depositions taken in an action before consolidation may be received as evidence afterwards in the trial of several actions consolidated, where the parties to the actions and beneficially interested therein are the same and the causes of action might have been joined. It is immaterial in which action the depositions were originally taken. *Wolters v. Rossi*, 126 Cal. 644.

703. 1. Peremptory Challenges. — When actions are consolidated, each plaintiff and defendant is entitled to the number of peremptory challenges to which he would have been entitled had the cases been tried separately. *Connecticut Mut. L. Ins. Co. v. Hillmon*, (C. C. A.) 107 Fed. Rep. 834.

CONSPIRACY.

708. II. VENUE. — See notes 1, 2. See also **VENUE**.

709. III. PARTIES TO INDICTMENT — **Present Practice.** — See notes 2, 3.

710. See note 1.

711. IV. INDICTMENT (see also **INDICTMENTS, INFORMATION, AND COMPLAINTS**) — **1. General Allegations.** — See note 1.

712. 2. Purpose — *a.* **GENERALLY.** — See note 1.

713. See notes 1, 2.

c. **OBJECT OF CONSPIRACY OFFENSE BY STATUTE.** —

See note 4.

715. 4. Where Means Are Unlawful. — See note 1.

716. 5. Overt Acts — *a.* **GENERALLY.** — See note 2.

717. See note 3.

b. **BY STATUTE.** — See note 4.

718. 6. Joinder of Counts — *a.* **GENERALLY.** — See note 1.

708. 1. *State v. Turner*, 119 N. Car. 841. See also *Thompson v. State*, 106 Ala. 67.

2. *U. S. v. Greene*, 100 Fed. Rep. 941 [citing 4 ENCYC. OF PL. AND PR. 708]; *Com. v. Spencer*, 6 Pa. Super. Ct. 256.

709. 2. *State v. Slutz*, 106 La. 182, citing 4 ENCYC. OF PL. AND PR. 709.

Joinder of Husband and Wife. — It has been held that an indictment charging a husband and wife with conspiracy is bad, since they have not the capacity to conspire. *State v. Clark*, 9 Houst. (Del.) 536; *Com. v. Allen*, 24 Pa. Co. Ct. 65.

3. *State v. Slutz*, 106 La. 182, citing 4 ENCYC. OF PL. AND PR. 709.

710. 1. *State v. Slutz*, 106 La. 182, citing 4 ENCYC. OF PL. AND PR. 710.

711. 1. *Madden v. State*, 57 N. J. L. 324. See also *Bannon v. U. S.*, 156 U. S. 464.

712. 1. *Lipschitz v. People*, 25 Colo. 261, citing 4 ENCYC. OF PL. AND PR. 712.

713. 1. *State v. Gannon*, (Conn. 1902) 52 Atl. Rep. 727; *People v. Gilman*, 121 Mich. 187. *Contra*, *State v. Barr*, (N. J. 1898) 40 Atl. Rep. 772.

In *State v. Howard*, 129 N. Car. 584, it was held that the steps taken to ac-

complish the conspiracy need not be set out in the indictment.

2. *Lipschitz v. People*, 25 Colo. 261, citing 4 ENCYC. OF PL. AND PR. 712 *et seq.*

4. *State v. Huegin*, 110 Wis. 189.

Language of Statute. — In *Towne v. People*, 89 Ill. App. 258, the court said: "Whether in any case it is enough that the indictment is merely framed in the words of the statute, must depend upon whether the words of the statute so far particularize the offense as by their use alone to notify the accused of the precise offense charged upon him."

715. 1. *Haynes v. U. S.*, (C. C. A.) 101 Fed. Rep. 817; *U. S. v. Lackey*, 99 Fed. Rep. 952. See also *Mendenhall v. Stewart*, 18 Ind. App. 262.

716. 2. *State v. True Nell*, 79 Mo. App. 243.

717. 3. *State v. True Nell*, 79 Mo. App. 243.

4. *People v. Goslin*, 171 N. Y. 627.

718. 1. When the Several Counts Relate to the Same Transaction and the defendant might be guilty under each and all, an election will not be compelled. *Looney v. People*, 81 Ill. App. 370.

719. *b.* **DUPLICITY.** — See notes 3, 4.

720. **7. Certainty Required** — *a.* **GENERALLY.** — See note 2.

722. **Executed Conspiracy.** — See note 1.

723. *c.* **FOLLOWING LANGUAGE OF STATUTE.** — See note 3.

725. **V. SPECIFIC OFFENSES** — **1. Conspiracy to Cheat and Defraud** — *b.* **OVERT ACTS.** — See notes 3, 5.

727. **3. Conspiracy to Obstruct Justice** — **Proposed Means.** — See note 3. See also **OBSTRUCTING JUSTICE.**

728. **4. Strikes and Boycotts** — *b.* **INJUNCTION.** — See note 6.

729. **5. Conspiracy Against United States** — **Essential Ingredients.** — See note 2.

734. **IX. INSTRUCTIONS** (see also **INSTRUCTIONS**) — **Assumption of Facts.** — See note 6.

737. **XV. CIVIL ACTIONS** — **2. Allegation of Damage.** — See notes 1, 2.

719. **3. People v. Summers**, 115 Mich. 537; *Com. v. Quay*, 7 Pa. Dist. 723; *State v. Huegin*, 110 Wis. 189; *Martens v. O'Connor*, 101 Wis. 18; *U. S. v. Greene*, 115 Fed. Rep. 343.

4. *Martens v. O'Connor*, 101 Wis. 18; *U. S. v. Greene*, 115 Fed. Rep. 343.

720. **2. Allegation in Alternative.** — An indictment for conspiracy which averred that the conspiracy was to prevent one "from obtaining work or employment or continuing in his said work and employment" is not bad on account of being in the alternative, as the words "obtaining" and "continuing" when referring to "employment" convey a conjunctive meaning. *State v. Dyer*, 67 Vt. 690.

722. **1.** *U. S. v. Greene*, 100 Fed. Rep. 941, *citing* 4 ENCYC. OF PL. AND PR. 722.

723. **3. People v. Goslin**, 67 N. Y. App. Div. 16.

725. **3. State v. Huegin**, 110 Wis. 189; *Gantt v. U. S.*, (C. C. A.) 108 Fed. Rep. 61.

5. *American F. Ins. Co. v. State*, 75 Miss. 24, *citing* 4 ENCYC. OF PL. AND PR. 726.

Surplusage. — When a complaint charges conspiracy in the language of the statute, and a conspiracy to carry out a particular purpose in a particular way is also charged, accompanied by a statement of overt acts pursuant to the conspiracy, the latter part may be rejected as surplusage, but the two charges of conspiracy may be read together as charging a conspiracy of the nature indicated by the particular allegations as regards the method adopted for effecting the criminal purpose. *State v. Huegin*, 110 Wis. 189.

727. **3. People v. Bird**, 126 Mich. 631.

728. **6. U. S. v. Sweeney**, 95 Fed. Rep. 434.

729. **2. Requisite Allegations.** — Under Rev. Stat. U. S., § 5440, making it an offense for two or more persons to conspire to defraud the United States, allegations of the accomplishment of a conspiracy are unnecessary. The gist of the crime is conspiring, and a statement of the purpose and nature of the conspiracy is sufficient. *U. S. v. Greene*, 115 Fed. Rep. 343; *Gantt v. U. S.*, (C. C. A.) 108 Fed. Rep. 61; *Wright v. U. S.*, (C. C. A.) 108 Fed. Rep. 805; *U. S. v. Taffe*, 86 Fed. Rep. 113; *U. S. v. Benson*, (C. C. A.) 70 Fed. Rep. 591. But *compare U. S. v. Peuschel*, 116 Fed. Rep. 642.

734. **6.** In *State v. Bingham*, 42 W. Va. 234, it was held error to instruct the jury that if it finds as a fact the existence of a conspiracy, it is immaterial whether or not the party sustained the injury alleged, or that one of the conspirators was the aggressor.

737. **1.** *Ertz v. Produce Exch.*, 79 Minn. 140; *Bayles v. Vanderveer*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 207.

Instances of Sufficient Complaints. — In the following cases complaints alleging conspiracy were held sufficient as stating facts sufficient: *Hardy v. Trick*, 121 Mich. 251; *People v. Butler*, 111 Mich. 483; *Colyer v. Guilfoyle*, 47 N. Y. App. Div. 302; *Martens v. O'Connor*, 101 Wis. 18.

2. *Hundley v. Louisville, etc., R. Co.*, 105 Ky. 162; *Ertz v. Produce Exch.*, 79 Minn. 140; *Commercial Union Assur. Co. v. Shoemaker*, 63

738. 2. Allegation of Damage — In Action Against Corporation. — See note 3.

One Suit Sufficient. — See note 4.

4. Action on Case — a. GENERALLY. — See notes 6, 7.

739. See note 3.

Recovery Against One. — See note 5.

Neb. 173; *Silverman v. Doran*, (Supm. Ct. Eq. T.) 23 Misc. (N. Y.) 96.

Instances of Insufficient Complaint. — In the following cases complaints alleging conspiracy were held insufficient: *Lipschitz v. People*, 25 Colo. 261; *Toledo Electric St. R. Co. v. Toledo Consol. St. R. Co.*, 5 Ohio Cir. Dec. 11; *Lanyon v. Edwards*, (C. C. A.) 79 Fed. Rep. 580.

Alleging Extortion. — A complaint in an action for damages against persons alleged to have formed a conspiracy for the collection of money, must allege that the sum demanded by the conspirators was not due from plaintiff to them. *Schulten v. Bavarian Brewing Co.*, 96 Ky. 224.

738. 3. Compare *Beechley v. Mulville*, 102 Iowa 602; *Hathaway v. State*, 36 Tex. Crim. 261.

Alleging Acts of Agent. — A corporation may be held liable as a party to a conspiracy to defraud in a transaction outside the scope of its charter, and a complaint against it and its coconspirators to enforce such liabilities charging that the corporation and its codefendants made and consummated the fraudulent agreement, is not defective on demurrer for want of allegations as to who acted for the corporation in making such agreement

and as to special authority having been given it by its governing body in regard to the subject. *Zinc Carbonate Co. v. Shullsburg First Nat. Bank*, 103 Wis. 125.

The Certainty Necessary to set out the facts which induced the conspirators to conspire is not so great as the certainty required in setting out *res gesta*. *Baron v. Pittsburg Plate Glass Co.*, 10 Ohio Dec. 114, 7 Ohio N. P. 528. See also *McDonald v. Illinois Cent. R. Co.*, 187 Ill. 529.

4. Silverman v. Doran, (Supm. Ct. Eq. T.) 23 Misc. (N. Y.) 96 [*citing* 4 ENCYC. OF PL. AND PR. 738]; *Rourke v. Elk Drug Co.*, 75 N. Y. App. Div. 145.

6. Bingham v. Lipman, 40 Oregon 363; *Davis v. Johnson*, (C. C. A.) 101 Fed. Rep. 952, in each of which cases the court *cited* 4 ENCYC. OF PL. AND PR. 738.

7. Davis v. Johnson, (C. C. A.) 101 Fed. Rep. 952 [*quoting* 4 ENCYC. OF PL. AND PR. 738]; *Porter v. Mack*, 50 W. Va. 581.

739. 3. Davis v. Johnson, (C. C. A.) 101 Fed. Rep. 952, *quoting* 4 ENCYC. OF PL. AND PR. 739.

5. Compare *Martin v. Leslie*, 93 Ill. App. 44; *Cranfill v. Hayden*, 22 Tex. Civ. App. 656.

CONSTRUCTION OF PLEADINGS.

742. 1. GENERAL PRINCIPLES OF CONSTRUCTION — 1. Construed by Court. — See note 1.

2. Specific Statements Prevail Against General. — See note 2.

3. Technical Objections Not Encouraged. — See note 3.

744. 4. Ambiguous Expressions Construed to Support Pleading. — See note 1.

745. 6. Construed to Reach Real Intention. — See note 2.

746. 7. Nothing Unless Averred Assumed in Favor of Pleader. — See note 1.

8. Pleadings Construed as Entireties. — See note 2.

742. 1. Speeder Cycle Co. v. Teeter, 18 Ind. App. 474.

2. O'Connor v. Dils, 43 W. Va. 54 [citing 4 ENCYC OF PL. AND PR. 742]; *Patrick v. Colorado Smelting Co.*, 20 Colo. 268; *Carlson v. Presbyterian Board of Relief*, 67 Minn. 436.

3. Benolkin v. Guthrie, 111 Wis. 554; *Winkler v. Racine Wagon, etc., Co.*, 99 Wis. 184.

744. 1. Two Theories. — *Miller v. Miller*, 17 Ind. App. 605. See also THEORY OF THE CASE.

Where there is such a confusion of theories that the court cannot determine from the general scope of the petition upon which a recovery is sought, the complaint is insufficient. *Grentner v. Fehrenschild*, 64 Kan. 764.

745. 2. Benolkin v. Guthrie, 111 Wis. 554.

Where damages are necessarily inferable from the facts alleged, a statement of such facts sufficiently states the damages. *Luby v. Bennett*, 111 Wis. 613.

746. 1. But in construing pleadings courts may take judicial notice of a public law in determining whether the facts alleged are sufficient to constitute a cause of action. *Acker v. Richards*, 63 N. Y. App. Div. 305.

A material fact not alleged is presumed not to exist. *Stillings v. Van-Allstine*, (Neb. 1902) 89 N. W. Rep. 756.

A court cannot look to the evidence

to determine the sufficiency of a pleading and the plea must stand or fall according to its own strength or weakness. *Speeder Cycle Co. v. Teeter*, 18 Ind. App. 474.

The sufficiency of a pleading is a pure question of law to be determined by the court. *Speeder Cycle Co. v. Teeter*, 18 Ind. App. 474.

Pleas Filed in Short. — Where pleas are filed "in short by consent," they do not state the facts relied on as constituting the defense and are mere skeletons or outlines from which the facts relied on in bar of the action are to be deduced. A plaintiff agreeing to this mode of pleading must be deemed to consent that the pleas shall be interpreted as if the outlines were filled. *Steele v. Walker*, 115 Ala. 485.

2. Louisiana. — *Howcott v. Petit*, 106 La. 530.

New York. — *Kent v. North Tarrytown*, 50 N. Y. App. Div. 502; *Beach v. Shanley*, 35 N. Y. App. Div. 566; *Kager v. Brenneman*, 33 N. Y. App. Div. 452.

North Carolina. — *Battery Park Bank v. Loughran*, 126 N. Car. 814.

Ohio. — *Reiff v. Mullholland*, 65 Ohio St. 178.

Even upon demurrer, the complaint is to be interpreted as a whole. *Prescott, etc., R. Co. v. Atchison, etc., R. Co.*, 73 Fed. Rep. 438.

Surplusage. — Whether matter is inducement or surplusage must be determined by construction of the entire

748. 9. Words Given Ordinary and Popular Meaning. — See note 3.

749. 10. Justice's Court. — See note 1.

II. CONSTRUCTION IN GENERAL UNDER CODE SYSTEM — 1. Pleadings to Be Liberally Construed — a. GENERALLY. — See note 2.

pleading. *Consolidated Coal Co. v. Peers*, 97 Ill. App. 188.

Allegations of a petition which state a cause of action cannot be rejected for the purpose of converting mere matter of inducement or surplusage into a substantive statement of a cause of action different from that which the petition in terms declares to be the foundation of the action. *Bailey v. Mosher*, (C. C. A.) 63 Fed. Rep. 488.

Aider by Reply. — A complaint and reply when not repugnant should be read together to determine the intent of the pleader. *Lavery v. Arnold*, 36 Oregon 84.

Clerical Errors. — See *Crossen v. Grandy*, (Oregon 1902) 70 Pac. Rep. 906.

Where it is evident that the pleader meant to use the word "paid" instead of "pain," the court will construe the pleading according to the pleader's intention. *Connor v. Becker*, 62 Neb. 856.

748. 3. Donovan v. St. Anthony, etc., Elevator Co., 7 N. Dak. 513.

Demand Implied. — Where a complaint alleges that "the defendant refuses, and has ever refused, to account for and pay over" the claim sued on, a previous demand will be implied, as the allegation is equivalent to a demand and refusal. *Brossard v. Williams*, 114 Wis. 89.

The Use of Epithets adds no force to a complaint. *Miller v. Miller*, 17 Ind. App. 605. See also **LEGAL CONCLUSIONS**.

Technical Legal Meaning. — To charge that an act is "purposely" done is not equivalent to a charge that it is "willfully" done. *Miller v. Miller*, 17 Ind. App. 605.

Words of Reference. — An allegation that the right of action accrued "on the day aforesaid," the reference being to a day set out in a preceding count, and a number of different days are referred to therein, is insufficient. *Opdycke v. Easton, etc., R. Co.*, (N. J. 1902) 52 Atl. Rep. 243. See also *Sbarboro v. Health Dept.*, 26 N. Y. App. Div. 177.

749. 1. Even in a justice's court, if

the statement does not set forth "the facts constituting the cause of action," and does not "advise the opposite party what he is sued for," the suit will be dismissed. *Sidway v. Missouri Land, etc., Co.*, 163 Mo. 342.

2. O'Connor v. Dils, 43 W. Va. 54, citing 4 ENCYC. OF PL. AND PR. 749. See also the following cases and statutes:

Missouri. — *Sidway v. Missouri Land, etc., Co.*, 163 Mo. 342; *Overton v. Overton*, 131 Mo. 559; *Butts v. Long*, 94 Mo. App. 687; Rev. Stat. Mo., § 629. *Nebraska.* — *Norfolk Beet Sugar Co. v. Hight*, 56 Neb. 162.

New York. — *National Contracting Co. v. Hudson River Water Power Co.*, 170 N. Y. 439; *Donovan v. Main*, 74 N. Y. App. Div. 44; *Acker v. Richards*, 63 N. Y. App. Div. 305; *Gruen v. Peabody Education Fund*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 203.

North Dakota. — *Donovan v. St. Anthony, etc., Elevator Co.*, 7 N. Dak. 513.

Oregon. — *Patterson v. Patterson*, 40 Oregon 560.

Washington. — *Livingstone v. Lovgren*, 27 Wash. 102.

Wisconsin. — *Benolkin v. Guthrie*, 111 Wis. 554; *Miles v. Mutual Reserve Fund L. Assoc.*, 108 Wis. 421; *Winkler v. Racine Wagon, etc., Co.*, 99 Wis. 184; *South Bend Chilled Plow Co. v. George C. Cribb Co.*, 97 Wis. 230; Stat. Wis., § 2668.

Limitation of Rule. — The rule is not intended to dispense with the necessity of stating directly or inferentially the facts on which the pleader depends. *Overton v. Overton*, 131 Mo. 559.

Allegations Which Indicate the Nature of the Plaintiff's Claim are sufficient, if under them the plaintiff is entitled to give the necessary evidence to establish his cause of action. *Waite v. Aborn*, 60 N. Y. App. Div. 521.

Argumentative Allegations. — A cause of action will be deemed to be stated whenever sufficient facts to sustain the action can be fairly gathered from all the averments, although the statement of them may be argumentative and the pleading deficient in technical

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752. Application of Rule. — See note 1.

753. *b.* RULE RELATES TO FORM AND NOT TO SUBSTANCE. — See note 1.

754. 2. Demand for Judgment May Aid Construction. — See note 1.

755. III. CONSTRUCTION ON DEMURDER UNDER CODE SYSTEM —

1. Liberal Construction. — See notes 2, 3.

756. 2. Pleadings Supported if Possible. — See note 1.

IV. CONSTRUCTION ON TRIAL UNDER CODE SYSTEM —

1. Liberal Construction. — See note 4.

757. 3. Defective Pleadings — How Construed. — See note 3.

759. V. CONSTRUCTION AT COMMON LAW — 1. Pleadings Construed Most Strongly Against Pleader. — See note 2.

language. *Gruen v. Peabody Education Fund*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 203.

752. 1. Absurd Construction Not to Be Given. — See *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185.

753. 1. *Mallinckrodt Chemical Works v. Nemnich*, 169 Mo. 388; *Sidway v. Missouri Land, etc., Co.*, 163 Mo. 342.

754. 1. The Court Is Not Bound by the Designation of the Relief Sought, and if the petition shows a ground for relief, the relief shown will be granted, no matter by what name the pleader has designated it. *Teasley v. Bradley*, 110 Ga. 497; *Squiers v. Thompson*, 73 N. Y. App. Div. 552; *Tiffin Glass Co. v. Stoehr*, 54 Ohio St. 157. See also PRAYERS FOR RELIEF.

755. 2. *Norfolk Beet Sugar Co. v. Hight*, 56 Neb. 162; *Benolkin v. Guthrie*, 111 Wis. 554.

While the rule in favor of pleadings assailed by demurrer on the ground of uncertainty is a liberal one, it does not by any means go to the extent of dispensing with reasonable certainty. *Logansport v. Kihm*, (Ind. 1902) 64 N. E. Rep. 595.

3. *Gruen v. Peabody Education Fund*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 203; *Benolkin v. Guthrie*, 111 Wis. 554.

756. 1. *Norfolk Beet Sugar Co. v. Hight*, 56 Neb. 162; *Frank v. Forgeston*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 726; *Harris v. Halverson*, 23 Wash. 779; *Benolkin v. Guthrie*, 111 Wis. 554; *Miles v. Mutual Reserve Fund L. Assoc.*, 108 Wis. 421; *South Bend Chilled Plow Co. v. George C. Cribb Co.*, 97 Wis. 230.

Reasonable Intentments. — If the es-

sential facts can be gathered from the pleading, or may be reasonably inferred from the allegations, it is sufficient, though such allegations be in form uncertain, incomplete, and defective. *Miles v. Mutual Reserve Fund L. Assoc.*, 108 Wis. 421.

4. Defects Supplied by Answer. — All of the pleadings may be looked into and examined for the purpose of seeing whether any defective allegation of the complaint has been supplied by the answer. *Youmans v. Paine*, 86 Hun (N. Y.) 479.

Construction by Parties. — In *National F. Ins. Co. v. Eastern Bldg., etc., Assoc.*, 63 Neb. 698, it was held that a petition, demurred to *ore tenus* after the parties have rested, will be given the construction which the parties placed upon it, as evidenced by the answer and the nature of the evidence introduced.

757. 3. Where essential facts can be ascertained by reasonable inference, the pleading will be sustained although the allegations are uncertain and defective. *Benolkin v. Guthrie*, 111 Wis. 554.

759. 2. *Woodward Iron Co. v. Cook*, 124 Ala. 349; *Bunzel v. Maas*, 116 Ala. 68; *McIntyre v. Hauser*, 131 Cal. 11; *Commercial Mut. Acc. Co. v. Bates*, 74 Ill. App. 335; *Frew v. Richardson*, 97 Ill. App. 18; *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515; *Patterson v. Patterson*, 40 Oregon 560; *Coughlin v. Blumenthal*, 96 Fed. Rep. 920.

See *Johnston v. Meaghr*, 14 Utah 426, wherein it was declared that the reason of the rule is that it is presumed that every person states his case as favorably to himself as possible.

But where the pleadings are con-

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759. Rule Amplified and Interpreted. — See note 3.

762. VI. EQUITY PLEADINGS. — See note 3.

strued after trial, the maxim is that the language is to have a reasonable construction, and where an expression presents different meanings, that meaning shall be taken which will support the declaration, and not one which would defeat it. *Johnston v. Meaghr*, 14 Utah 426.

Dilatory Plea. — Inasmuch as a dilatory plea is not favored, nothing in it can be supplied by intendment or construction. *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515.

759. 3. *McDonald v. Illinois Cent. R. Co.*, 187 Ill. 529, *citing* 4 ENCYC. OF

PL. AND PR. 759. See also *Commercial Mut. Acc. Co. v. Bates*, 74 Ill. App. 335; *Johnston v. Meaghr*, 14 Utah 426.

If alleged conduct is reasonably susceptible of honest and lawful construction, that construction will prevail. *Brashear v. Madison*, 142 Ind. 685.

762. 3. When equitable relief is sought, there must be, from the necessity of the case, greater latitude in the allegations of the complaint. *John H. Park, etc., Co. v. National Wholesale Druggists Assoc.*, 30 N. Y. App. Div. 508; *Deering v. Shreyer*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 618.

CONTEMPT.

767. I. CHARACTER OF PROCEEDING — 1. Criminal. — See note 1.

769. Rules of Evidence Criminal. — See note 1.

770. 3. Strictly Pursued. — See note 1.

771. Collateral Matters Not Examinable. — See note 1.

4. Summary. — See note 3.

772. 5. Special. — See note 1.

773. II. ENTITLING PROCEEDING — Distinctive. — See note 2.

767. 1. State v. Stevenson. 104 Iowa 50; *In re Davis*, 58 Kan. 368; *State v. Lavery*, 31 Oregon 77; *State v. Nathans*, 49 S. Car. 199, in each of which cases the court cited 4 ENCYC. OF PL. AND PR. 767. See also the following cases:

California. — McClatchy v. Superior Ct., 119 Cal. 413.

Georgia. — Compare Tindall v. Nisbet, 113 Ga. 1114; *Drakeford v. Adams*, 98 Ga. 722

Michigan. — Compare In re Chadwick, 109 Mich. 588.

Nebraska. — Hydock v. State, 59 Neb. 297; *Herdman v. State*, 54 Neb. 626; *Beckett v. State*, 49 Neb. 210; *Zimmerman v. State*, 46 Neb. 13; *Hawes v. State*, 46 Neb. 149; *Cooley v. State*, 46 Neb. 603.

Ohio. — Brimson v. State, 63 Ohio St. 347.

South Dakota. — Burdick v. Marshall, 8 S. Dak. 308.

Texas. — Contra, Taylor v. Goodrich, (Tex. Civ. App. 1897) 40 S. W. Rep. 515.

United States. — Castner v. Pocahontas Collieries Co., 117 Fed. Rep. 184.

New Trial — Iowa. — Contempt proceedings are not governed by the general principles of criminal procedure, but by special statutes, and the procedure relative to the granting of new trials is that provided for civil actions. *State v. Stevenson*, 104 Iowa 50.

769. 1. Burdick v. Marshall, 8 S. Dak. 308, citing 4 ENCYC. OF PL. AND PR. 769. See also the following cases:

Minnesota. — State v. District Ct., 65 Minn. 146.

Nebraska. — Hydock v. State, 59 Neb. 297.

West Virginia. — State v. Davis, 50 W. Va. 100.

Presumption in Favor of Accused. — *Glover v. American Casualty Ins., etc., Co.*, 130 Mo. 173; *Hydock v. State*, 59 Neb. 297; *Hawes v. State*, 46 Neb. 149. Compare *State v. O'Brien*, 87 Minn. 161.

Evidence in Civil Contempt. — Where the principal or only object is to redress a private injury the rules of criminal evidence do not apply. *Drakeford v. Adams*, 98 Ga. 722.

Self Incrimination. — In a proceeding to punish for contempt not committed in the presence of the court, the defendant cannot be compelled to give evidence against himself. *In re Haines*, 67 N. J. L. 442.

770. 1. State v. Conn, 37 Oregon 596 [citing 4 ENCYC. OF PL. AND PR. 770]; *State v. Fifth Judicial Dist. Ct.*, 24 Mont. 33; *Herdman v. State*, 54 Neb. 626; *Hawes v. State*, 46 Neb. 149; *Flor v. Flor*, 73 N. Y. App. Div. 262; *Bradbury v. Bliss*, 23 N. Y. App. Div. 606; *State v. Root*, 5 N. Dak. 487.

Statute Strictly Construed. — *Levan v. Third Dist. Ct.*, (Idaho 1896) 43 Pac. Rep. 574; *Bradbury v. Bliss*, 23 N. Y. App. Div. 606.

771. 1. Hamlin v. New York, etc., R. Co., 170 Mass. 548, citing 4 ENCYC. OF PL. AND PR. 771.

3. State v. Crum, 7 N. Dak. 299.

772. 1. State v. Hudson County Electric Co., 61 N. J. L. 114 [citing 4 ENCYC. OF PL. AND PR. 772]; *State v. Fifth Judicial Dist. Ct.*, 24 Mont. 33.

Contempt Is Indictable. — *State v. Fifth Judicial Dist. Ct.*, 24 Mont. 33.

773. 2. In Illinois. — Oster v. People, 192 Ill. 473.

In Iowa. — The action is usually

774. Immateriality. — See note 1.

III. INSTITUTING PROCEEDING — 1. Discretionary with Court. — See note 2.

775. 3. Prerequisite Conditions — *a.* CONTEMPTS IN COURT'S PRESENCE. — See note 3.

Evidence Not Requisite. — See note 4.

776. b. CONTEMPTS OUT OF COURT'S PRESENCE — (1) *Clear Statement of Facts.* — See notes 1, 2.

777. (2) Knowledge and Service of Violated Order. — See note 1.

brought in the name of the state, but may be entitled as in the case in which the contempt is alleged to have been committed. *State v. Stevenson*, 104 Iowa 50, *per* Robinson, J.

In Oregon criminal contempts should be entitled in the name of the state, and civil contempts in the name of the state upon relation of the private party. *State v. Downing*, 40 Oregon 309.

In South Carolina if the object is punishment the title of the case should be in the name of the state; if to compel the performance of an act it should have the title of the cause in which the relief is sought; if for both purposes it may have both titles. *State v. Nathans*, 49 S. Car. 199.

In South Dakota. — See *Freeman v. Huron*, 8 S. Dak. 435, *citing* 4 ENCYC. OF PL. AND PR. 772, and holding that while it would be preferable to entitle the proceeding in the name of the state, it is not error to entitle it as in the action out of which it arose.

774. 1. *State v. Crum*, 7 N. Dak. 299 [*citing* 4 ENCYC. OF PL. AND PR. 774]; *State v. Nathans*, 49 S. Car. 199.

2. *People v. Durrant*, 116 Cal. 179, *quoting* 4 ENCYC. OF PL. AND PR. 774.

Mandamus Compelling Issuance. — *Contra*, *State v. Loud*, 24 Mont. 428.

Refusal Not Appealable. — An action of a court in interpreting its own decree and refusing to issue an attachment for contempt on the ground that the same has not been violated is not appealable. *Fullerton v. Peabody*, 2 Pa. Super. Ct. 145.

775. 3. Alabama. — *Coleman v. Roberts*, 113 Ala. 323.

Kansas. — *State v. Anders*, 64 Kan. 742.

New York. — *Falkenberg v. Frank*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 692.

North Dakota. — *State v. Crum*, 7 N. Dak. 299. See also *State v. Root*, 5 N. Dak. 487.

Wisconsin. — *In re Rosenberg*, 90 Wis. 581.

Where the Act Is Not Itself Contemptuous, but its character as such can only appear through its connection with facts not within the direct personal cognizance of the court, an information is necessary. *Le Hane v. State*, 48 Neb. 105.

4. *State v. Root*, 5 N. Dak. 487 [*citing* 4 ENCYC. OF PL. AND PR. 775]; *Coleman v. Roberts*, 113 Ala. 323; *State v. Crum*, 7 N. Dak. 299.

776. 1. *State v. Root*, 5 N. Dak. 487, *citing* 4 ENCYC. OF PL. AND PR. 776.

Court May Act Sua Sponte. — *Telegram Newspaper Co. v. Com.*, 172 Mass. 294; *Cooley v. State*, 46 Neb. 603. *Contra*, *State v. Anders*, 64 Kan. 742.

2. *Fisher v. Nash*, 47 N. Y. App. Div. 234; *Ex p. Duncan*, (Tex. Crim. 1901) 62 S. W. Rep. 758.

Void Orders. — Disobedience of a void order is not ground for instituting proceedings for contempt. *Ex p. Clarke*, 126 Cal. 235; *Jenkins v. State*, 59 Neb. 68, *per* Norval, J.

Defective Orders. — A witness cannot be adjudged guilty of contempt for failure to obey a subpoena which is defective and improperly served. *In re Haines*, 67 N. J. L. 442.

777. 1. *State v. Sommerville*, 105 La. 273, *citing* 4 ENCYC. OF PL. AND PR. 777. See also *Flor v. Flor*, 73 N. Y. App. Div. 262.

Personal Service of the violated order is necessary, service by mail being insufficient. *Matter of Siebert*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 680.

Original Order Vacated and Reinstated on Appeal. — Where the original order is served on a defendant and the order is vacated, but subsequently reinstated on appeal, no further service is necessary. *Rochester Lamp Co. v. Brigham*, 1 N. Y. App. Div. 490.

777. Service Unnecessary — Knowledge Presumed. — See note 2.

778. Actual Knowledge. — See note 2.

(3) *Injury to Prosecutor.* — See note 3.

(4) *Against Parties to Original Proceedings.* — See note 4.

(5) *Demand and Refusal.* — See note 5.

779. 4. By Affidavit — a. ITS NECESSITY. — See note 2.

780. Affidavit Not Absolutely Essential. — See note 1.

b. ITS REQUISITES — *Prima Facie Case.* — See note 2.

777. 2. *State v. Sommerville*, 105 La. 273, citing 4 ENCYC. OF PL. AND PR. 777.

778. 2. *Drakeford v. Adams*, 98 Ga. 722 [citing 4 ENCYC. OF PL. AND PR. 778]; *Williamson v. Pender*, 127 N. Car. 481; *Freeman v. Huron*, 8 S. Dak. 435.

3. *Cunningham v. Colonial, etc., Mortg. Co.*, 57 Kan. 678.

4. *Ex p. Truman*, 124 Cal. 387; *Cassidy v. John Church Co.*, 11 Ohio Cir. Dec. 461. Compare *State v. Lavery*, 31 Oregon 77.

Persons in Privity with the parties to the original suit may be proceeded against. *Ahlens v. Thomas*, 24 Nev. 407.

Persons Not Parties. — Where it is sought to hold a person liable for a violation of an order to which he was not a party, it must be alleged that he had knowledge of its terms and conditions. *State v. Lavery*, 31 Oregon 77.

Suit Begun. — *State v. Sommerville*, 105 La. 273.

5. *Illinois.* — *Blake v. People*, 161 Ill. 74.

New York. — *Flor v. Flor*, 73 N. Y. App. Div. 262; *Bradbury v. Bliss*, 23 N. Y. App. Div. 606.

Demand Unnecessary. — A demand is unnecessary where the defendant in contempt asserts that he will never obey the decree. *State v. Ditmar*, 19 Wash. 324.

779. 2. *State v. Clancy*, 24 Mont. 359; *State v. Nathans*, 49 S. Car. 199, in each of which cases the court cited 4 ENCYC. OF PL. AND PR. 779. See also the following cases:

Indiana. — *Snyder v. State*, 151 Ind. 553; *Saunderson v. State*, 151 Ind. 550.

Kansas. — *In re Blush*, 5 Kan. App. 879.

Oregon. — *State v. Conn*, 37 Oregon 596; *State v. Lavery*, 31 Oregon 77.

Wyoming. — See also *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464.

Actual Knowledge. — *Herdman v. State*, 54 Neb. 626, citing 4 ENCYC. OF PL. AND PR. 779. See also *State v. Conn*, 37 Oregon 596; *Freeman v. Huron*, 8 S. Dak. 435.

780. 1. *Oster v. People*, 192 Ill. 473, citing 4 ENCYC. OF PL. AND PR. 780.

2. *Minnesota.* — *State v. District Ct.*, 65 Minn. 146.

Oregon. — *State v. Conn*, 37 Oregon 596.

South Carolina. — *State v. Nathans*, 49 S. Car. 199.

Washington. — *State v. Allen*, 14 Wash. 684.

Requisites of Affidavit. — The affidavit must show the facts constituting the contempt, and aver service of the order violated. *State v. Downing*, 40 Oregon 309.

Time and Place. — The affidavit must state the particular time at which the offensive words were spoken, and where the contempt alleged is that offensive words were spoken in the court room while the court was in session it must be alleged that they were in the immediate view and presence of the court and were calculated to interrupt its proceedings or impair its authority. *State v. Root*, 5 N. Dak. 487.

Designating Persons. — The affidavit must designate specifically the persons intended to be charged. *State v. Rockwood*, (Ind. 1902) 64 N. E. Rep. 592.

Must Show Ability to Comply. — The affidavit must show that it was within the power of the party prosecuted to comply with the order violated. *Hawthorne v. State*, 45 Neb. 871; *State v. Allen*, 14 Wash. 684.

Positive Affirmation Necessary. — An affidavit alleging merely that information has come to the affiant that the accused has violated an order of the court is insufficient. *State v. Gallup*, 1 Kan. App. 618.

Amendment of Affidavit. — Where the affidavit is amended the amendment

- 781.** Jurisdiction of Court. — See note 1.
5. By Information. — See note 2.
IV. PRIMARY PROCESS — 1. Generally. — See note 4.
782. 2. Order to Show Cause — *a.* GENERALLY. — See note 1.
b. REQUISITES. — See note 2.
c. SERVICE — *Personal Service Necessary.* — See note 3.
783. 3. Attachment Without Prior Order — *a.* GENERALLY. — See note 2.
785. 4. Process Without Attachment. — See note 1.
787. VII. ABATEMENT. — See notes 4, 5.
788. VIII. HEARING — 2. Contemnor's Rights — *a.* RIGHT TO BE HEARD. — See note 3.
In Constructive Contempts. — See note 4.

must be sworn to. *State v. Lavery*, 31 Oregon 77.

Defective Affidavit — Waiver. — A defect in an affidavit is waived by a personal appearance and answer. *People v. Court Sessions*, 147 N. Y. 290. Or it may be waived by admissions in the answer. *State v. Downing*, 40 Oregon 309.

Striking Affidavit from Files. — Where the affidavit contains matter which is impertinent and irrelevant it will be stricken from the files on motion. *May v. Ball*, (Ky. 1902) 67 S. W. Rep. 257.

781. 1. *Hawthorne v. State*, 45 Neb. 871.

2. *Snyder v. State*, 151 Ind. 553; *Saunderson v. State*, 151 Ind. 550.

Statement of Facts. — *Cooley v. State*, 46 Neb. 603.

4. *Buckley v. Perrine*, 55 N. J. Eq. 514 [citing 4 ENCYC. OF PL. AND PR. 781]; *Palmer v. Palmer*, 36 Fla. 385; *State v. Clancy*, 24 Mont. 359.

In *Kansas* it is provided by statute that in cases of indirect contempt there must be a written accusation, a warrant of arrest, an answer by the accused, and an order fixing a time and place of trial. *State v. Anders*, 64 Kan. 742.

782. 1. *Indiana.* — *Snyder v. State*, 151 Ind. 553; *Saunderson v. State*, 151 Ind. 550.

New Jersey. — See *In re Haines*, 67 N. J. L. 442.

2. In *Indiana* the facts of the alleged contempt must be definitely set forth. *Snyder v. State*, 151 Ind. 553; *Saunderson v. State*, 151 Ind. 550.

In *New York.* — *Bradbury v. Bliss*, 23 N. Y. App. Div. 606.

Order Not Demurrable. — Objection to

an order to show cause cannot be taken by demurrer. *Continental Nat. Bldg., etc., Assoc. v. Scott*, 40 Fla. 386.

3. **Service on Attorney.** — *Foley v. Foley*, 120 Cal. 33; *Rochester Lamp Co. v. Brigham*, 1 N. Y. App. Div. 490.

783. 2. Violation of Injunction may be punished by attachment without a prior order. *Shore v. People*, 26 Colo. 516.

785. 1. **Appearance and Answer to Order Nisi.** — See *State v. Dittmar*, 19 Wash. 324.

787. 4. *State v. Nathans*, 49 S. Car. 199.

5. In *South Carolina* a distinction is made between civil and criminal contempts, it being held that the former abate while the latter do not. *State v. Nathans*, 49 S. Car. 199.

788. 3. *Hebb v. Tucker County*, 48 W. Va. 279 [quoting 4 ENCYC. OF PL. AND PR. 788]; *Tomsky v. Superior Ct.*, 131 Cal. 620; *McClatchy v. Superior Ct.*, 119 Cal. 413; *Palmer v. Palmer*, 36 Fla. 385; *Smith v. Tenney*, 62 Ill. App. 571; *State v. Anders*, 64 Kan. 742; *State v. Clancy*, 24 Mont. 359; *Matter of Reddish*, 47 N. Y. App. Div. 187; *Post v. State*, 7 Ohio Cir. Dec. 257; *Ward v. Ward*, 70 Vt. 430. See also *Kuhlman v. Superior Ct.*, 122 Cal. 636.

Personal Appearance of the accused at the hearing is not necessary. *In re Clarke*, 125 Cal. 388; *Foley v. Foley*, 120 Cal. 33; *Barclay v. Barclay*, 184 Ill. 471.

4. *McClatchy v. Superior Ct.*, 119 Cal. 413; *State v. Anders*, 64 Kan. 742; *State v. Clancy*, 24 Mont. 359; *Beckett v. State*, 49 Neb. 210; *Ward v. Ward*, 70 Vt. 430.

789. b. RIGHT TO TRIAL BY JURY. — See note 5.

Not Violation of Constitutional Privileges. — See note 6.

Discretion of Court. — See note 7.

790. 3. Contemnor's Defenses — *b. INABILITY TO OBEY.* — See note 2.

791. Inability Clearly Shown. — See note 1.

c. WANT OF INTENTION. — See notes 3, 4.

792. Want of Intention as Affecting Punishment. — See note 1.

d. ADVICE OF COUNSEL. — See notes 3, 4.

e. WANT OF JURISDICTION IN COURT. — See note 5.

793. 4. Unavailable Defenses — *a. APPEAL FROM VIOLATED ORDER.* — See note 4.

b. INVALIDITY OF VIOLATED ORDER. — See note 5.

789. 5. State v. Stevenson, 104 Iowa 50 [citing 4 ENCYC. OF PL. AND PR. 789]; *Barclay v. Barclay*, 184 Ill. 471; *Taylor v. Goodrich*, (Tex. Civ. App. 1897) 40 S. W. Rep. 515; *Tinsley v. Anderson*, 171 U. S. 101.

In *Kansas* it is provided by statute that in cases of indirect contempt the defendant may demand a trial by jury. *In re Rich*, 10 Kan. App. 280. See also *In re Barnhouse*, 60 Kan. 849.

6. Barclay v. Barclay, 184 Ill. 471.

7. In Georgia. — See *Tindall v. Nisbet*, 113 Ga. 1114; *Lee v. Lee*, 97 Ga. 736.

790. 2. Herrington v. Cassem, 82 Ill. App. 594; *Walton v. Walton*, 54 N. J. Eq. 607; *In re Jaramillo*, 8 N. Mex. 598; *Matter of Wegman*, 40 N. Y. App. Div. 632; *Irwin's Estate*, 9 Pa. Dist. 282. See also *Salomon v. Holdom*, 72 Ill. App. 346.

Pecuniary Inability. — *Kahlbon v. People*, 101 Ill. App. 567; *Moseley v. People*, 101 Ill. App. 564; *Herrington v. Cassem*, 82 Ill. App. 594; *Hawthorne v. State*, 45 Neb. 871; *Grand Lodge, etc., v. Jansen*, 62 N. J. Eq. 737; *Walton v. Walton*, 54 N. J. Eq. 607; *In re Jaramillo*, 8 N. Mex. 598; *Irwin's Estate*, 9 Pa. Dist. 282. *Contra*, *Young v. Young*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 335, *per Gildersleeve, J.*

791. 1. Huckins v. State, 61 Neb. 871.

3. Thistlethwaite v. State, 149 Ind. 319; *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464 [in each of which cases the court cited 4 ENCYC. OF PL. AND PR. 791]; *Freeman v. Huron*, 8 S. Dak. 435.

4. In North Carolina. — *In re Robinson*, 117 N. Car. 533.

792. 1. Laramie Nat. Bank v. Steinhoff, 7 Wyo. 464 [citing 4 ENCYC. OF PL. AND PR. 792]; *Mackay v. State*,

60 Neb. 143; *Freeman v. Huron*, 8 S. Dak. 435.

3. Russell v. Mohr-Weil Lumber Co., 102 Ga. 563; *State v. Stevenson*, 104 Iowa 50, *per Robinson, J.*; *New York Mail, etc., Transp. Co. v. Shea*, 30 N. Y. App. Div. 374; *Delozier v. Bird*, 123 N. Car. 689; *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464, *per Potter, J.*; *Royal Trust Co. v. Washburn, etc., R. Co.*, 113 Fed. Rep. 531; *Tornanses v. Melsing, (C. C. A.)* 106 Fed. Rep. 775.

4. Russell v. Mohr-Weil Lumber Co., 102 Ga. 563; *French v. Commercial Nat. Bank*, 79 Ill. App. 110; *Coffin v. Burstein*, 68 N. Y. App. Div. 22; *New York Mail, etc., Transp. Co. v. Shea*, 30 N. Y. App. Div. 374; *Royal Trust Co. v. Washburn, etc., R. Co.*, 113 Fed. Rep. 531.

5. State v. Summerville, 105 La. 273 [citing 4 ENCYC. OF PL. AND PR. 792]; *In re Grear*, 9 Ohio Dec. 299; *Ex p. Duncan*, (Tex. Crim. 1901) 62 S. W. Rep. 758.

Preliminary Motion to Quash. — The accused should be allowed to attack the jurisdiction of the court by a preliminary motion to quash before being required to join issue upon the facts. *State v. Root*, 5 N. Dak. 487.

793. 4. Merchant v. Pielke, 9 N. Dak. 245 [citing 4 ENCYC. OF PL. AND PR. 793]; *New York Mail, etc., Transp. Co. v. Shea*, 30 N. Y. App. Div. 374, *reversing* (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 15; *State v. Downing*, 40 Oregon 309. *Compare Schwarz v. Superior Ct.* 111 Cal. 106, holding that an appeal from an order granting an injunction is a defense in proceedings to punish a violation thereof as to the mandatory, but not as to the prohibitory, part thereof.

5. Russell v. Mohr-Weil Lumber Co.,

794. *d.* LIABILITY TO INDICTMENT. — See note 1.

e. MISCELLANEOUS INSTANCES. — See note 2.

795. *5.* Contemnor's Default. — See note 1.

6. Conclusiveness of Contemnor's Answer — At Law. — See note 2.

In Constructive Contempt. — See note 3.

796. In Equity. — See note 1.

7. Interrogatories — *a.* IN GENERAL. — See note 2.

b. WHEN UNNECESSARY. — See note 5.

c. WHEN NECESSARY. — See note 6.

797. IX. ADJUDICATION — 2. Judgment. — See note 7.

798. See notes 1, 2.

102 Ga. 563; *French v. Commercial Nat. Bank*, 79 Ill. App. 110; *Jenkins v. State*, 59 Neb. 68; *State v. Downing*, 40 Oregon 309; *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464; *Tornanses v. Melsing*, (C. C. A.) 106 Fed. Rep. 775. See also *Williamson v. Pender*, 127 N. Car. 481.

As Affecting Amount of Fine. — *Russell v. Mohr-Weil Lumber Co.*, 102 Ga. 563.

794. 1. *Bradley v. State*, 111 Ga. 168; *Nichols v. Judge*, (Mich. 1902) 89 N. W. Rep. 691, *per Grant, J.*; *Fisher v. McDaniel*, 9 Wyo. 457. See also *State v. Murphy*, 71 Vt. 127.

In Equity. — A court of equity may on this account decline to exercise its power to punish by contempt and dismiss the proceedings without prejudice to a subsequent indictment. *In re Dolan*, 6 Pa. Dist. 578.

2. *Lapse of Time* since the commission of the contempt is no defense in proceedings to punish therefor. *Matter of Hay Foundry, etc., Works*, 22 N. Y. App. Div. 87.

The Fact that a Defendant Is Out on Bail to answer a criminal charge before a justice in another county is not a defense. *In re Popejoy*, 26 Colo. 32.

795. 1. *Failure to Answer.* — Where, after overruling a demurrer to an information for contempt, the defendant fails to present an answer, the information will be taken as admitted. *Nebraska Children's Home Soc. v. State*, 57 Neb. 765.

2. *Oster v. People*, 192 Ill. 473 [citing 4 ENCYC. OF PL. AND PR. 795]; *Kyle v. People*, 72 Ill. App. 171; *In re Robinson*, 117 N. Car. 533. *Contra*, *Freeman v. Huron*, 8 S. Dak. 435.

In North Dakota the answers are not conclusive. *Noble Tp. v. Aasen*, 10 N. Dak. 264.

3. In Illinois the answer is conclusive only in contempt proceedings brought to vindicate the majesty of the law or the dignity of the court, and not in proceedings to enforce orders and decrees as part of the remedy sought. *Loven v. People*, 158 Ill. 159.

Indiana. — *Burns's Annot. Stat. Ind.* (1894), § 1026, provides that in cases where the contempt proceeding is to enforce a civil right and remedy the defendant is not entitled to a discharge. *Thistlethwaite v. State*, 149 Ind. 319.

Contempts Consisting in Libelous Publications. — The defendant's answer denying the contempt is not conclusive where the words used admit of only one construction. *In re Chadwick*, 109 Mich. 588. See also *Bloom v. People*, 23 Colo. 416, holding generally that the answer is not conclusive.

796. 1. *Noble Tp. v. Aasen*, 10 N. Dak. 264 [citing 4 ENCYC. OF PL. AND PR. 796]; *Tolman v. Leonard*, 6 App. Cas. (D. C.) 224; *Loven v. People*, 158 Ill. 159.

2. See *Oster v. People*, 192 Ill. 473, citing 4 ENCYC. OF PL. AND PR. 796.

3. *Smith v. Waalkes*, 109 Mich. 16; *People v. Anthony*, 7 N. Y. App. Div. 132.

4. *Required by Statute.* — *Noble Tp. v. Aasen*, 10 N. Dak. 264.

797. 7. Judgment, How Rendered. — Judgment and sentence in cases of criminal contempt must be rendered publicly in open court. *State v. Nathans*, 49 S. Car. 199.

798. 1. *Ex p. Smith*, 40 Tex. Crim. 179, citing 4 ENCYC. OF PL. AND PR. 798.

2. In California in cases of direct contempt the order adjudicating the contempt must contain a recital of the facts. *Overend v. Superior Ct.*, 131 Cal. 280.

In Colorado it is only in cases of direct

- 799. 3. Warrant of Commitment** — *a.* NECESSITY. — See note 1.
b. FORMAL REQUISITES — *In General.* — See notes 2, 3.
Duration of Imprisonment. — See note 4.
- 800. 4. Fine** — *a.* PUNITIVE. — See note 2.

contempts that the judgment must recite the facts constituting the contempt. *Shore v. People*, 26 Colo. 516.

In Kansas the facts of the alleged contempt must be set out. *In re Elliott*, 9 Kan. App. 265; *In re Moxcey*, 9 Kan. App. 262.

In New York. — Socialistic Co-operative Pub. Assoc. *v.* Kuhn, 51 N. Y. App. Div. 583; *Dailey v. Fenton*, 47 N. Y. App. Div. 418; *Wolfe v. Knight*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 438.

Clear Finding of Contempt Essential. — *Ex p. Kearby*, 35 Tex. Crim. 531, 634, citing 4 ENCYC. OF PL. AND PR. 798.

Alternative Judgments. — A judgment imposing a fine and directing that the defendant be imprisoned until it is paid is neither in the alternative nor indefinite. *Shore v. People*, 26 Colo. 516.

Jurisdictional Facts. — The order adjudicating the contempt must allege facts showing the jurisdiction of the court. *Overend v. Superior Ct.*, 131 Cal. 280.

The Fine — To Whom Paid. — An order adjudging a defendant in contempt and ordering him to pay a fine must state to whom the fine is to be paid. *Smith v. Tenney*, 62 Ill. App. 571.

799. 1. *Ex p. Kearby*, 35 Tex. Crim. 531, 634.

Civil and Criminal Contempts — New York Practice. — In civil contempts an order should first issue to do a certain thing within a specified time, and upon failure of the defendant to comply therewith a commitment may issue; but in criminal contempts such prior alternative order is unnecessary. *Falkenberg v. Frank*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 692.

2. *Tolman v. Leonard*, 6 App. Cas. (D. C.) 224.

3. See *State v. Crum*, 7 N. Dak. 299.

In New York. — Code Civ. Pro. N. Y., § 11, provides that in cases of criminal contempt the order of commitment must set forth the facts and circumstances of the offense. *People v. Court Sessions*, 147 N. Y. 290.

Witnesses. — Where a witness is committed for refusing to answer a question, such question must be stated in the order. *Wilcox v. State*, 46 Neb. 402.

The commitment must also show the pertinency and relevancy of the question. *Ex p. Woodworth*, 6 Ohio Dec. 19.

Must Show Ability to Obey. — *Moseley v. People*, 101 Ill. App. 564. *Contra, In re Popejoy*, 26 Colo. 32.

Wilful Disobedience. — The warrant must show that the disobedience of the order was wilful. *Kahlbon v. People*, 101 Ill. App. 567.

Fine — To Whom Paid. — A warrant committing a defendant to prison until the payment of a fine should designate to whom the fine should be paid. *McDonald v. People*, 86 Ill. App. 558.

Definiteness and Certainty. — The warrant of commitment must be definite and certain in its terms. *Billingsley v. People*, 86 Ill. App. 233; *McDonald v. People*, 86 Ill. App. 558; *Salomon v. Holdom*, 72 Ill. App. 346; *Matter of Curtis*, 10 Okla. 660; *Taylor v. Newblock*, 5 Okla. 647.

A Technical Inaccuracy in the recitals of the warrant will not render it invalid where the defect can be supplied by the record. *Tolman v. Leonard*, 6 App. Cas. (D. C.) 224.

Amount to Be Paid. — Code Civ. Pro. N. Y., § 2284, provides that the order must specify the act or duty to be performed and the amount to be paid. *Burnham v. Denike*, 53 N. Y. App. Div. 407.

Contempt to Enforce Payment of Alimony. — The warrant committing a defendant for the nonpayment of alimony must state the amount to be paid. *Jernec v. Jernec*, 54 N. J. Eq. 657.

4. *Kahlbon v. People*, 101 Ill. App. 567. See also *State v. Crum*, 7 N. Dak. 299.

In New York. — *People v. Tamsen*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 212.

Limitation of Duration of Imprisonment. — The time of imprisonment should be limited by the provision, "or until discharged according to law" or words of like effect. *McDonald v. People*, 86 Ill. App. 558.

800. 2. In Hawaii. — See *Matter of Davis*, 11 Hawaii 594.

800. *b.* COMPENSATORY. — See notes 3, 4.

801. *5.* Imprisonment — *a.* DURATION. — See note 3.

802. *b.* LIMITATION — (1) *Generally.* — See notes 1, 2.

(2) *In Cases of Nonpayment of Fines.* — See note 3.

803. *c.* NOT IMPRISONMENT FOR DEBT. — See note 3.

800. 3. Punishment by Fine Only. — In cases of civil contempt where the object is to protect the right of a party to a civil action or special proceeding the punishment should be by a fine only, unless there is a wilful refusal to recognize the authority of the court. *Jewelers' Mercantile Agency v. Rothschild*, 6 N. Y. App. Div. 499.

4. Buffalo Loan, etc., Co. v. Medina Gas, etc., Co., 68 N. Y. App. Div. 414.

In New York the amount of the compensatory fine must be established by the evidence. *Burnham v. Denike*, 53 N. Y. App. Div. 407; *People v. Anthony*, 7 N. Y. App. Div. 132. See also *Buffalo Loan, etc., Co. v. Medina Gas, etc., Co.*, 68 N. Y. App. Div. 414.

Under Code Civ. Pro. N. Y., § 2284, where no general damages are proved the fine is limited to \$250 and the costs and expenses of the proceeding. *East River Nat. Bank v. De Lacy*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 868; *McAveney v. Brush*, 1 N. Y. App. Div. 97. See also *Matter of Hatfield*, 17 N. Y. App. Div. 430.

This provision is merely a limitation, and not a direction as to the amount. *Matter of Husted*, (Surrogate Ct.) 37 Misc. (N. Y.) 237.

The "costs and expenses" provided for by the above section are only the costs and expenses of the motion to punish for contempt. *Matter of Husted*, (Surrogate Ct.) 37 Misc. (N. Y.) 237.

Several Defendants. — Where several defendants are adjudged in contempt the compensatory fine allowed by statute cannot be imposed on each defendant. Each defendant is severally liable for the payment of the single fine, but payment by one is satisfaction as to all. *Socialistic Co-operative Pub. Assoc. v. Kuhn*, 164 N. Y. 473.

In North Dakota the amount ordered to be paid by one suitor to another as compensation for damages and costs cannot be fixed arbitrarily by the court, but must be ascertained from the evidence. *Noble Tp. v. Aasen*, 10 N. Dak. 264.

801. 3. In Hawaii. — See *Matter of Davis*, 11 Hawaii 594.

In Idaho the punishment is limited by statute to a fine not exceeding five hundred dollars or imprisonment not exceeding five days, or both. *Levan v. Third Dist. Ct.*, (Idaho 1896) 43 Pac. Rep. 574.

In Louisiana. — *State v. St. Paul*, 104 La. 203.

In New York. — See *Hommel v. Butting*, 46 N. Y. App. Div. 206.

In Texas. — Rev. Civ. Stat. Tex., § 1101, limits the penalty which may be imposed by a judge of the District Court to a fine not exceeding one hundred dollars and imprisonment not exceeding three days. *Ex p. Kearby*, 35 Tex. Crim. 531.

Imprisonment Only. — In New York a witness refusing to answer a legal and pertinent question or to produce a book may be committed until he submits to do the act or is discharged according to law, but in such cases the imposition of a fine is improper. *Press Pub. Co. v. Associated Press*, 41 N. Y. App. Div. 493.

802. 1. *Ex p. Kearby*, 35 Tex. Crim. 531 [citing 4 ENCYC. OF PL. AND PR. 802]; *Matter of Curtis*, 10 Okla. 660; *Taylor v. Newblock*, 5 Okla. 647.

2. *Tindall v. Nisbet*, 113 Ga. 1114; *Nebraska Children's Home Soc. v. State*, 57 Neb. 765; *People v. Anthony*, 7 N. Y. App. Div. 132; *Delozier v. Bird*, 123 N. Car. 689; *Ex p. Tinsley*, 37 Tex. Crim. 517; *In re Rosenberg*, 90 Wis. 581; *Tinsley v. Anderson*, 171 U. S. 101.

Ability to Obey. — *Billingsley v. People*, 86 Ill. App. 233; *Salomon v. Holdom*, 72 Ill. App. 346.

3. *Matter of Davis*, 11 Hawaii 594, citing 4 ENCYC. OF PL. AND PR. 802. See also the following cases:

Colorado. — *Shore v. People*, 26 Colo. 516.

Wyoming. — *Fisher v. McDaniel*, 9 Wyo. 457.

803. 3. *In re Popejoy*, 26 Colo. 32; *Barclay v. Barclay*, 184 Ill. 471; *In re Meggett*, 105 Wis. 291.

Nonpayment of Alimony. — *Tolman v. Leonard*, 6 App. Cas. (D. C.) 224; *Barclay v. Barclay*, 184 Ill. 471. See also

804. 6. Double Redress — *a.* GENERALLY. — See note 1.

7. Miscellaneous Punishments. — See note 4.

805. 8. Contemnor's Disabilities — *a.* AFFECTING FAVORS. — See note 1.

b. AFFECTING RIGHTS. — See note 2.

806. 9. Costs — *a.* IN GENERAL. — See note 1.

807. X. CONTEMNOR'S REMEDIES — 1. By Motion to Vacate — *a.* IN GENERAL. — See note 6.

808. b. INABILITY TO OBEY. — See note 3.

809. c. DISCHARGE IN INSOLVENCY. — See note 1.

2. By Appeal and Writ of Error — *a.* WHEN NOT ALLOWED — (1) *In General.* — See note 3.

Lubbering v. State, 10 Ohio Cir. Dec. 508.

Fines and Costs. — *Duff v. McDonough*, 2 Pa. Super. Ct. 373. *Contra*, *Lubbering v. State*, 10 Ohio Cir. Dec. 508.

804. 1. In Louisiana. — *State v. Judge*, 50 La. Ann. 552, citing 4 ENCYC. OF PL. AND PR. 804.

4. Disbarment of Attorney. — Disbarment cannot be added as an additional punishment for a criminal contempt, as the statutory procedure for disbarment must always be followed. *State v. Root*, 5 N. Dak. 487; *Ex p. Kearby*, 35 Tex. Crim. 634.

Striking Out Answer. — The court may strike out a defendant's answer as a punishment for contempt. *Devlin v. Hinman*, 161 N. Y. 115; *Socialistic Co-operative Pub. Assoc. v. Kuhn*, 51 N. Y. App. Div. 583.

805. 1. Smith v. Smith, 18 Wash. 158, quoting 4 ENCYC. OF PL. AND PR. 805. See also:

United States. — *Hovey v. Elliott*, 167 U. S. 409.

Striking Out Answer. — Where an answer has been regularly filed by a defendant, the court cannot order the same to be stricken from the files and judgment taken against him *pro confesso* because he is held guilty of a contempt. *Hovey v. Elliott*, 167 U. S. 409.

2. Ward v. Ward, 70 Vt. 430; *Hovey v. Elliott*, 167 U. S. 409.

806. 1. Ahlers v. Thomas, 24 Nev. 407, citing 4 ENCYC. OF PL. AND PR. 806.

Costs Included in Fine. — In *Montana* it is provided by statute that the costs must be paid from the fine imposed. *State v. Fifth Judicial Dist. Ct.*, 24 Mont. 33.

807. 6. Matter of Reddish, 47 N. Y. App. Div. 187.

808. 3. See *Nisbet v. Tindall*, 115 Ga. 374, in which case it was held that a judge might make an order in vacation discharging from custody a person in prison for contempt, upon satisfactory proof of his inability to comply with the order.

In *North Carolina*, under Code Civ. Pro., § 500, where a defendant in contempt is unable to perform the act required, he may be discharged by the judge committing him, or by the judge having jurisdiction, on such terms as may be just. See *Childs v. Wiseman*, 119 N. Car. 497.

809. 1. Young v. Young, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 335, *per* Gildersleeve, J.

3. California. — *Mott v. Clarke*, (Cal. 1899) 56 Pac. Rep. 545; *People v. Kuhlman*, 118 Cal. 140; *Matter of Wittmeier*, 118 Cal. 255.

Hawaii. — See *Matter of Davis*, 11 Hawaii 594.

United States. — *In re Chetwood*, 165 U. S. 443.

Contempt in Presence of Court. — *Brizendine v. State*, 103 Tenn. 677. See also *Borror v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 630.

In *Missouri* appeals will lie from judgments in cases of constructive but not in cases of direct contempt. *Glover v. American Casualty Ins., etc., Co.*, 130 Mo. 173.

Appeal to U. S. Supreme Court. — Where, under the final decree of the highest court of a state, a defendant in a contempt proceeding is denied a right claimed under the constitution, laws, or treaties of the United States, an appeal will lie. *Tinsley v. Anderson*, 171 U. S. 101.

- 810.** (2) *In Criminal Contempts.* — See note 1.
811. (3) *In Interlocutory Judgments.* — See note 2.
 (4) *Where Trial Court Has Jurisdiction.* — See note 4.
 b. WHEN ALLOWED — (1) *In General.* — See note 6.
812. (3) *In Civil Contempts.* — See note 2.
813. (5) *Where Trial Court Is Without Jurisdiction.* — See note 2.
 (6) *Statutory Provisions.* — See note 3.
814. d. REVIEWABLE MATTERS. — See notes 2, 4.
815. e. NOT SUPERSEDEAS. — See note 1.
 5. By Habeas Corpus — a. WHEN APPROPRIATE — (2) *For Want of Jurisdiction.* — See note 5.

810. 1. *Glover v. American Casualty Ins., etc., Co.*, 130 Mo. 173; *Grand Lodge, etc., v. Jansen*, 62 N. J. Eq. 737. See also *Snow v. Snow*, 13 Utah 15. Compare *Kyle v. People*, 72 Ill. App. 171.

811. 2. In New York an interlocutory order in a contempt proceeding is not appealable to the Court of Appeals as a matter of right. *Ray v. New York Bay Extension R. Co.*, 155 N. Y. 102.

4. See *Levan v. Third Dist. Ct.*, (Idaho 1896) 43 Pac. Rep. 574.

6. *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464 [citing 4 ENCYC. OF PL. AND PR. 811]; *Nienaber v. Tarvin*, 104 Ky. 149; *Zimmerman v. State*, 46 Neb. 13; *State v. Nathans*, 49 S. Car. 199.

Erroneous Judgment. — *Kyle v. People*, 72 Ill. App. 171.

In Illinois judgments of courts of record are subject to review in cases of either direct or indirect contempt. *Kyle v. People*, 72 Ill. App. 171.

812. 2. *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464, citing 4 ENCYC. OF PL. AND PR. 812. See also the following cases:

New Jersey. — *Grand Lodge, etc. v. Jansen*, 62 N. J. Eq. 737.

Utah. — *Snow v. Snow*, 13 Utah 15.

813. 2. *Levan v. Third Dist. Ct.*, (Idaho 1896) 43 Pac. Rep. 574.

3. In Georgia. — See *Haygood v. Conn*, 100 Ga. 97, citing the Georgia statute, but holding that a "fast" writ of error does not lie.

In Indiana an appeal is allowed by statute. *State v. Rockwood*, (Ind. 1902) 64 N. E. Rep. 592.

The state as well as the defendant may appeal. *State v. Rockwood*, (Ind. 1902) 64 N. E. Rep. 592.

In Kansas. — Gen. Stat. Kan. (1897), c. 85, § 14, provides that any judgment of conviction for contempt may be reviewed upon direct appeal to, or

writ of error from, the Supreme Court. See *In re Rich*, 10 Kan. App. 280.

In Montana. — Code Civ. Pro. Mont., § 2183, provides that judgments and orders in cases of contempt are final and conclusive and there is no appeal. *State v. Loud*, 24 Mont. 428.

In New York. — *In re De Long*, (Supm. Ct. Spec. T.) 25 Civ. Pro. (N. Y.) 363.

In North Dakota, under Rev. Codes 1899, § 5954, any final order of conviction in a contempt case may be reviewed in the Supreme Court. *State v. Massey*, 10 N. Dak. 154; *Noble Tp. v. Aasen*, 10 N. Dak. 264; *Merchant v. Pielke*, 9 N. Dak. 245.

In Ohio. — Rev. Stat. Ohio, § 5649, provides that "the judgment and orders of a court or officer made in cases of contempt may be reviewed on error." *Brimson v. State*, 63 Ohio St. 347.

In Washington the right to an appeal is allowed under Ball. Code, § 5811. *State v. Superior Ct.*, 28 Wash. 590; *State v. Allen*, 14 Wash. 684.

814. 2. *State v. Massey*, 10 N. Dak. 154.

Review of Facts. — The facts found by the trial judge are not reviewable except as to their sufficiency to sustain the verdict. *Green v. Green*, 130 N. Car. 578.

4. *Shore v. People*, 26 Colo. 516; *Bloom v. People*, 23 Colo. 416. Compare *French v. Commercial Nat. Bank*, 79 Ill. App. 110, which case was reversed and remanded on the ground that the punishment was unnecessarily severe.

Errors Occurring During the Trial may be reviewed, if a motion for a new trial has been filed pointing out such errors. *Zimmerman v. State*, 46 Neb. 13.

815. 1. Compare *State v. Superior Ct.*, 28 Wash. 590.

5. *Kansas.* — See also *In re Barn-*

816. (3) *For Void Judgment.* — See note 3.

817. b. WHEN INAPPROPRIATE — (1) *In General.* — See notes 2, 3.

818. (2) *For Mere Irregularities.* — See note 1.

c. MATTERS EXAMINABLE — (1) *Generally.* — See note 2.

(2) *Jurisdictional Questions.* — See note 4.

Irregularities in Proceedings in Trial Court. — See note 5.

821. 9. *By Pardon.* — See note 1.

house, 60 Kan. 849; *In re Palmeto*, 58 Kan. 809; *In re Rich*, 10 Kan. App. 280.

Texas. — *Ex p.* Duncan, (Tex. Crim. 1901) 62 S. W. Rep. 758.

United States. — *Ex p.* Buskirk, (C. C. A.) 72 Fed. Rep. 14.

816. 3. *Castner v. Pocahontas Collieries Co.*, 117 Fed. Rep. 184 [citing 4 ENCYC. OF PL. AND PR. 816]; *Ex p.* Clarke, 126 Cal. 235; *Ex p.* Duncan, (Tex. Crim. 1901) 62 S. W. Rep. 758; *Ex p.* Ellis, 37 Tex. Crim. 539; *Ex p.* Buskirk, (C. C. A.) 72 Fed. Rep. 14.

Omission of Formal Requisites — Constructive Contempt. — *In re Blush*, 5 Kan. App. 879.

817. 2. *In re Taber*, 13 S. Dak. 62.

3. *Castner v. Pocahontas Collieries Co.*, 117 Fed. Rep. 184, citing 4 ENCYC. OF PL. AND PR. 817. See also the following cases:

Colorado. — *In re Popejoy*, 26 Colo. 32.

Georgia. — *Tindall v. Nisbet*, 113 Ga. 1114.

Montana. — *In re Boyle*, 26 Mont. 367.

Pennsylvania. — *Jack v. Twyford*, 10 Pa. Super. Ct. 475.

South Dakota. — *In re Taber*, 13 S. Dak. 62.

United States. — *Tinsley v. Anderson*, 171 U. S. 101.

818. 1. *Inability to Obey.* — *Tindall v. Nisbet*, 113 Ga. 1114.

2. *In re Rosenberg*, 90 Wis. 581.

The Evidence Before the Trial Court. — *In re Popejoy*, 26 Colo. 32.

4. *Jack v. Twyford*, 10 Pa. Super. Ct. 475.

5. *Tindall v. Nisbet*, 113 Ga. 1114; *In re Taber*, 13 S. Dak. 62; *Fisher v. McDaniel*, 9 Wyo. 457.

821. 1. *Herring v. Pugh*, 126 N. Car. 852, per Montgomery, J. *Contra*, *Taylor v. Goodrich*, (Tex. Civ. App. 1897) 40 S. W. Rep. 515.

CONTINUANCES.

825. II. POSTPONEMENTS. — See note 1.

826. III. POWER TO CONTINUE — Largely Regulated by Statute. — See note 1.

828. VI. AS EXERCISE OF DISCRETION. — See notes 2, 3.

825. 1. Improper Statements by Attorney. — Improper statements by an attorney in the presence of a jury panel which is drawn to try the case to which his statements refer are grounds for a postponement until another panel can be summoned. *Thompson v. O'Conner*, 115 Ga. 120.

826. 1. Code Civ. Pro. Okla., § 328 (Stat. Okla. 1893, § 4206), authorizes the court to continue an action at any stage of the proceedings, for good cause shown. *McMahan v. Norick*, (Okla. 1902) 69 Pac. Rep. 1047.

828. 2. Alabama. — *Walker v. State*, 117 Ala. 85.

Arkansas. — *Jones v. State*, 61 Ark. 88.

Colorado. — *Keegan v. Donnelly*, 11 Colo. App. 31.

Florida. — *Gass v. State*, (Fla. 1902) 32 So. Rep. 109.

Georgia. — *Fraser v. State*, 112 Ga. 13.

Idaho. — *Holt v. Gridley*, (Idaho 1900) 63 Pac. Rep. 188; *Reynolds v. Corbus*, (Idaho 1901) 63 Pac. Rep. 884.

Indiana. — *North British, etc., Ins. Co. v. Rudy*, 26 Ind. App. 472.

Iowa. — *Reed v. Lane*, 96 Iowa 454.

Kansas. — *Missouri Pac. R. Co. v. Haynes*, 1 Kan. App. 586.

Louisiana. — *State v. Charles*, 108 La. 230.

Mississippi. — *Lipscomb v. State*, 76 Miss. 223.

Missouri. — *Cooley v. Kansas City, etc., R. Co.*, 149 Mo. 487; *State v. Burns*, 148 Mo. 167; *Rottman Distilling Co. v. Van Frank*, 88 Mo. App. 50; *Shirk v. Shirk*, 75 Mo. App. 573.

Nebraska. — *Storz v. Finklestein*, 48 Neb. 27.

Ohio. — *Haas v. State*, 7 Ohio Cir. Dec. 509, 13 Ohio Cir. Ct. 418.

Oklahoma. — *Hyde v. Territory*, 8 Okla. 69.

Oregon. — *State v. Wong Gee*, 35 Oregon 276.

Pennsylvania. — *De Grote v. De Grote*, 175 Pa. St. 50.

South Dakota. — *Nebraska Land, etc., Co. v. Burris*, 10 S. Dak. 430.

Tennessee. — *Madden v. State*, (Tenn. 1901) 67 S. W. Rep. 74.

Texas. — *Gulf, etc., R. Co. v. Burroughs*, (Tex. Civ. App. 1901) 66 S. W. Rep. 83; *Clarke v. Faver*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1009; *Gulf, etc., R. Co. v. Rowland*, (Tex. Civ. App. 1896) 35 S. W. Rep. 31; *Berry v. Burnett*, 23 Tex. Civ. App. 558.

West Virginia. — *Ravenswood Bank v. Hamilton*, 43 W. Va. 75.

United States. — *Baker v. Texarkana Nat. Bank*, (C. C. A.) 74 Fed. Rep. 598.

An Agreement Between the Attorneys to the effect that a criminal case shall be continued does not compel the court to enter an order of continuance. *Keaton v. State*, 41 Tex. Crim. 621.

In Georgia. — 2 Code Ga., § 5260, does not take away the discretion of a judge of the Superior Court to deny a continuance in a case on appeal from the justice's court. *Harrison v. Langston*, 100 Ga. 394.

3. Arkansas. — *Supreme Lodge, etc. v. Robbins*, 70 Ark. 364.

Colorado. — *Michael v. Mills*, 22 Colo. 439; *Keegan v. Donnelly*, 11 Colo. App. 31.

Louisiana. — *State v. Charles*, 108 La. 230; *State v. Baum*, 51 La. Ann. 1112.

Missouri. — *Rottman Distilling Co. v. Van Frank*, 88 Mo. App. 50.

Nebraska. — *Burris v. Court*, 48 Neb. 179.

North Carolina. — *Piedmont Wagon Co. v. Bostic*, 118 N. Car. 758.

Oklahoma. — *McMahan v. Norick*, (Okla. 1902) 69 Pac. Rep. 1047.

832. VIII. GROUNDS FOR CONTINUANCE — 5. Public Excitement or Prejudice. — See notes 5, 6.

833. See note 3.

6. Want of Preparation — a. IN GENERAL. — See note 5.

834. b. IN CRIMINAL CASES — State. — See note 2.

Accused. — See note 6.

835. c. DILIGENCE. — See note 1.

837. 7. Amendment of Pleadings — Modern Rule. — See notes 1, 2.

Oregon. — *State v. Wong Gee*, 35 Oregon 276.

Texas. — *East Texas Land, etc., Co. v. Texas Lumber Co.*, 21 Tex. Civ. App. 411.

West Virginia. — *Ravenswood Bank v. Hamilton*, 43 W. Va. 75.

United States. — In *Drexel v. True*, (C. C. A.) 74 Fed. Rep. 12, it was held that the ruling of a court on an application for a continuance is not reviewable.

When a Continuance Is Granted the Appellate Court is more reluctant to review the action of the court below than when it is denied. *Cannon v. Griffith*, 3 Kan. App. 506.

832. 5. Courier-Journal Co. v. Sallee, 104 Ky. 335, citing 4 ENCYC. OF PL. AND PR. 832.

6. State v. Rice, (Idaho 1901) 66 Pac. Rep. 87; *Laughlin v. Com.*, (Ky. 1896) 37 S. W. Rep. 590. See also *Hoover v. State*, 48 Neb. 184. *Contra*, *State v. Manns*, 48 W. Va. 480.

Martial Law. — The existence of martial law is not in itself a ground for a continuance. *State v. Corcoran*, (Idaho 1900) 61 Pac. Rep. 1034.

833. 3. Hubbard v. State, (Tex. Crim. 1902) 67 S. W. Rep. 413.

5. Brooks v. Com., 100 Ky. 194; *State v. Pool*, 50 La. Ann. 449; *Gaines v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 623; *Gulf, etc., R. Co. v. Schneider*, (Tex. Civ. App. 1894) 28 S. W. Rep. 260; *New York L. Ins. Co. v. Davis*, 94 Va. 427.

Texas Statute. — Code Crim. Pro. Tex., art. 567, requires that where a defendant is charged with a misdemeanor he shall be allowed two days in which to prepare for trial. *King v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 926.

A Good and Sufficient Excuse for not being prepared must be made before a court will continue a case for want of preparation. *Palmer v. Caywood*, (Neb. 1902) 89 N. W. Rep. 1034.

834. 2. Recent Employment of

counsel is not necessarily a ground for a continuance. *Bishop v. Com.*, (Ky. 1900) 58 S. W. Rep. 817. But see *State v. Collins*, 104 La. 629, holding that where counsel came into the case on Monday, and the case was set for Friday, a continuance should have been granted.

6. In Hayden v. Com., (Ky. 1898) 45 S. W. Rep. 886, it was held that where an indictment was three months old a continuance would not be granted on the ground that the defendant had not had time to consult his attorneys. But compare *State v. Weems*, 96 Iowa 426; *State v. White*, 98 Iowa 346; *Holmes v. State*, 38 Tex. Crim. 370.

Lapse of Time. — In a prosecution for murder, a showing that the trial took place only three weeks after the homicide is insufficient to show abuse of discretion in refusing to grant a continuance. *Hoover v. State*, 48 Neb. 184.

835. 1. Georgia. — *Bailey v. Wilner*, 107 Ga. 364; *Gunn v. Gunn*, 95 Ga. 439.

Illinois. — *Ryan v. People*, 165 Ill. 143.

Missouri. — *State v. Craft*, 164 Mo. 631.

Texas. — *St. Louis Brewing Assoc. v. Walker*, 23 Tex. Civ. App. 6.

837. 1. Pifer v. Stanley, 57 Mo. App. 516.

2. Continuance Properly Refused — Amendment of Complaint — Alabama. — *Elyton Land Co. v. Denny*, 108 Ala. 553; *Torrey v. Bishop*, 104 Ala. 548.

Arizona. — *Jordan v. Schuerman*, (Ariz. 1898) 53 Pac. Rep. 579.

California. — *Schultz v. McLean*, 109 Cal. 437.

Colorado. — *Wilcox v. American Sav. Bank*, 21 Colo. 348; *Beshoar v. Roberts*, 8 Colo. App. 173.

Georgia. — *Atlanta Land, etc., Co. v. Haile*, 106 Ga. 498; *Morrison v. Morrison*, 102 Ga. 170; *Wilson Coal, etc., Co. v. Hall, etc.*, *Woodworking Mach. Co.*, 97 Ga. 330; *Lewis v. Bracken*, 97 Ga. 337; *Constitution Pub. Co. v. Way*, 94 Ga. 120.

839. 10. Absence of Counsel — a. IN GENERAL. — See note 7.

840. See notes 1, 2, 4.

Illinois. — Cozzens v. Chicago Hydraulic-Press Brick Co., 166 Ill. 213; Franklin v. Krum, 70 Ill. App. 649.

Indiana. — Magnuson v. Billings, 152 Ind. 177; North British, etc., Ins. Co. v. Rudy, 26 Ind. App. 472.

Iowa. — Theis v. Chicago, etc., R. Co., 107 Iowa 522; Foote v. Burlington Gaslight Co., 103 Iowa 576.

Kansas. — Union Pac. R. Co. v. Motzner, 8 Kan. App. 431; Clark v. Ellithorpe, 7 Kan. App. 337.

Kentucky. — Purkholder v. Farmers' Bank, (Ky. 1902) 67 S. W. Rep. 832.

Michigan. — Crane Lumber Co. v. Bellows, 116 Mich. 304.

Missouri. — Mirrieles v. Wabash R. Co., 163 Mo. 470; Nolan v. Johns, 126 Mo. 159.

New York. — Rosenberg v. Third Ave. R. Co., 47 N. Y. App. Div. 323.

North Carolina. — Dobson v. Southern R. Co., 129 N. Car. 289; Silngluff v. Hall, 124 N. Car. 397.

South Dakota. — J. I. Case Threshing Mach. Co. v. Eichinger, 15 S. Dak. 530.

Texas. — Mayfield Lumber Co. v. Carver, (Tex. Civ. App. 1901) 66 S. W. Rep. 216; Texas, etc., R. Co. v. Bancroft, (Tex. Civ. App. 1900) 56 S. W. Rep. 606; Gulf, etc., R. Co. v. Brown, 16 Tex. Civ. App. 93; Gulf, etc., R. Co. v. Duvall, 12 Tex. Civ. App. 348; Texas, etc., R. Co. v. Neal, (Tex. Civ. App. 1895) 33 S. W. Rep. 693; Gulf, etc., R. Co. v. Jagoe, (Tex. Civ. App. 1895) 32 S. W. Rep. 1061; Shiner v. Shiner, 15 Tex. Civ. App. 666; Texas, etc., R. Co. v. Cornelius, 10 Tex. Civ. App. 125; Galveston, etc., R. Co. v. Smith, 9 Tex. Civ. App. 450.

West Virginia. — Amos v. Stockert, 47 W. Va. 109; Ravenswood Bank v. Hamilton, 43 W. Va. 75.

Amendments Requiring Continuance. — In the following cases the amendments were of such a character as to warrant a continuance at the request of the defendant:

California. — Marr v. Rhodes, 131 Cal. 267; Schultz v. McLean, 109 Cal. 437.

Delaware. — Cirwiltin v. Mills, 2 Marv. (Del.) 232.

Georgia. — Central R., etc., Co. v. Jackson, 94 Ga. 640.

Illinois. — Cozzens v. Chicago Hydraulic-Press Brick Co., 166 Ill. 213.

Indiana. — Brandt v. State, 17 Ind. App. 311.

Kansas. — Vale v. Trader, 5 Kan. App. 307.

Nebraska. — Dunn v. Bozarth, 59 Neb. 244.

Texas. — Galveston, etc., R. Co. v. Smith, 9 Tex. Civ. App. 450.

Washington. — Eldridge v. Young America, etc., Min. Co., 27 Wash. 297.

Wisconsin. — Whitefoot v. Leffingwell, 90 Wis. 182.

839. 7. In Louisiana the rule is that the physical inability of counsel to attend court is good ground for a continuance. Vicksburg, etc., R. Co. v. Scott, 47 La. Ann. 706.

Remarks from Bench. — Where a court is engaged in trying jury cases and intimates from the bench that the civil cases will not be reached in their regular order, the absence of the defendant's counsel for a day is excusable and a ground for continuance. Callaway v. Douglasville College, 99 Ga. 623.

840. 1. California. — Harloe v. Lambie, 132 Cal. 133; People v. Durran, 119 Cal. 201.

Colorado. — Reynolds v. Campling, 23 Colo. 105.

Georgia. — Callaway v. Douglasville College, 99 Ga. 623.

Kentucky. — Hatfield v. Com., (Ky. 1900) 55 S. W. Rep. 679; Cornett v. Combs, (Ky. 1899) 53 S. W. Rep. 32.

Louisiana. — Johnson v. Dean, 48 La. Ann. 100.

New York. — McCready v. Lindenberg, 37 N. Y. App. Div. 425.

Tennessee. — State v. Frost, 103 Tenn. 685.

Texas. — Coleman v. State, (Tex. Crim. 1901) 63 S. W. Rep. 322; Boyd v. Leith, (Tex. Civ. App. 1899) 50 S. W. Rep. 618; Self v. State, 39 Tex. Crim. 455; Watkins v. Atwell, (Tex. Civ. App. 1898) 45 S. W. Rep. 404; Webb v. State, (Tex. Crim. 1897) 40 S. W. Rep. 989; Tuttle v. State, 41 Tex. Crim. 96.

Intoxication of Counsel may be ground for an adjournment for a few days to allow other counsel to become familiar with the case, but a continuance over the term will be refused. People v. Warren, 130 Cal. 678.

Where a Party Is an Attorney a continuance will not be granted because

841. *b.* MEMBER OF CONGRESS OR LEGISLATURE. — See note 2.

c. ON ACCOUNT OF SICKNESS. — See note 6.

d. PROFESSIONAL ENGAGEMENTS. — See note 7.

842. See note 1.

11. Absence of Party — a. VOLUNTARY ABSENCE. — See note 2.

b. ON ACCOUNT OF SICKNESS — *In General.* — See note 4.

of the absence of counsel. *Keegan v. Donnelly*, 11 Colo. App. 31.

840. 2. *West v. Hennessey*, 63 Minn. 378.

4. *Delk v. State*, 100 Ga. 61. But compare *Watkins v. Ahrens*, etc., Mfg. Co., (Ky. 1897) 38 S. W. Rep. 868.

The Unlawful Detention in jail of the only counsel for the defendant is sufficient ground for a continuance. *Scott v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 171.

Local Counsel. — The absence of the only local counsel has been held to be ground for a continuance. *Leslie v. Com.*, (Ky. 1897) 42 S. W. Rep. 1095.

Reasonable Time. — Where a defendant is kept in close confinement between the time of his arrest and his trial, and the counsel appointed to defend him are much occupied in the trial of other cases, the court should grant a continuance of a reasonable time to allow his counsel to prepare his defense. *State v. Pool*, 50 La. Ann. 449.

Custom of Court. — It is reversible error for a court to refuse to continue a case when the only counsel engaged is too ill to proceed, and to base its action on the ground that it has been the custom of the court to compel litigants to employ other counsel. *Varn v. Green*, 50 S. Car. 403.

841. 2. *Starr & Curt. Annot. Stat. Ill.* (1896), c. 110, par. 47, compels a court to continue a case when the attorney of record is a member of the legislature and is in actual attendance on its sessions. *Ware v. Jerseyville*, 158 Ill. 234.

Attending Legislature. — The affidavit required by the Illinois Practice Act (*Starr & Curt. Annot. Stat. Ill.* 1896, c. 110, par. 47) to be filed when a continuance is asked on the ground that the attorney is attending the legislature must state that he was employed "in such suit" before the session began. *Wieghard v. Fieldon Creamery Co.*, 65 Ill. App. 202.

Member of Legislature. — The fact that the attorney is a member of the legislature will not obviate the necessity of setting out in the affidavit the fact that the party cannot safely go to trial without him. *McClory v. Crawley*, 59 Ill. App. 392.

6. In *Kessel v. O'Sullivan*, 60 Ill. App. 548, the court said: "While a temporary postponement of the trial might have been granted for that cause [illness of the attorney] it was no ground for a continuance; and whatever may have been the hardship to the attorney it does not appear that his client suffered by it."

7. *Adamek v. Plano Mfg. Co.*, 64 Minn. 304.

In New York. — When it is shown, as required by the rules of court, that an attorney is actually engaged in the trial of another cause, a continuance must be granted. *Marsh v. Nassau Show Case Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 837.

842. 1. *Adamek v. Plano Mfg. Co.*, 64 Minn. 304, quoting 4 ENCYC. OF PL. AND PR. 841.

2. Merits of Case. — A court will not pass upon the merits of a case on an application for a continuance, and if a defendant is voluntarily absent and bases an application to continue on the ground that the case of the plaintiff is without merit, it will be refused. *Bergevin v. Barnard*, 72 Ill. App. 47.

Mistatement of Plaintiff. — Where a party is absent from the trial because he has been misinformed by the plaintiff as to the date of trial, a continuance will be granted. *Richardson v. Boyd*, 69 Ark. 368.

4. *Rubens v. Mead*, (Cal. 1898) 53 Pac. Rep. 432; *Elliott v. Field*, 21 Colo. 378; *Post v. Cecil*, 11 Ind. App. 362; *Townsend v. Rhea*, (Ky. 1897) 38 S. W. Rep. 865; *Yori v. Cohn*, (Nev. 1901) 65 Pac. Rep. 945; *Michelsen v. Spies*, 83 Hun (N. Y.) 509; *McMahan v. Norick*, (Okla. 1902) 69 Pac. Rep. 1047.

Failure to File Answer. — Where a

843. See note 2.

844. *d.* NECESSITY OF PARTY'S PRESENCE. — See note 1.

845. 13. Absence of Evidence — *a.* IN GENERAL — Rule Stated. — See note 1.

party has failed to file an answer in an action for a divorce, or to make any other kind of defense, a continuance on the ground of illness of a party will not be granted on the day set for the hearing. *Queirolo v. Queirolo*, 129 Cal. 686. See also *Garlington v. Fletcher*, 111 Ga. 861.

Effect of Doctor's Certificate. — In *State v. Lee*, 58 S. Car. 335, it was held that although the defendant produced a doctor's certificate of physical inability, if his appearance and manner did not indicate that he was physically unable to attend the trial a motion for continuance would be denied.

843. 2. Inconsistent Action of Party. — Where a party, after making an application for a continuance on the ground that he is too ill to come into court, travels about the country while such application is under consideration, the court does not abuse its discretion in refusing to grant his request. *Spann v. Torbert*, 130 Ala. 541.

844. 1. When a Codefendant Is Dismissed by amendment of the pleadings it is not a ground of continuance, as the other parties are supposed to be prepared to go on with the trial. *Evans v. Marden*, 154 Ill. 443.

Fault of Mail. — The miscarriage of a letter informing a party of the date of a trial is ground for a continuance. *Helm v. Voils*, 58 Kan. 816. See also *Richardson v. Boyd*, 69 Ark. 368, in which case the defendant was misinformed as to the date of trial.

845. 1. In the following cases the refusal of a continuance on the ground of absence of witnesses was held to be a proper exercise of discretion:

Alabama. — *Terry v. State*, 120 Ala. 286.

Arkansas. — *Kitts v. State*, 70 Ark. 521; *Lane v. State*, 67 Ark. 290; *Maxey v. State*, 66 Ark. 523; *Hamilton v. State*, 62 Ark. 543.

California. — *Simpson v. Simpson*, (Cal. 1895) 41 Pac. Rep. 804; *People v. Warren*, 130 Cal. 678; *People v. Breen*, 130 Cal. 72; *People v. Winters*, 125 Cal. 325; *People v. Wade*, 118 Cal. 672; *People v. Sanders*, 114 Cal. 216.

Georgia. — *Jones v. Rome Grocery Co.*, 99 Ga. 103; *Wilson v. Burr*, 97

Ga. 256; *Stanford v. New England Mortg. Security Co.*, 110 Ga. 274; *Morrison v. Morrison*, 102 Ga. 170; *Chism v. Varnedoe*, 96 Ga. 777; *Wilcox v. Mims*, 95 Ga. 564; *Blount v. Beall*, 95 Ga. 182; *McElveen Commission Co. v. Jackson*, 94 Ga. 549; *Rome R. Co. v. Barnett*, 94 Ga. 446.

Illinois. — *Davids v. People*, 192 Ill. 176; *Bailey v. Kerr*, 180 Ill. 412; *Feinberg v. People*, 174 Ill. 609; *Stringam v. Parker*, 159 Ill. 304; *Bergevin v. Barnard*, 72 Ill. App. 47; *Chambers v. Beahan*, 57 Ill. App. 285.

Indiana. — *Post v. State*, 14 Ind. App. 452; *Dunnington v. Syfers*, 157 Ind. 458.

Iowa. — *State v. Penney*, 113 Iowa 691; *State v. McGinn*, 109 Iowa 641; *Reed v. Lane*, 96 Iowa 454; *State v. McDonough*, 104 Iowa 6.

Kansas. — *Gill v. Buckingham*, 7 Kan. App. 227; *Atchison, etc., R. Co. v. O'Melia*, 1 Kan. App. 374.

Kentucky. — *Strange v. Com.*, (Ky. 1901) 64 S. W. Rep. 980; *Clark v. Com.*, (Ky. 1900) 58 S. W. Rep. 429; *Mattingsby v. Willet*, (Ky. 1898) 44 S. W. Rep. 376; *Cope v. Deaton*, (Ky. 1897) 43 S. W. Rep. 190.

Louisiana. — *State v. Baptiste*, 108 La. 586.

Michigan. — *McNaughton v. Evert*, 116 Mich. 141; *People v. Williams*, 118 Mich. 692.

Minnesota. — *Conrad v. Dobmeier*, 64 Minn. 284; *West v. Hennessey*, 63 Minn. 378.

Missouri. — *State v. Cochran*, 147 Mo. 504; *State v. Tettaton*, 159 Mo. 354; *State v. Webster*, 152 Mo. 87; *Cooley v. Kansas City, etc., R. Co.*, 149 Mo. 487; *State v. Rice*, 149 Mo. 461; *State v. Clark*, 147 Mo. 20.

Nebraska. — *Kerr v. State*, 63 Neb. 115; *Tatum v. State*, 61 Neb. 229; *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341; *Stratton v. Dole*, 45 Neb. 472; *Kansas City, etc., R. Co. v. Conlee*, 43 Neb. 121; *Home F. Ins. Co. v. Johnson*, 43 Neb. 71.

New York. — *Simon v. Sheridan, etc., Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 489.

Oklahoma. — *Smith v. Territory*, 11 Okla. 669; *Pearce v. Territory*, 11 Okla.

847. See note 1.

438; *Butt v. Carson*, 5 Okla. 160; *Hyde v. Territory*, 8 Okla. 69.

Oregon. — *State v. Huffman*, 39 Oregon 48; *State v. Wong Gee*, 35 Oregon 276.

South Carolina. — *State v. Smith*, 56 S. Car. 378.

South Dakota. — *Nebraska Land, etc., Co. v. Burris*, 10 S. Dak. 430.

Texas. — *Bond v. National Exch. Bank*, (Tex. Civ. App. 1899) 53 S. W. Rep. 71; *Winters v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1110; *Gaines v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 1012; *Steel v. State*, (Tex. Crim. 1897) 43 S. W. Rep. 101; *Willis v. Sanger*, 15 Tex. Civ. App. 655; *Taylor v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 274; *Kennedy v. Yoe*, (Tex. Civ. App. 1897) 39 S. W. Rep. 946; *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229; *Koller v. State*, 36 Tex. Crim. 496; *Missouri, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1896) 37 S. W. Rep. 771; *Ft. Worth, etc., R. Co. v. Kennedy*, 12 Tex. Civ. App. 654; *Cole v. Grigsby*, (Tex. Civ. App. 1894) 35 S. W. Rep. 680; *Sullivan v. Crouch*, 10 Tex. Civ. App. 404; *McKinney v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 786; *Galveston, etc., R. Co. v. Briggs*, (Tex. Civ. App. 1895) 30 S. W. Rep. 933; *San Antonio, etc., R. Co. v. Bowles*, (Tex. Civ. App. 1895) 30 S. W. Rep. 89; *Alexander v. Brown*, (Tex. Civ. App. 1895) 29 S. W. Rep. 561; *St. Louis Southwestern R. Co. v. Freedman*, 18 Tex. Civ. App. 553; *Lindsley v. Parks*, 17 Tex. Civ. App. 527; *Cabell v. Holloway*, 10 Tex. Civ. App. 307; *Highsmith v. State*, 41 Tex. Crim. 32; *Williams v. State*, 40 Tex. Crim. 565; *O'Toole v. State*, 40 Tex. Crim. 578; *Byrd v. State*, 39 Tex. Crim. 609; *Little v. State*, 39 Tex. Crim. 654.

Virginia. — *Andrews v. Com.*, 100 Va. 801; *Emmons v. Pidcock*, 93 Va. 146; *Gaines v. Wilson*, (Va. 1896) 24 S. E. Rep. 828; *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34; *Goodell v. Gibbons*, 91 Va. 608.

United States. — *Hardy v. U. S.*, 186 U. S. 224; *Kerr-Murray Mfg. Co. v. Hess*, (C. C. A.) 98 Fed. Rep. 56; *U. S. v. Schoonmaker*, 93 Fed. Rep. 724.

Attendance of Female Witness. — Under the *Georgia* statutes a female cannot be compelled to attend court, and it is not an error to refuse a continuance on the ground that a female witness is ab-

sent. *Buchanan v. McClain*, 110 Ga. 477.

Interrogation. — Where the testimony of an absent witness could have been taken by interrogation, a continuance will be refused. *Rome R. Co. v. Barnett*, 94 Ga. 446.

Agreement of Opposite Party to Produce. — Where the opposing party agrees to produce a witness for the other side at a certain time provided no continuance is granted, it is error to refuse a continuance upon the failure of such witness to appear. *Louisville, etc., R. Co. v. Carothers*, (Ky. 1901) 65 S. W. Rep. 833.

847. 1. In the following cases a denial of a continuance where it was asked because of the absence of a witness was held to be error:

Alabama. — *Walker v. State*, 117 Ala. 85.

Delaware. — *Smyth v. Wilmington City R. Co.*, 1 Penn. (Del.) 218; *Miller v. Hickman*, 1 Penn. (Del.) 263.

Florida. — *Shiver v. State*, 41 Fla. 630.

Georgia. — *Kennedy v. State*, 101 Ga. 559; *Allen v. State*, 112 Ga. 752; *Compton v. State*, 108 Ga. 747; *Ryder v. State*, 100 Ga. 528.

Kentucky. — *Robinson v. Com.*, (Ky. 1902) 68 S. W. Rep. 1099; *Gambrel v. Com.*, (Ky. 1901) 63 S. W. Rep. 272; *Strange v. Com.*, (Ky. 1900) 55 S. W. Rep. 204.

Louisiana. — *State v. Fairfax*, 107 La. 624.

Massachusetts. — *Lansky v. West End St. R. Co.*, 173 Mass. 20.

Mississippi. — *Scott v. State*, 80 Miss. 197; *Havens v. State*, 75 Miss. 488.

Missouri. — *State v. Dewitt*, 152 Mo. 76.

Oklahoma. — *Lawson v. Territory*, 8 Okla. 1; *Miller v. U. S.*, 8 Okla. 315.

South Dakota. — *White Sewing Mach. Co. v. Simpson*, 10 S. Dak. 448.

Texas. — *Smith v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 267; *Cline v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 679; *Duffy v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 418; *Cortez v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 453; *Davis v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 918; *Cogdell v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 645; *Baines v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 119; *Lynch v. Munson*, (Tex. Civ. App. 1901) 61 S. W. Rep. 140; *Whitney v.*

849. To Take Depositions. — See note 4.

850. To Search for Evidence. — See note 2.

b. INDEFINITE, IMMATERIAL, IRRELEVANT, OR INCOMPETENT. — See note 4.

State, (Tex. Crim. 1900) 59 S. W. Rep. 895; Tull v. State, (Tex. Crim. 1900) 55 S. W. Rep. 61; Gaines v. State, (Tex. Crim. 1899) 53 S. W. Rep. 623; Curtis v. State, (Tex. Crim. 1897) 40 S. W. Rep. 265; Massey v. State, (Tex. Crim. 1897) 40 S. W. Rep. 726; Koiler v. State, 36 Tex. Crim. 496; Williams v. State, (Tex. Crim. 1896) 37 S. W. Rep. 325; Texas, etc., R. Co. v. Yates, (Tex. Civ. App. 1895) 33 S. W. Rep. 291; Murphy v. State, 41 Tex. Crim. 120; Logan v. State, 39 Tex. Crim. 573; Bennett v. State, 39 Tex. Crim. 639; Dawson v. State, 38 Tex. Crim. 9; Blake v. State, 38 Tex. Crim. 377. The foregoing cases show that in Texas a first and second application for continuance are determined by the certain and definite rules prescribed by the statute; that little or no discretion is left to the trial court to deny a continuance where the affidavit therefor is in strict compliance with the statute; and that although a subsequent application is addressed to the discretion of the court, its refusal will be reviewed if flagrantly unjust.

849. 4. *Chenault v. Spencer*, (Ky. 1902) 68 S. W. Rep. 128; *Neal v. Sheriff*, 52 N. Y. App. Div. 465.

Unwilling Witness. — Where it appears that if a continuance should be granted to take a deposition the witness would refuse to answer the interrogatories, it is not error to deny the continuance. *Nickell v. Citizens' Bank*, (Ky. 1901) 60 S. W. Rep. 925.

850. 2. *Delk v. State*, 99 Ga. 667; *State v. Madison*, 49 W. Va. 96.

Misplaced Deposition. — A continuance will not be granted in order to find a misplaced deposition when the person whose deposition has been misplaced is in court. *Matthews v. Missouri Pac. R. Co.*, 142 Mo. 645.

4. *Arkansas*. — *Kitts v. State*, 70 Ark. 521.

Colorado. — *Keegan v. Donnelly*, 11 Colo. App. 31.

Illinois. — *Dauids v. People*, 102 Ill. 176; *Stringam v. Parker*, 159 Ill. 304.

Indiana. — *Brandt v. State*, 17 Ind. App. 311.

Iowa. — *State v. McDonough*, 104 Iowa 6.

Kansas. — *Vale v. Trader*, 5 Kan. App. 307.

Missouri. — *State v. Tettaton*, 159 Mo. 354.

Nebraska. — *McDemott v. Manley*, (Neb. 1902) 90 N. W. Rep. 1119.

Nevada. — *Taylor v. Nevada-California Oregon R. Co.*, (Nev. 1902) 69 Pac. Rep. 858.

New York. — *Weston v. Proctor*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 800.

Oregon. — *State v. Huffman*, 39 Oregon 48.

Texas. — *Farris v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 140; *DeLucenay v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 796; *Morris v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 531; *Dent v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 627; *Adkins v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 924; *Greer v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1075; *Parsley v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 257; *Calhoun v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 322; *Garcia v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 122; *Ross v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 105; *Gentry v. State*, 41 Tex. Crim. 497; *Belknap v. Groover*, (Tex. Civ. App. 1900) 56 S. W. Rep. 249; *Wilson v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 489; *Dailey v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 821; *Wade v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 582; *Wrage v. State*, 41 Tex. Crim. 369; *Martin v. State*, 41 Tex. Crim. 242; *Hargrove v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1124; *Garza v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 103; *McGrew v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 226; *Isham v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 581; *Robinson v. State*, (Tex. Crim. 1898) 48 S. W. Rep. 176; *Rios v. State*, (Tex. Crim. 1898) 48 S. W. Rep. 505; *Gregory v. State*, (Tex. Crim. 1898) 48 S. W. Rep. 577; *Gaines v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 1012; *Shaw v. State*, 39 Tex. Crim. 161; *Von Senden v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 725; *Greenwood v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 177; *Kugadt v. State*, 38 Tex. Crim. 681; *Lindsley v. Parks*, 17 Tex. Civ. App. 527; *Pilot v. State*, 38 Tex. Crim.

852. See note 2.

c. CUMULATIVE EVIDENCE. — See note 3.

853. *d.* AS TO CHARACTER — *To Impeach*. — See note 1.

To Fortify. — See note 2.

e. DEPARTURE OF WITNESS AFTER ATTENDANCE. —

See note 5.

854. *f.* DILIGENCE OF APPLICANT — (1) *As General Requisite*. — See note 2.

515; *Toms v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 491; *Koller v. State*, 36 Tex. Crim. 496; *Garrett v. State*, 37 Tex. Crim. 198; *Highsmith v. State*, 41 Tex. Crim. 32; *Harris v. State*, 40 Tex. Crim. 8.

West Virginia. — *State v. Madison*, 49 W. Va. 96.

Controverting Affidavit After Continuance. — A prosecuting attorney may, when an application for continuance is asked on the ground that a material witness for the defense is absent, controvert the allegation in the affidavit for a continuance and show that if such witness was present he would give material evidence in favor of the prosecution. *Henry v. State*, 38 Tex. Crim. 306.

852. 2. Statute of Limitations. — Where the defendant admits the allegations of the complaint and pleads the statute of limitations, a continuance will not be granted on the ground that his attorney is unprepared to proceed. *Worth v. Norton*, 60 S. Car. 293.

3. Arkansas. — *Maxey v. State*, 66 Ark. 523.

Missouri. — *State v. Tettaton*, 159 Mo. 354; *Cooley v. Kansas City, etc., R. Co.*, 149 Mo. 487.

Tennessee. — *State v. Robinson*, 106 Tenn. 204.

Texas. — *Grimsinger v. State*, (Tex. Crim. 1901) 69 S. W. Rep. 583; *Cauthern v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 96; *Solomon v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 915; *Parker v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1066; *Hargrove v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1070; *Martin v. State*, (Tex. Crim. 1901), 61 S. W. Rep. 486; *Gaun v. State*, (Tex. Crim. 1900), 59 S. W. Rep. 896; *Galveston, etc., R. Co. v. Robinett*, (Tex. Civ. App. 1899) 54 S. W. Rep. 263; *Speights v. State*, 41 Tex. Crim. 323; *Squires v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 770; *Shackelford v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 884; *Gerstenkorn*

v. State, 38 Tex. Crim. 621; *Gaines v. State*, 38 Tex. Crim. 202; *Brittain v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 297; *Henderson v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 116; *Brooks v. State*, 39 Tex. Crim. 622. See also *Butts v. State*, 35 Tex. Crim. 364; *Barber v. State*, 35 Tex. Crim. 70.

Washington. — *State v. Boyce*, 24 Wash. 514.

853. 1. State v. Penney, 113 Iowa 691; *Barber v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 515; *Scott v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 177; *Hopkins v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 933; *Tippett v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 883; *Martin v. State*, 41 Tex. Crim. 242; *Shaw v. State*, 39 Tex. Crim. 161; *Galveston, etc., R. Co. v. Henning*, (Tex. Civ. App. 1897) 39 S. W. Rep. 302; *Garrett v. State*, 37 Tex. Crim. 198.

2. Jackson v. State, (Tex. Crim. 1901) 62 S. W. Rep. 914; *Wright v. State*, 37 Tex. Crim. 627.

5. Blasland-Parcels-Jordon Shoe Co. v. Hicks, 70 Mo. App. 307.

854. 2. California. — *People v. Winters*, 125 Cal. 325; *Tompkins v. Montgomery*, 123 Cal. 219.

Colorado. — *Hart v. Green*, 16 Colo. App. 70.

Georgia. — *Kidd v. State*, 101 Ga. 528; *Jones v. Rome Grocery Co.*, 99 Ga. 103; *Morrison v. Morrison*, 102 Ga. 170; *Harrison v. Langston*, 100 Ga. 394.

Illinois. — *Bailey v. Kerr*, 180 Ill. 412; *Lichtliter v. Russell*, 89 Ill. App. 62.

Kansas. — *State v. Miller*, 63 Kan. 62; *Gill v. Buckingham*, 7 Kan. App. 227.

Kentucky. — *Mattingly v. Willet*, (Ky. 1898) 44 S. W. Rep. 376; *Moody v. Com.*, (Ky. 1897) 43 S. W. Rep. 209.

Louisiana. — *State v. Veillon*, 49 La. Ann. 614.

Missouri. — *State v. Webster*, 152 Mo. 87; *Cooley v. Kansas City, etc., R. Co.*, 149 Mo. 487; *State v. Thompson*, 141 Mo. 408.

855. *Absent Papers, etc.* — See note 2.

Whereabouts of Witnesses. — See note 3.

856. (2) *What Constitutes Due Diligence* — (a) *In General* —
No Absolute Standard. — See note 2.

Nebraska. — *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341.

Nevada. — *Yori v. Cohn*, (Nev. 1902) 67 Pac. Rep. 212.

New York. — *Weston v. Proctor*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 800.

Oklahoma. — *Swope v. Burnham*, 6 Okla. 736.

Texas. — *American Cent. Ins. Co. v. Heath*, (Tex. Civ. App. 1902) 69 S. W. Rep. 235; *Turner v. State*, (Tex. Crim. 1901) 68 S. W. Rep. 511; *Corley v. State*, (Tex. Crim. 1901) 66 S. W. Rep. 453; *Sebastak v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 242; *Neyland v. Texas Yellow Pine Lumber Co.*, 26 Tex. Civ. App. 417; *Hopkins v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 933; *Frazier v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 934; *Luton v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1051; *Ash v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 881; *Hall v. Clountz*, 26 Tex. Civ. App. 348; *Thompson v. Autry*, (Tex. Civ. App. 1900) 57 S. W. Rep. 47; *Drye v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 65; *Galveston, etc., R. Co. v. Robinett*, (Tex. Civ. App. 1899) 54 S. W. Rep. 263; *Roberts v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 383; *Jackson v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 389; *Winters v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1110; *Johnson v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 1018; *Wallace v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 395; *Gregory v. State*, (Tex. Crim. 1898) 48 S. W. Rep. 577; *Hull v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 472; *Garza v. State*, 39 Tex. Crim. 358; *Clark v. State*, 39 Tex. Crim. 179; *Benon v. State*, 38 Tex. Crim. 487; *Harmanson v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 995; *Henry v. State*, 38 Tex. Crim. 306; *Underwood v. State*, 38 Tex. Crim. 193; *Bratt v. State*, (Tex. Crim. 1897) 41 S. W. Rep. 624; *Longacre v. State*, (Tex. Crim. 1897) 41 S. W. Rep. 629; *Christian v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 682; *Marro v. State*, 37 Tex. Crim. 330; *Flores v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 790; *Kirk v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 440; *McIver v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 745; *Cole v. Grigsby*, (Tex.

Civ. App. 1894) 35 S. W. Rep. 680; *Flanders v. Hord*, (Tex. Civ. App. 1896) 34 S. W. Rep. 1046; *Mattheld v. Cotton*, 19 Tex. Civ. App. 595; *Willis v. Sanger*, 15 Tex. Civ. App. 655; *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229; *Highsmith v. State*, 41 Tex. Crim. 32; *Pace v. State*, 41 Tex. Crim. 203; *Luttrell v. State*, 40 Tex. Crim. 651.

Virginia. — *Emmons v. Pidcock*, 93 Va. 146.

United States. — *Engelstad v. Dufresne*, (C. C. A.) 116 Fed. Rep. 582.

Failure to Take Depositions may be such a lack of diligence as will justify a court in refusing a continuance. *Christian, etc., Co. v. Dantzler Lumber Co.*, 78 Miss. 74; *State v. Boman*, 161 Mo. 88; *Smith v. Territory*, 11 Okla. 669; *Texas, etc., R. Co. v. Bancroft*, (Tex. Civ. App. 1900) 56 S. W. Rep. 606; *Speights v. State*, 41 Tex. Crim. 323; *Butler v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 1089; *Gregory v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 572; *Gulf, etc., R. Co. v. Roland*, (Tex. Civ. App. 896) 35 S. W. Rep. 31; *Barkman v. State*, 41 Tex. Crim. 105.

Waiver of Notice of Trial. — A party waiving notice of trial ten days before the case is called will be refused a continuance on the ground of absence of evidence as he has not shown due diligence in procuring it. *Baldwin Coal Co. v. Davis*, 15 Colo. App. 371.

855. 2. Dying Statement. — When the magistrate who took a dying statement testifies without objection as to its contents, a continuance on account of the loss of such paper will be refused. *Rambo v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 163.

3. Knowledge of Party's Whereabouts. — If it appears that the party applying for a continuance knew the whereabouts of an absent witness and made no effort to secure his attendance, it will be fatal to his application. *Tompkins v. Montgomery*, 123 Cal. 219.

856. 2. Filing of Information. — It is not lack of diligence to make no preparations for going to trial before an information is filed. *Hockley v. People*, (Colo. 1902) 69 Pac. Rep. 512.

857. (c) Subpoena, Deposition, Attachment, or Recognizance — SUBPOENA. See notes 5, 6.

858. See notes 1, 2.

859. See notes 1, 3.

860. ATTACHMENT. — See note 1.

863. 15. Surprise on Trial — Sufficient Ground. — See notes 7, 8, 10.

857. 5. Horton v. State, 112 Ga. 27.

6. Louisiana. — State v. Lejeune, 52 La. Ann. 463.

Texas. — Kyle v. State (Tex. Crim. 1899) 53 S. W. Rep. 846; Bryant v. State, (Tex. Crim. 1898) 47 S. W. Rep. 373.

The Promise of a Witness to attend the trial will not excuse a defendant for lack of diligence in failing to have a subpoena issued for the witness. Clark v. State, 40 Tex. Crim. 127.

Same Witness in Different Cases. — The mere fact that a person has been subpoenaed to testify in one case will not excuse lack of diligence when no subpoena has been issued for such witness in a case to be tried on the same day and in which a continuance is sought. Isham v. State, (Tex. Crim. 1899) 49 S. W. Rep. 594.

858. 1. State v. Gaubert, 49 La. Ann. 1692; Carter v. State, (Miss. 1898) 24 So. Rep. 307; Cannon v. State, 75 Miss. 364; State v. Kindred, 148 Mo. 270; Gutierrez v. State, (Tex. Crim. 1900) 59 S. W. Rep. 274; Martin v. State, 41 Tex. Crim. 242; Stevens v. State, (Tex. Crim. 1899) 49 S. W. Rep. 105.

Rule in Delaware. — Where, under a rule that witnesses must be summoned as soon as the calendar is published, a witness leaves the state at eight o'clock on the morning of the day of publication, a party is not guilty of laches if he fails to issue a subpoena, and a continuance should be granted. Miller v. Hickman, 1 Penn. (Del.) 263.

2. Wade v. State, (Tex. Crim. 1899) 54 S. W. Rep. 582.

Service of Subpoena. — In Indian Territory it is necessary to show that a subpoena for the absent witness was placed in the hands of the sheriff. Oats v. U. S., 1 Indian Ter. 152.

859. 1. Shaw v. State, 39 Tex. Crim. 161; Davis v. State, 39 Tex. Crim. 681.

3. Issuance of Subpoena. — If a subpoena for a material witness has been issued immediately after the substance

of his testimony has been ascertained, a continuance for a reasonable time within which to effect a serving ought to be allowed. Reid v. Farmers', etc., Tobacco Warehouse, (Ky. 1898) 44 S. W. Rep. 124.

860. 1. Iowa. — State v. McGinn, 109 Iowa 641.

Oregon. — State v. Birchard, 35 Oregon 484.

863. 7. Osborne v. Stephenson, 36 Oregon 328 [citing 4 ENCYC. OF PL. AND PR. 863]; Coffeen Coal, etc., Co. v. Barry, 56 Ill. App. 587; State v. Cooper, (Tenn. 1899) 53 S. W. Rep. 391.

Appointment of Receiver. — Where the defendant has no knowledge of the appointment of a receiver of the plaintiff's property until a few hours before trial, he is entitled to a continuance. E. F. Kirwan Mfg. Co. v. Truxton, 1 Penn. (Del.) 409.

Names of Witnesses Not Indorsed on Indictment. — In Lindle v. Com., (Ky. 1901) 64 S. W. Rep. 986, it was held that where numerous witnesses whose names had not been indorsed on the indictment were summoned, it was such a surprise as to entitle the defendant to a continuance.

8. Texas, etc., R. Co. v. Boggs, (Tex. Civ. App. 1895) 30 S. W. Rep. 1089.

Erroneous Admission of Evidence. — Where a court refuses to allow an amendment of a complaint to include the value of certain property, but on the trial allows the plaintiff to prove the value of such property, it is such a surprise as will entitle the defendant to a continuance. Freeland v. Brooklyn Heights R. Co., 54 N. Y. App. Div. 90.

10. Deeds Introduced on Former Trial. — Where a court refuses to admit in evidence certain deeds, a defendant cannot claim a continuance on the ground of surprise, based on the fact that such deeds were admitted on a former trial, unless the fact appears in the record of such former trial. Lyons, etc., Toll Road Co. v. People, 29 Colo. 434.

864. See notes 2, 5, 6.

Insufficient Ground. — See notes 8, 9, 10.

Motion and Affidavit. — See note 13.

865. 18. **Miscellaneous.** — See note 1.

864. 2. *Collins v. Boyd*, (Tex. Civ. App. 1900) 59 S. W. Rep. 831.

5. Evidence of Confession. — When a witness unexpectedly testifies that the defendant confessed, it is a sufficient ground for a continuance. *Lowry v. Com.*, (Ky. 1901) 63 S. W. Rep. 977.

6. McMahan v. Veasey, (Tex. Civ. App. 1900) 60 S. W. Rep. 333.

8. A continuance will be refused when asked for on the ground of surprise where the party praying for it has filed cross-interrogatories covering the testimony which he alleges surprised him. *Texas Cent. R. Co. v. Brock*, (Tex. Civ. App. 1895) 30 S. W. Rep. 274.

9. Hopkins v. State, (Tex. Crim. 1901) 64 S. W. Rep. 933.

10. When Non Est Factum Is Pleaded a continuance will not be granted on the ground of surprise. *Gibson v. German-American Town Mut. Ins. Co.*, 85 Mo. App. 41.

13. Batson v. State, 36 Tex. Crim. 606.

865. 1. *Hans v. State*, 50 Neb. 150, citing 4 ENCYC. OF PL. AND PR. 865.

Physician's Certificate Not Conclusive. — A continuance will not necessarily be granted because a physician testifies that a defendant is physically and mentally unable to go to trial. *Lipscomb v. State*, 76 Miss. 223.

Pending an Appeal from an Interlocutory Order a continuance will not be granted when it is probable that such order is nonappealable. *Theis v. Chicago, etc., R. Co.*, 107 Iowa 522. See also *Murmutt v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 508.

Preponderance of Evidence. — A court will not grant a continuance for the purpose of allowing a party to secure certain testimony, the only object of which is to give to one side the preponderance of evidence. *Lansky v. West End St. R. Co.*, 173 Mass. 20.

The Transfer of a Cause from one department to another of the same court is not a ground for a continuance. *State v. Callaway*, 154 Mo. 91.

Illness of Jurors. — A continuance will not be granted because two members of a panel from which a jury is to be drawn are ill. *Rex v. Pullman's Palace Car Co.*, 2 Marv. (Del.) 337.

Complicated Questions of Fact and Law.

— It seems that when delicate questions of law and complicated questions of fact are involved, a court will more readily grant a continuance. *Georgia Northern R. Co. v. Tifton, etc., R. Co.*, 108 Ga. 784.

Establishing Competency of Evidence.

— A short time will be allowed to a prosecuting attorney within which to procure documentary evidence of a pardon previously issued to a witness, in order to make his testimony competent. *Miller v. State*, (Tex. Crim. 1899) 50 S. W. Rep. 704.

Self-incrimination. — The absence of a witness whose testimony would tend to incriminate him, and who would refuse to testify on that ground, is not a ground for a continuance. *Burns v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 905.

Misapprehension as to the Date of Trial is not ordinarily a ground for a continuance when the defendant has been released on bail. *Cooper v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 916.

Forcible Detention of Witness. —

Where a suggestion is made to the court in a case involving capital punishment, that an absent witness has been forcibly detained by interested parties, the court, on a motion for a continuance, should hear evidence to ascertain the facts. *Logan v. State*, 39 Tex. Crim. 573.

Withdrawal of Attorneys from Case. —

In *Hatfield v. Com.*, (Ky. 1900) 55 S. W. Rep. 679, it was held that a continuance would not be granted where attorneys withdrew from the case because the defendant did not pay the agreed fee when other competent attorneys remained to conduct the defense.

The Nervous Condition of the Defendant, rendering him unfit to inform his counsel about his case, is good ground for a continuance when his trial is set four days after he committed a homicide. *Brooks v. Com.*, 100 Ky. 194.

Incompetency of Juror. — In *Humphries v. State*, 100 Ga. 260, it was held that a continuance would not be granted because a juror had served on a panel before which a codefendant was tried,

865. IX. AVOIDING CONTINUANCE BY ADMISSION — 1. At Common Law — a. IN CRIMINAL CASES. — See note 2.

866. See note 1.

b. IN CIVIL CASES. — See note 4.

867. 2. By Statute — a. IN CRIMINAL CASES — Admission as Evidence Merely. — See note 3.

Misconduct of the Sheriff in summoning the jury is not ground for a continuance. *Bateman v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 290. See also *State v. Nelson*, 19 R. I. 467; *Jones v. State*, 37 Tex. Crim. 433; *Branch v. State*, 35 Tex. Crim. 304.

The Poverty of the Defendant and his consequent failure to employ counsel are insufficient grounds for a continuance when he fails to ask the court to appoint counsel. *State v. Inks*, 135 Mo. 678. See also *Moody v. Com.*, (Ky. 1897) 43 S. W. Rep. 209; *State v. Bokien*, 14 Wash. 403.

Tired Attorney. — A continuance will not be granted because an attorney is exhausted by the trial of many cases. *Murmurt v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 508.

Absence of Stenographer. — The fact that a court stenographer is unable to attend court on account of illness is not a ground for a continuance. *Callahan v. Billat*, 68 Mo. App. 435.

Change of City Administration. — A continuance will be granted to allow an incoming city attorney to become familiar with the cases pending against the city. *Rock Island v. Starkey*, 91 Ill. App. 592.

Nonresident Defendant. — The fact that issues have not been joined with a nonresident defendant who has appeared will not entitle a resident defendant to a continuance. *National Bank of Commerce v. Galland*, 14 Wash. 502.

Inconvenience of Defendant. — The fact that the defendant's witnesses are engaged in running the defendant's railroad trains, and that it would inconvenience the defendant for them to attend court, is not ground for a continuance. *Hogan v. Missouri*, etc., R. Co., 88 Tex. 679.

865. 2. Alabama. — *Winter v. State*, 123 Ala. 1; *Terry v. State*, 120 Ala. 286.

Colorado. — *Baldwin Coal Co. v. Davis*, 15 Colo. App. 371.

Delaware. — *Seward v. Wilmington*, 2 Marv. (Del.) 375.

Idaho. — *State v. St. Clair*, (Idaho 1898) 53 Pac. Rep. 1.

Iowa. — *State v. Wiltsey*, 103 Iowa 54.

Kentucky. — *Ross v. Com.*, (Ky. 1900) 59 S. W. Rep. 28; *Smith v. Com.*, (Ky. 1897) 42 S. W. Rep. 1138; *Toliver v. Com.*, 104 Ky. 760.

Louisiana. — *State v. Lee*, 50 La. Ann. 9.

Michigan. — *People v. Savant*, 112 Mich. 297, citing 4 ENCYC. OF PL. AND PR. 865-868.

Minnesota. — *Conrad v. Dobmeier*, 64 Minn. 284.

Nebraska. — *Catron v. State*, 52 Neb. 389.

Oregon. — *Lew v. Lucas*, 37 Oregon 208.

Texas. — *Gardner v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 1114. *Contra*, *Francis v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 488.

United States. — *Kerr-Murray Mfg. Co. v. Hess*, (C. C. A.) 98 Fed. Rep. 56.

Contents of Admission. — The admission must be of facts as they would appear in evidence, and not the conclusion which may or may not be drawn from a statement of facts. *Wilson v. Purl*, 133 Mo. 367.

Truth of Statement. — If an application for a continuance is made on the ground of the absence of a witness, the prosecuting attorney merely admitting that the witness would testify to the facts stated in the application without admitting their truth, and the defendant's attorney allows the trial to proceed without objection, he is estopped from objecting to evidence contradicting the statement of facts to which the absent witness would have sworn. *State v. Schoonover*, 21 Ind. App. 520.

866. 1. Reading Affidavit. — In some jurisdictions a continuance will be refused where it is agreed that the affidavit for a continuance may be read before the jury. *Aiken v. Com.*, (Ky. 1902) 68 S. W. Rep. 849; *Russell v. State*, 62 Neb. 512; *Pearce v. Territory*, 111 Okla. 438.

4. Smith v. Chadron First Nat. Bank, 45 Neb. 444.

867. 3. In Kentucky, under the Code of Criminal Practice, a defendant

868. Witness Out of Reach of Process, etc. — See note 1.

869. *b.* IN CIVIL CASES — Admission as Evidence. — See note 1.

3. Effect of Admission — *a.* WHERE FACTS ARE ADMITTED. — See note 5.

870. X. APPLICATION FOR CONTINUANCE — 1. Motion Necessary. — See note 8.

872. 2. Time for Application. — See notes 1, 3, 5.

873. 3. Duty of Court to Entertain Application. — See notes 1, 2.

4. Renewed Application. — See note 4.

XI. AFFIDAVIT FOR CONTINUANCE — 1. Necessity for Affidavit. — See note 5.

875. 2. By Whom to Be Made. — See note 2.

is entitled to a continuance over the term of court at which he was indicted, unless the prosecution will admit the truth of his proposed testimony. *Robinson v. Com.*, (Ky. 1902) 68 S. W. Rep. 1099.

868. 1. *People v. Savant*, 112 Mich. 297, citing 4 ENCYC. OF PL. AND PR. 865-868.

869. 1. *Geary v. Kansas City, etc.*, R. Co., 138 Mo. 251 [quoting 4 ENCYC. OF PL. AND PR. 869]; *People v. Savant*, 112 Mich. 297; *Fanton v. State*, 50 Neb. 351.

In *State v. Daniels*, 49 La. Ann. 954, it was held that the admission need not be made as to all the absent witnesses, but only as to those whose absence is legal ground for a continuance.

5. Confession of Judgment. — When a party appears by his attorney and consents that judgment as prayed be taken against him, the court will not, at the instance of the plaintiff, continue the case on the ground that the defendant, confessing judgment, has not been properly served. *Miller v. Winton*, (Tenn. Ch. 1900) 56 S. W. Rep. 1049.

870. 8. *Colorado*. — *Beshoar v. Robards*, 8 Colo. App. 173.

Texas. — *Batson v. State*, 36 Tex. Crim. 606.

When Formal Motion Unnecessary. — When the court intimates from the bench that a motion for a continuance will not be granted, a formal motion therefor need not be incorporated in the record. *Nichols v. Headley Grocer Co.*, 66 Mo. App. 321.

An Offer to File an Application for a continuance is of no avail. It must be actually filed. *Ryan v. People*, 62 Ill. App. 355.

A Court on Its Own Motion may continue a cause when neither party ap-

pears. *Kiefer v. County Com'rs*, 7 Ohio Dec. 31.

872. 1. *Fraser v. State*, 112 Ga. 13; *Brown v. State*, 62 N. J. L. 666.

3. Applying for Change of Venue. — Unless due diligence is shown in procuring the necessary evidence upon which to base an application for a change of venue, a continuance for that purpose will not be granted. *McNamara v. Com.*, (Ky. 1899) 51 S. W. Rep. 786.

5. Rule of Court. — When a court establishes a rule in regard to motions for continuances, a refusal to hear a motion not in conformity with the rule is not error. *Lesh v. Meyer*, 63 Kan. 524.

In Iowa the application for a continuance is regulated by Code Iowa (1897), § 3664, and a strict compliance with the provisions thereof is necessary. *State v. Penney*, 113 Iowa 691.

873. 1. A Party with No Standing in Court will not be heard to move for a continuance. *Burgwald v. Donelson*, 2 Kan. App. 301. See also *Baker v. Texarkana Nat. Bank*, (C. C. A.) 74 Fed. Rep. 598.

2. *Hattox v. State*, 80 Miss. 186; *Mayton v. Guild*, (Tex. Civ. App. 1894) 29 S. W. Rep. 218.

4. In *Sims v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 705, it was held that the application for a continuance should set out that no other application has been made.

5. Illinois. — *Hunt v. O'Brien*, 59 Ill. App. 321.

Kentucky. — *Clark v. Com.*, (Ky. 1900) 58 S. W. Rep. 429.

875. 2. Compare Chicago, etc., R. Co. v. Kane, 65 Ill. App. 276, holding that although an attorney had received a letter from his client stating his inability to attend, such attorney could

877. 5. Requisites of Affidavit — a. IN GENERAL — Compliance with Statute. — See note 6.

Strictly Construed. — See note 7.

878. Precision. — See notes 1, 2.

Entitling. — See note 3.

c. WANT OF PREPARATION. — See note 8.

879. e. ABSENCE OF COUNSEL. — See notes 2, 5, 7.

f. ABSENCE OF PARTY. — See notes 8, 9, 10, 11, 12.

880. g. ABSENCE OF EVIDENCE — (1) In General. — See notes 2, 3, 4, 5, 6.

not upon such information make a sufficient affidavit for continuance.

877. 6. State v. Penney, 113 Iowa 691; *Insurance Co. of North America v. Wicker*, 93 Tex. 390.

7. State v. Murphy, 9 N. Dak. 175; *East Texas Land, etc., Co. v. Texas Lumber Co.*, 21 Tex. Civ. App. 411 [each citing 4 ENCYC. OF PL. AND PR. 877]; *Board v. O'Donovan*, 82 Ill. App. 163; *Leiper v. Earthman*, (Tenn. Ch. 1897) 46 S. W. Rep. 321.

Facts and not conclusions should be stated. *Henry v. State*, 38 Tex. Crim. 306.

878. 1. The Grounds for the Continuance should be precisely set out in the affidavit. *Collins v. Ferguson*, 22 Tex. Civ. App. 552.

2. Wilson v. State, 128 Ala. 17; *Taul v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 394; *Villereal v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 715.

3. Munoz v. State, (Tex. Crim. 1901) 60 S. W. Rep. 759.

8. Franklin v. Krum, 171 Ill. 378.

879. 2. Attendance on Legislature. — When a continuance is sought on the ground that an attorney is absent, and the affidavit alleges that he is a member of the legislature, it must set out the fact that he will be in actual attendance upon the session of the legislature at the time the case will be reached. *Mackin v. Cody*, 68 Ill. App. 108.

6. Keegan v. Donnelly, 11 Colo. App. 31.

7. Oral Announcement of Absence. — When the case is called, a mere oral announcement that counsel is absent is not a sufficient showing for a continuance. *Corbett v. National Bank of Commerce*, 44 Neb. 230.

8. Shannon v. Consolidated Tiger, etc., Min. Co., 24 Wash. 119.

9. Evans v. Marden, 154 Ill. 443; *Kellyville Coal Co. v. Hill*, 94 Ill. App.

89; *Shannon v. Consolidated Tiger, etc., Min. Co.*, 24 Wash. 119.

10. Kellyville Coal Co. v. Hill, 94 Ill. App. 89; *Belknap v. Groover*, (Tex. Civ. App. 1900) 56 S. W. Rep. 249; *Shannon v. Consolidated Tiger, etc., Min. Co.*, 24 Wash. 119.

Effort to Procure Attendance. — The affidavit for a continuance must show that some effort has been made to procure the attendance of a witness or to take his deposition. *Texas Midland R. Co. v. Crowder*, 25 Tex. Civ. App. 536.

11. Keens v. Robertson, 46 Neb. 837; *Doxey v. Westbrook*, (Tex. Civ. App. 1901) 62 S. W. Rep. 787; *Shannon v. Consolidated Tiger, etc., Min. Co.*, 24 Wash. 119.

12. Kellyville Coal Co. v. Hill, 94 Ill. App. 89; *St. Louis, etc., R. Co. v. Holladay*, 131 Mo. 440; *Shannon v. Consolidated Tiger, etc., Min. Co.*, 24 Wash. 119.

When Sickness Is Alleged as a reason for the absence of a party from the trial, a physician's certificate to that effect should be filed with his affidavit in an application for a continuance. *Smith v. Smith*, 132 Mo. 681.

880. 2. Kellyville Coal Co. v. Hill, 95 Ill. App. 660.

3. California. — *Tompkins v. Montgomery*, 123 Cal. 219.

Kentucky. — *McClurg v. Ingleheart*, (Ky. 1895) 33 S. W. Rep. 80.

Nebraska. — *Life Ins. Clearing Co. v. Altschuler*, 53 Neb. 481.

New York. — *Spanghel v. Spanghel*, 39 N. Y. App. Div. 5; *Wilkins v. Beadleston*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 489.

Texas. — *Boggs v. State*, 38 Tex. Crim. 82; *Wright v. State*, 37 Tex. Crim. 627; *Insurance Co. of North America v. Wicker*, 93 Tex. 390.

West Virginia. — *State v. Madison*, 49 W. Va. 96.

880. (2) *Absent Papers.* — See note 8.

881. (3) *Cumulative Evidence.* — See notes 3, 4.

(4) *Statement of Diligence.* — See note 5.

882. See note 1.

883. (5) *Expectation of Obtaining Evidence.* — See notes 1, 2.

880. 4. *Tompkins v. Montgomery*, 123 Cal. 219; *Wilkins v. Beadleston*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 489; *Insurance Co. of North America v. Wicker*, 93 Tex. 390.

5. *Carter v. State*, (Miss. 1898) 24 So. Rep. 307; *Robinson v. State*, (Tex. Crim. 1898) 48 S. W. Rep. 176. *Contra*, *Kellyville Coal Co. v. Hill*, 95 Ill. App. 660.

6. *Barker v. Marietta Guano Co.*, 112 Ga. 305; *Lichtliter v. Russell*, 89 Ill. App. 62; *West Chicago Park Com'rs v. Barber*, 62 Ill. App. 108; *Hibbets v. Hibbets*, (Iowa 1902) 90 N. W. Rep. 613.

In *Smith v. Roome*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 8, it was held that a mere allegation of an affidavit that the defendant was present when a certain agreement was made is not sufficient to show that the evidence that he is expected to give is material, or that the trial cannot safely proceed without him.

8. *Keegan v. Donnelly*, 11 Colo. App. 31.

881. 3. *State v. Carter*, 51 La. Ann. 442.

4. *Hyde v. Territory*, 8 Okla. 69.

5. *Colorado.* — See also *Elliott v. Field*, 21 Colo. 378.

Georgia. — See also *Wilson v. Burr*, 97 Ga. 256.

Illinois. — *Ide v. Gilbert*, 62 Ill. App. 524; *Hefling v. Van Zandt*, 60 Ill. App. 662.

Indiana. — See *Hunt v. Listenberger*, 14 Ind. App. 320.

Indian Territory. — *Missouri, etc., R. Co. v. Elliott*, 2 Indian Ter. 407.

Iowa. — *Hibbets v. Hibbets*, (Iowa 1902) 90 N. W. Rep. 613.

Kentucky. — *Rose v. Hall*, (Ky. 1897) 39 S. W. Rep. 413; *McClurg v. Ingleheart*, (Ky. 1895) 33 S. W. Rep. 80.

Minnesota. — See *Conrad v. Dohmeier*, 64 Minn. 284; *West v. Hennessey*, 63 Minn. 378.

Missouri. — See *Smith v. Smith*, 132 Mo. 681.

Nebraska. — *Kerr v. State*, 63 Neb. 115.

New York. — *Neal v. Sherriff*, 52 N. Y. App. Div. 465.

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Texas. — *Nite v. State*, 41 Tex. Crim. 340; *Logan v. State*, 39 Tex. Crim. 573; *Galveston, etc., R. Co. v. Henning*, 90 Tex. 656; *Byrd v. State*, 39 Tex. Crim. 609; *Flanders v. Hord*, (Tex. Civ. App. 1896) 34 S. W. Rep. 1046; *San Antonio, etc., R. Co. v. Bowles*, (Tex. Civ. App. 1895) 30 S. W. Rep. 89; *McKinney v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 786; *Hogan v. Missouri, etc., R. Co.*, 88 Tex. 679.

Facts Constituting Due Diligence should be set out in an application for a continuance, and the mere allegation that "diligence" has been used is insufficient. *Crawford v. Saunders*, 9 Tex. Civ. App. 225.

882. 1. *California.* — *Gainsley v. Gainsley*, (Cal. 1896) 44 Pac. Rep. 456.

Texas. — *Chavarria v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 312; *Stevens v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 105.

Commissioner's Ignorance. — Where the affidavit specifically shows that a commissioner to whom a deposition was sent failed to understand how to proceed, and thereby delayed the taking of the deposition, a continuance will be granted. *Neal v. Sherriff*, 52 N. Y. App. Div. 465.

883. 1. *Arkansas.* — *Lane v. State*, 67 Ark. 290.

California. — *People v. Winters*, 125 Cal. 325; *People v. Sanders*, 114 Cal. 216.

Florida. — *Gass v. State*, (Fla. 1902) 32 So. Rep. 109.

Georgia. — *Owens v. State*, 110 Ga. 292.

Illinois. — *Heltschnidt v. McAlpine*, 59 Ill. App. 231.

Indiana. — *Post v. State*, 14 Ind. App. 452; *Weaver v. State*, 154 Ind. 1.

Kentucky. — *Strange v. Com.*, (Ky. 1901) 64 S. W. Rep. 980; *Clark v. Com.*, (Ky. 1900) 58 S. W. Rep. 429; *Banks v. Com.*, 105 Ky. 41.

Louisiana. — *State v. Baptiste*, 108 La. 586; *State v. Timberlake*, 50 La. Ann. 308.

Nebraska. — *Tatum v. State*, 61 Neb. 229.

Texas. — *East Texas Land, etc., Co. v. Texas Lumber Co.*, 21 Tex. Civ.

884. (6) *Materiality and Statement of Facts* — At Common Law. — See note 1.

Present Practice. — See notes 2, 3.

886. See notes 3, 4, 5.

887. See note 1.

(7) *No Other Witness to Same Facts.* — See note 2.

App. 411 [*citing* 4 ENCYC. OF PL. AND PR. 882]; *Hopkins v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 619; *Sims v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 705; *Brittain v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 297; *Gulf, etc., R. Co. v. Jagoe*, (Tex. Civ. App. 1895) 32 S. W. Rep. 717; *Williams v. State*, 40 Tex. Crim. 565; *O'Toole v. State*, 40 Tex. Crim. 578; *Byrd v. State*, 39 Tex. Crim. 609; *Cabell v. Holloway*, 10 Tex. Civ. App. 307.

West Virginia. — *State v. Madison*, 49 W. Va. 96.

883. 2. *Minder v. State*, 113 Ga. 772; *Wolfe v. Johnson*, 152 Ill. 280.

884. 1. *State v. Hollier*, 49 La. Ann. 371; *Ingles v. Straus*, 91 Va. 209.

2. *Georgia.* — *Wiggins v. State*, 101 Ga. 502.

New York. — *Pensacola First Nat. Bank v. Anderson*, 55 N. Y. App. Div. 570.

3. *Alabama.* — *Walker v. State*, 117 Ala. 85.

Arkansas. — *Hamilton v. State*, 62 Ark. 543.

Colorado. — *Holland v. People*, (Colo. 1902) 69 Pac. Rep. 519.

Delaware. — *State v. Hawkins*, 2 Penn. (Del.) 474.

Illinois. — *Cassem v. Galvin*, 158 Ill. 30; *Hefling v. Van Zandt*, 60 Ill. App. 662.

Kentucky. — *McClurg v. Ingleheart*, (Ky. 1895) 33 S. W. Rep. 80.

Missouri. — *State v. Rice*, 149 Mo. 461.

Nebraska. — *Lomax v. Holbine*, (Neb. 1902) 90 N. W. Rep. 1122; *Kerr v. State*, 63 Neb. 115.

Oregon. — *State v. Fiester*, 32 Ore. 254.

Tennessee. — *Shaver v. Southern Oil Co.*, (Tenn. Ch. 1897) 43 S. W. Rep. 736.

Texas. — *Davis v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 73; *Harrison v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 500; *DeLucenay v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 796; *Morris v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 531; *Crawford v. Lozano*, (Tex. Civ.

App. 1898) 48 S. W. Rep. 538; *Leslie v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 367; *Dancy v. State*, (Tex. Crim. 1898) 46 S. W. Rep. 247; *Cooper v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 1109; *Pilot v. State*, 38 Tex. Crim. 515; *Harmanson v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 995; *Norton v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 578; *Brown v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 749; *Brooks v. State*, 39 Tex. Crim. 622; *Willis v. Sanger*, 15 Tex. Civ. App. 655.

Virginia. — *Gaines v. Wilson*, (Va. 1896) 24 S. E. Rep. 828.

United States. — *U. S. v. Schoonmaker*, 93 Fed. Rep. 724.

Evidence Sought Inadmissible. — Where a continuance is asked because of the absence of a certain witness, and it appears from the face of the affidavit that the testimony he would give if present is inadmissible, the continuance will be refused. *Nebraska Land, etc., Co. v. Burris*, 10 S. Dak. 430.

886. 3. *Texas.* — *Rodgers v. State*, 36 Tex. Crim. 563.

4. *Owen v. Cibolo Creek Mill, etc., Co.*, (Tex. Civ. App. 1897) 43 S. W. Rep. 297.

In *Missouri* the affidavit for a continuance on the ground of absence of a witness should show why his deposition was not taken. *Harris v. Powell*, 56 Mo. App. 24.

5. *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341; *Witowski v. Maisner*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 487.

887. 1. *Weaver v. State*, 154 Ind. 1; *Helfrich Saw, etc., Mill Co. v. Everly*, (Ky. 1895) 32 S. W. Rep. 750.

2. *Colorado.* — *Mutzenburg v. McGowan*, 10 Colo. App. 486.

Georgia. — *Ryder v. State*, 100 Ga. 528.

Illinois. — *Davids v. People*, 192 Ill. 176.

Nebraska. — *Kerr v. State*, 63 Neb. 115.

Texas. — *Mathews v. State*, 41 Tex. Crim. 98.

In *Kindred v. State*, (Tex. Crim.

- 887.** (8) *Not Made for Delay Merely.* — See note 3.
- 888.** **XII. TERMS** — 1. **Power to Impose Terms.** — See notes 2, 3.
2. **Proper Terms.** — See note 4.
- 890.** **XIII. ORDERS GRANTING CONTINUANCES** — 1. **Construction of Order.** — See note 3.
- 891.** 2. **Entry on Record.** — See note 1.
3. **Power to Set Aside.** — See note 2.
Notice of Further Proceedings. — See note 7.
- 892.** **XV. CONTINUANCES BY JUSTICES OF PEACE** — 1. **Power and Duty** — **Power.** — See note 8.
- 893.** See note 1.

1902) 68 S. W. Rep. 796, it was held that where the affidavit disclosed that the absent witness would testify to the same facts as the witness for the prosecution, a continuance was properly refused.

887. 3. *Cobb v. State*, 110 Ga. 314; *Tomlin v. State*, 110 Ga. 268; *Buchanan v. McClain*, 110 Ga. 477; *Lion F. Ins. Co. v. Wicker*, (Tex. Civ. App. 1899) 54 S. W. Rep. 294; *Roberts v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 383. See also *Smith v. Territory*, 11 Okla. 669.

888. 2. *St. Louis, etc., R. Co. v. Kilpatrick*, 67 Ark. 47; *Pomeroy v. Bell*, 118 Cal. 635.

3. **Oklahoma Statute.** — Code Civ. Pro. Okla., § 328 (Stat. Okla., § 4206), provides that "the court may, for good cause shown, continue an action at any stage of the proceedings, upon such terms as may be just." *McMahon v. Norick*, (Okla. 1902) 69 Pac. Rep. 1047.

4. *Alabama.* — *Alexander v. Moore*, 111 Ala. 410.

California. — *Pomeroy v. Bell*, 118 Cal. 635.

890. 3. **Construction of Order.** — In *Fish v. People*, 86 Ill. App. 408, an order for a continuance reading, "continued until attorneys agree as to date for trial," was construed to mean that the case was continued from day to day during the term at which said order was made, and was superseded by another order setting the date of trial in another term.

891. 1. In *State v. Moore*, 57 Mo. App. 662, it was held that there was no difference between continuing a case and entering an order therefor.

2. *Sampson v. People*, 188 Ill. 592, citing 4 ENCYC. OF PL. AND PR. 891. See also *Kiefer v. County Com'rs*, 7 Ohio Dec. 31, 4 Ohio N. P. 282.

Grounds for Setting Aside. — In *Hunt*

v. Listenberger, 14 Ind. App. 320, the court was sustained in setting aside an order for a continuance when it had been misinformed concerning consent of counsel.

Effect of Change of Venue. — If a court grants a change of venue, a continuance previously granted in that court is set aside by inference. *Hamilton v. State*, 40 Tex. Crim. 464.

7. **Notice to Correct Stipulation.** — When the parties have entered into a stipulation to continue a case, leaving the date to which the case is to go over blank, the proper practice is to serve a notice of motion upon the opposing parties, in which it should be set out that the court will, upon the return day of such notice, be asked to set a day certain for the trial of said action. *Kiefer v. County Com'rs*, 7 Ohio Dec. 31.

892. 3. *Benoit v. Revoir*, 8 N. Dak. 226.

Discretion of Justice. — A justice has a reasonable discretion to exercise after the expiration of the hour to which the cause is adjourned, and where he has knowledge or information that the party intends to appear and will soon arrive, he does not lose jurisdiction by granting a reasonable abatement. *Hardenburgh v. Fish*, 61 N. Y. App. Div. 333. See also *Brower v. Tatro*, 115 Mich. 368; *Johnson v. Little*, 82 Minn. 69.

Stipulation for Continuance. — A justice of the peace is not bound to continue a case to a day named in a stipulation signed by counsel for the parties plaintiff and defendant. *Hall v. Bramell*, 87 Mo. App. 285.

893. 1. In *New York.* — Under Code Civ. Pro. N. Y., § 2960, no continuance can be obtained before a justice of the peace on the application of the plaintiff, except at the time of the

896. 2. Effect of Unauthorized Continuance — a. SUBSEQUENT PROCEEDINGS VOID. — See note 3.

897. Mandamus to Proceed with Trial. — See note 2.

898. b. ESTOPPEL AND WAIVER — Estoppel. — See note 1.
Waiver. — See note 2.

901. XVII. REVIEW OF RULING ON APPLICATION FOR CONTINUANCE — 2. Where Continuance Was Refused — a. AT COMMON LAW. — See notes 1, 2, 3.

902. b. PREVAILING MODERN RULE. — See note 1.

return of the summons, and then not to exceed eight days. *Moody v. Becker*, (County Ct.) 70 N. Y. Supp. 543.

In California. — Under Code Civ. Pro. Cal., § 874, a justice of the peace has power to continue a case two days in order to allow the defendant time to answer. *Hall v. Kerrigan*, 135 Cal. 4.

Recess Not Continuance. — A statute which requires a justice of the peace to docket every adjournment, designating at whose request it is granted, etc., does not contemplate that every recess for the purpose of eating and sleeping should be particularly entered. *State v. Nohl*, 113 Wis. 15.

896. 3. Humburg v. Namura, 13 Hawaii 702, citing 4 ENCYC. OF PL. AND PR. 896.

In Murray v. Churchill, 86 Ill. App. 480, it was held that where a justice of the peace continues a cause indefinitely he loses jurisdiction, and any judgment or order entered in such case is a nullity.

897. 2. State v. Cline, 85 Mo. App. 628.

When Acting Within His Power mandamus will not lie to compel a justice of the peace to enter a default judgment after he has continued an action. *Hall v. Kerrigan*, 135 Cal. 4. See also *Artope v. Macon*, etc., R. Co., 110 Ga. 346.

898. 1. Harris v. State, 40 Tex. Crim. 8.

2. Waiver. — Where a statute provides that a justice of the peace shall not continue a case for more than three days, a party waives his right to complain of the violation of such statute when he signs a stipulation agreeing to a continuance for a longer period. *Cedar Rapids v. Rall*, 115 Iowa 335.

901. 1. State v. Clark, 147 Mo. 20.

2. Lyman v. Warner, (C. C. A.) 113 Fed. Rep. 87, citing 4 ENCYC. OF PL. AND PR. 901.

3. Alabama. — *Wimberly v. Windham*, 104 Ala. 409.

Wisconsin. — *Whitefoot v. Leffingwell*, 90 Wis. 182.

902. 1. In the following cases the refusal of a continuance was held to be a proper exercise of discretion:

Alabama. — *Spann v. Torbert*, 130 Ala. 541; *Winter v. State*, 123 Ala. 1.

Arkansas. — *Richardson v. Boyd*, 69 Ark. 368; *St. Louis*, etc., R. Co. v. *Kilpatrick*, 67 Ark. 47.

California. — *People v. Breen*, 130 Cal. 72; *People v. Wade*, 118 Cal. 672.

Colorado. — *Reynolds v. Campling*, 23 Colo. 105.

Georgia. — *Fraser v. State*, 112 Ga. 13; *Fletcher v. Collins*, 111 Ga. 253; *Stanford v. New England Mortg. Security Co.*, 110 Ga. 274; *Wilcox v. Mims*, 95 Ga. 564; *Hamilton v. Moore*, 94 Ga. 707; *Rome R. Co. v. Barnett*, 94 Ga. 446; *McElveen Commission Co. v. Jackson*, 94 Ga. 549.

Idaho. — *State v. Rice*, (Idaho 1901) 66 Pac. Rep. 87.

Illinois. — *Condon v. Brockway*, 157 Ill. 90.

Indiana. — *Wheeler v. State*, 158 Ind. 687.

Iowa. — *Hibbets v. Hibbets*, (Iowa 1902) 90 N. W. Rep. 613; *Zalesky v. Home Ins. Co.*, 102 Iowa 613.

Kentucky. — *Aiken v. Com.*, (Ky. 1902) 68 S. W. Rep. 849; *Quinn v. Com.*, (Ky. 1901) 63 S. W. Rep. 702; *McNamara v. Com.*, (Ky. 1899) 51 S. W. Rep. 786; *Green v. Culver*, (Ky. 1897) 39 S. W. Rep. 426; *McClurg v. Ingleheart*, (Ky. 1895) 33 S. W. Rep. 80; *Blanks v. Com.*, 105 Ky. 41.

Louisiana. — *Wetta v. New Orleans*, etc., R. Co., 107 La. 383; *State v. Cook*, 52 La. Ann. 114; *State v. Baum*, 51 La. Ann. 1112; *State v. Carter*, 51 La. Ann. 442; *State v. Timberlake*, 50 La. Ann. 308.

Michigan. — *Walter A. Wood Mowing*, etc., *Mach. Co. v. Vanderbilt*, 109

904. See note 1.

Mich. 489; *Leach v. Detroit Electric R. Co.*, 125 Mich. 373.

Minnesota. — *Allen v. Brown*, 72 Minn. 459.

Mississippi. — *Carter v. State*, (Miss. 1898) 24 So. Rep. 307; *Havens v. State*, 75 Miss. 488; *Lipscomb v. State*, 76 Miss. 223.

Missouri. — *State v. Craft*, 164 Mo. 631; *State v. Cochran*, 147 Mo. 504; *State v. Kindred*, 148 Mo. 270; *Sisk v. American Cent. F. Ins. Co.*, 96 Mo. App. 9; *Shirk v. Shirk*, 75 Mo. App. 573.

Nebraska. — *Kerr v. State*, 63 Neb. 115; *Catron v. State*, 52 Neb. 389; *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341; *Stratton v. Dole*, 45 Neb. 472.

Oregon. — *State v. Fiester*, 32 Oregon 254; *State v. Wong Gee*, 35 Oregon 276.

South Carolina. — *Worth v. Norton*, 60 S. Car. 293; *State v. Lee*, 58 S. Car. 335; *State v. Smith*, 56 S. Car. 378.

Texas. — *Grimsinger v. State*, (Tex. Crim. 1901) 69 S. W. Rep. 583; *Munoz v. State*, (Tex. Crim. 1901) 60 S. W. Rep. 759; *Berry v. Burnett*, 23 Tex. Civ. App. 558; *Burns v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 905; *Roberts v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 383; *Stevens v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 105; *Houston v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 468; *Missouri, etc., R. Co. v. Wright*, 19 Tex. Civ. App. 47; *Green v. Johnson*, (Tex. Civ. App. 1898) 44 S. W. Rep. 6; *Ft. Worth, etc., R. Co. v. Kennedy*, 12 Tex. Civ. App. 654; *White v. Waco Bldg. Assoc.*, (Tex. Civ. App. 1895) 31 S. W. Rep. 58.

Virginia. — *Andrews v. Com.*, 100 Va. 801; *Payne v. Zell*, 98 Va. 294.

904. 1. In the following cases the refusal of a continuance was held to be such an abuse of discretion as to constitute reversible error:

Alabama. — *Walker v. State*, 117 Ala. 85.

California. — *Morehouse v. Morehouse*, 136 Cal. 332.

Florida. — *Shiver v. State*, 41 Fla. 630.

Georgia. — *Kidd v. State*, 101 Ga. 528; *Hunt v. State*, 102 Ga. 569; *Delk v. State*, 100 Ga. 61; *Georgia Northern R. Co. v. Tifton, etc., R. Co.*, 108 Ga. 784; *Compton v. State*, 108 Ga. 747; *Ryder v. State*, 100 Ga. 528; *Central R., etc., Co. v. Jackson*, 94 Ga. 640.

Illinois. — *Ware v. Jerseyville*, 158 Ill. 234.

Indiana. — *Schwartz v. Parsons*, 22 Ind. App. 340, *quoting* 4 ENCYC. OF PL. AND PR. 902; *Post v. Cecil*, 11 Ind. App. 362.

Kansas. — *State v. Coggins*, 10 Kan. App. 455; *Helm v. Voils*, 58 Kan. 810, 49 Pac. Rep. 662.

Kentucky. — *Cornelius v. Com.*, (Ky. 1901) 64 S. W. Rep. 412; *Chandler v. Bush*, (Ky. 1900) 59 S. W. Rep. 749; *Strange v. Com.*, (Ky. 1900) 55 S. W. Rep. 204; *St. Clair v. Com.*, (Ky. 1897) 42 S. W. Rep. 341; *Schamberg v. Leslie*, (Ky. 1897) 41 S. W. Rep. 265; *Watkins v. Ahrens, etc., Mfg. Co.*, (Ky. 1897) 38 S. W. Rep. 868; *Brooks v. Com.*, 100 Ky. 194.

Louisiana. — *Vicksburg, etc., R. Co. v. Scott*, 47 La. Ann. 706.

Massachusetts. — *Lansky v. West End St. R. Co.*, 173 Mass. 20.

Mississippi. — *Williams v. State*, (Miss. 1898) 23 So. Rep. 547; *Hattox v. State*, 80 Miss. 186; *Scott v. State*, 80 Miss. 197.

Missouri. — *State v. Dewitt*, 152 Mo. 76; *Rottman Distilling Co. v. Van Frank*, 88 Mo. App. 50; *Campbell v. McCaskill*, 88 Mo. App. 44; *Nichols v. Headley Grocer Co.*, 66 Mo. App. 321; *Alt v. Groschlose*, 61 Mo. App. 409.

Nevada. — *Yori v. Cohn*, (Nev. 1901) 65 Pac. Rep. 945.

New York. — *McCready v. Lindenberg*, 37 N. Y. App. Div. 425; *Marsh v. Nassau Show Case Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 837.

Oklahoma. — *McMahan v. Norick*, (Okla. 1902) 69 Pac. Rep. 1047; *Miller v. U. S.*, 8 Okla. 315; *Lawson v. Territory*, 8 Okla. 1.

Oregon. — *Linn County v. Morris*, 40 Oregon 415.

South Carolina. — *Varn v. Green*, 50 S. Car. 403.

South Dakota. — *White Sewing Mach. Co. v. Simpson*, 10 S. Dak. 448.

Texas. — *Jemison v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 842; *Davis v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 918; *Baines v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 119; *Lynch v. Munson*, (Tex. Civ. App. 1901) 61 S. W. Rep. 140; *Morse v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 989; *Long v. State*, 39 Tex. Crim. 461; *Curtis v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 265; *Burlington F. Ins. Co. v. Coff-*

906. *d.* **ABSOLUTE RIGHT BY STATUTE.** — See note 2.

907. **3. New Trial, Appeal or Error, Record, Exceptions, etc.** — Motion for New Trial. — See note 1.

908. **Record.** — See notes 1, 2.

Exceptions and Bills of Exceptions. — See note 4. See also **BILLS OF EXCEPTIONS; EXCEPTIONS AND OBJECTIONS.**

909. **4. Harmless Error** — *a.* **IN GENERAL.** — See note 2.

910. *d.* **ABSENCE OF EVIDENCE.** — See note 7.

man, 13 Tex. Civ. App. 439; Dillingham v. Chapman, (Tex. Civ. App. 1895) 30 S. W. Rep. 677; Missouri, etc., R. Co. v. Hogan, (Tex. Civ. App. 1895) 30 S. W. Rep. 686; Texas, etc., R. Co. v. Boggs, (Tex. Civ. App. 1895) 30 S. W. Rep. 1089; Mayton v. Guild, (Tex. Civ. App. 1894) 29 S. W. Rep. 218; Smith v. Bates, (Tex. Civ. App. 1894) 27 S. W. Rep. 1044; Murphy v. State, 41 Tex. Crim. 120; Dawson v. State, 38 Tex. Crim. 9; McMahan v. Veasey, (Tex. Civ. App. 1900) 60 S. W. Rep. 333; St. Louis Southwestern R. Co. v. Terry, 22 Tex. Civ. App. 176; French v. McGinnis, 10 Tex. Civ. App. 7.

Washington. — National Bank of Commerce v. Galland, 14 Wash. 502.

West Virginia. — State v. Manns, 48 W. Va. 480.

Waiver of Error. — Where a court erred in refusing to continue an action to allow time for filing an amended pleading, the objection is waived when the amended pleading is filed. Schultz v. McLean, 109 Cal. 437. See also Day v. Mooney, 3 Okla. 608.

906. 2. Continuance as of Course. — Where the statutory provisions for a continuance are complied with, it is not within the discretion of the court to deny it. Wilborn v. Elmendorf, (Tex. Civ. App. 1897) 40 S. W. Rep. 1059; Gulf, etc., R. Co. v. Mitchell, 18 Tex. Civ. App. 380. See also Michael v. Mills, 22 Colo. 439; Cannon v. Griffith, 3 Kan. App. 506; Storz v. Finklestein, 48 Neb. 27; Burris v. Court, 48 Neb. 179; Piedmont Wagon Co. v. Bostic, 118 N. Car. 758; Jemison v. State, (Tex. Crim. 1902) 66 S. W. Rep. 842; Proctor v. State, (Tex. Crim. 1901) 65 S. W. Rep. 368; Davis v. State, (Tex. Crim. 1901) 65 S. W. Rep. 918; Garcia v. State, (Tex. Crim. 1901) 61 S. W. Rep. 122; Drexel v. True, 36 U. S. App. 611; Baker v. Texarkana Nat. Bank, 41 U. S. App. 185. Compare Ft. Worth, etc., R. Co. v. Enos, 15 Tex. Civ. App. 673.

907. 1. In Illinois the refusal to

grant a continuance can be reviewed only on a motion for a new trial. Lichliter v. Russell, 89 Ill. App. 62.

908. 1. Presumption of Correctness. — Where the record on appeal from a justice's court recites that the cause was "adjourned by consent" to a day and hour certain, it will not be presumed that the parties were not present when they consented. Hardenburgh v. Fish, 61 N. Y. App. Div. 333.

2. North British, etc., Ins. Co. v. Rudy, 26 Ind. App. 472; Purcell Mill, etc., Co. v. Kirkland, 2 Indian Ter, 160; Klinker v. Third Ave. R. Co., 26 N. Y. App. Div. 322.

4. Alabama. — Walker v. State, 117 Ala. 85.

Georgia. — Howard v. State, 115 Ga. 244.

Illinois. — Lichliter v. Russell, 89 Ill. App. 62.

Indiana. — Rivers v. State, 144 Ind. 16.

Missouri. — State v. Thompson, 141 Mo. 408.

Virginia. — Dillard v. Dillard, (Va. 1895) 21 S. E. Rep. 669.

909. 2. Brice v. State, (Tex. Crim. 1901) 61 S. W. Rep. 121; Morse v. State, (Tex. Crim. 1898) 47 S. W. Rep. 989; Little v. State, 39 Tex. Crim. 654.

Consulting Jurors. — The mere fact that the court consulted jurors as to whether a continuance would be convenient to them is not necessarily reversible error when other grounds were presented and passed upon. McCready v. Lindenborn, 37 N. Y. App. Div. 425.

If the Record Does Not Show that the defendant was prejudiced by the refusal of the trial court to grant a continuance on the ground that the defendant was not prepared to go to trial, the verdict will not be disturbed. State v. Rice, (Idaho 1901) 66 Pac. Rep. 87.

910. 7. State v. Baum, 51 La. Ann. 1112; State v. Cochran, 147 Mo. 504; State v. Davis, 76 Mo. App. 586; Hamilton v. State, 41 Tex. Crim.

911. See notes 2, 3.

§99, *Drye v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 65. See also *Shaw v. State*, 39 Tex. Crim. 161.

911. 2. *State v. Cook*, 52 La. Ann. 114.

3. *Kentucky*. — *Toliver v. Com.*, 104 Ky. 760.

Louisiana. — *State v. Timberlake*, 50 La. Ann. 308.

Mississippi. — *Washington v. State*, (Miss. 1901) 29 So. Rep. 77.

Texas. — *Solomon v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 915; *Corley v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1073; *Chavarria v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 312; *Ash v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 881; *Jackson v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 404; *Wilson v. State*,

(Tex. Crim. 1900) 55 S. W. Rep. 489; *Dailley v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 821; *Nite v. State*, 41 Tex. Crim. 340; *Squires v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 770; *Martin v. State*, 41 Tex. Crim. 242; *Robinson v. State*, (Tex. Crim. 1898) 48 S. W. Rep. 176; *Maloney v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 718; *Tanner v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 489; *Henry v. State*, 38 Tex. Crim. 306; *Longacre v. State*, (Tex. Crim. 1897) 41 S. W. Rep. 629; *Reed v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 613; *McGriff v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 789; *Gregory v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 752; *Pace v. State*, 41 Tex. Crim. 203; *Areola v. State*, 40 Tex. Crim. 51.

CONTRACTS.

915. I. ACTIONS OF TORT AND OF CONTRACT DISTINGUISHED —

Introductory. — See note 1.

Cardinal Rule. — See note 3.

916. Allegations of Tort When Not Controlling. — See note 1.

III. DECLARATION, PETITION, OR COMPLAINT — 1. How to State Contract — *a*. IN HÆC VERBA, OR ACCORDING TO LEGAL EFFECT. — See note 3.

917. See note 1.

918. Not Necessary to Do Both. — See note 1.

Ambiguous Contract. — See note 2.

b. RULE AS TO CORRECTNESS AND CERTAINTY. — See notes 5, 6. See also DEFINITENESS AND CERTAINTY.

915. 1. Facts Showing Liability Both on Contract and in Tort. — Whether a claim of relief is rightfully founded upon a contract relation entered into or upon wrongful acts done, where but a single transaction is relied upon the recital of the facts relating to such single transaction is not open to objection for the reason that such recital may tend to show a liability upon contract and also in tort. *Barto v. Nix*, 15 Wash. 563.

3. *Siebrecht v. Siegel-Cooper Co.*, 38 N. Y. App. Div. 549.

916. 1. *Hamilton v. Mandle*, 103 Ga. 788.

Misappropriation and Conversion. — *Footte v. Ffoulke*, 55 N. Y. App. Div. 617.

3. *California*. — *Concannon v. Smith*, 134 Cal. 14.

Washington. — See *Seal v. Cameron*, 24 Wash. 62.

United States. — *Timmons v. Bank v. Fidelity, etc., Co.*, 120 Fed. Rep. 315, citing 4 ENCYC. OF PL. AND PR. 916, and declaring that the rule therein stated is applicable in the federal courts and in the courts of South Carolina.

The Proper and Scientific Mode of declaring on a contract is to set it out in accordance with its legal effect. *Fitzgerald v. Lorenz*, 79 Ill. App. 651.

Reference to Annexed Contract. — Under the *New Jersey Practice Act*, an annexed copy of the contract sued upon

must be referred to in the body of the pleading as so annexed, or the court cannot take notice of it on demurrer. *Melick v. Foster*, 64 N. J. L. 394.

917. 1. *Anderson v. Gaines*, 156 Mo. 664, holding that it is in violation of the rules of good pleading, in an action to set aside a deed, to set out the deed *in hæc verba* instead of stating its legal effect.

918. 1. Misanaming Contract — Effect. — The plaintiff is not bound by his appellation of the contract if the court construes the instrument differently; nor is the defendant concluded by his admission of the plaintiff's construction if such admission is accompanied by profert of the instrument itself. *St. Joseph, etc., R. Co. v. St. Louis, etc., R. Co.*, 135 Mo. 173.

2. *Stephens v. American F. Ins. Co.*, 14 Utah 265.

5. Amendment. — It is error to refuse to permit the plaintiff to amend his complaint by inserting a correct description of the instrument sued on. *Chambers v. Talladega Real Estate, etc., Assoc.*, 126 Ala. 296. See also AMENDMENTS.

6. *Booz v. Cleveland School Furniture Co.*, 45 N. Y. App. Div. 593, holding that a complaint which does not specify the terms and nature of the contract sued upon, or any facts showing a breach thereof, is demurrable. See also *Sloan v. Gibbs*, 56 S. Car. 480.

919. Variance. — See note 1. See also VARIANCE.

c. HOW MUCH OF CONTRACT TO BE STATED. — See note 2.

Degree of Certainty. — The subject-matter of a contract should be set forth with such certainty that it could be pleaded by the defendant in bar of another suit. *Phillips v. Knight*, 20 R. I. 624.

919. 1. *Iroquois Furnace Co. v. Bignall Hardware Co.*, 102 Ill. App. 68; *Bilsborrow v. Warner*, 117 Mich. 506; *Slaughter v. Davenport*, 82 Mo. App. 652; *McMahan v. Canadian R. Co.*, 40 Oregon 148; *Wilkinson Mfg. Co. v. Welde*, 196 Pa. St. 508; *Loudon v. Robertson*, (Tex. Civ. App. 1899) 54 S. W. Rep. 783; *Duval v. American Telephone, etc., Co.*, 113 Wis. 504. See also *Saatoff v. Scott*, 103 Iowa 201; *Sams v. Price*, 119 N. Car. 572.

A Slight Variance Will Not Be Fatal when it appears that the contract sued on contains every essential and material element of the contract actually made by the parties. *Nappanee Canning Co. v. Reid*, (Ind. App. 1901) 60 N. E. Rep. 1068.

Variance as to Date. — Where the date of a parol contract is stated in the declaration under a *videlicet*, it is not important that it should be proved as laid. *Trench v. Hardin County Canning Co.*, 168 Ill. 135. See also SCILLICET OR VIDELICET.

Amendment to Conform to Proof. — Where the proof as to the contract varies from the allegations of the complaint, the complaint may be amended to conform to the proof, provided no objection was taken to the evidence on the ground that it did not tend to support the allegations of the pleading. *Charlton v. Rose*, 24 N. Y. App. Div. 485. See also AMENDMENTS.

If the complaint is ambiguous as to the terms of the contract, but the evidence given upon the trial authorized a recovery, the complaint will be deemed upon appeal to have been amended to conform to the contract, for the purpose of sustaining the judgment. *Nilsen v. De Haven*, 47 N. Y. App. Div. 537, *affirmed* 168 N. Y. 656.

Evidence Showing Special Contract. — Where a complaint declared upon a common count for services rendered, and the evidence disclosed a special contract to pay to the plaintiff a certain sum per day while he was unable to

work, it was held that there was a fatal variance. *Louisville, etc., R. Co. v. Barnes*, 16 Ind. App. 312.

Evidence Showing Conditional Contract. — In an action upon an unconditional contract the fact that the contract proved is conditional does not constitute a fatal variance where the action is also based upon a *quantum meruit*, and the issues as to the conditional contract have been fully made up and presented to the court for decision. *Kavanaugh v. Ballard*, (Ky. 1900) 56 S. W. Rep. 159.

Evidence Showing Contract Partly Verbal. — Although the contract alleged in the petition is averred to be in writing, and the contract proved is partly in writing and partly verbal, yet there is no variance where the contract alleged and the contract proved are the same. *Sanders Pressed Brick Co. v. Columbia Real Estate, etc., Co.*, 86 Mo. App. 169.

Evidence Showing Several Instead of Joint Contract. — In an action on contract against several persons, it must appear on the face of the pleadings that their contract is joint, and that fact must also be proved on the trial. If the contract is alleged to be joint, and on the trial it appears to be several, the plaintiff must be nonsuited. *Board of Education v. Howard*, 65 N. J. L. 75.

When Petition Shows Extinguishment of Contract. — Under the rule that parties are absolutely concluded by the statements contained in their pleadings, a petition seeking recovery on a contract which it at the same time shows to have been extinguished does not state a cause of action. *Davis v. Bond*, 75 Mo. App. 32.

2. See *Fravert v. Fesler*, 11 Colo. App. 387.

Setting Out Plans and Specifications. — In an action to recover for certain work done under a contract for street construction in accordance with the plans and specifications of the engineer of the defendant, the complaint need not set out or exhibit such plans and specifications in addition to the contract itself. *Wysor Land Co. v. Jones*, 24 Ind. App. 451. See also WORK AND LABOR.

When Contract Divisible. — If the

920. *e.* STATEMENT OF CONDITIONAL CONTRACT. — See notes 2, 3, 4.

921. *g.* STATEMENT OF MODIFIED CONTRACT. — See note 3.

922. *h.* STATEMENT OF PAROL OR WRITTEN CONTRACT. — See notes 2, 3.

plaintiff intends to rely upon one part only of the contract, for the reason that the other part may be invalid, such fact should be pleaded. *Union Strawboard Co. v. Bonfield*, 96 Ill. App. 413.

Material Omissions — Effect. — *Hannan v. Greenfield*, 36 Oregon 97.

The rule that material omissions in the statement of a contract will be fatal, as laid down in *Gilmore v. Lymcoming F. Ins. Co.*, 55 Cal. 123, has no application to a complaint setting forth a contract between the plaintiff and the defendant in which reference is made to another contract between the defendant and third persons, but failing to set out the contract referred to, where it does not appear that such latter contract was in writing or that it was necessary to the plaintiff's recovery that the terms thereof should be set out or shown. *Sutliff v. Seidenberg*, 132 Cal. 63.

920. 2. *Griffin v. Bass Foundry, etc., Co.*, (Ala. 1902) 33 So. Rep. 177.

3. *Newton Rubber Works v. Graham*, 171 Mass. 352, holding that according to the well-settled rules of pleading the condition should be set out as a part of the contract and performance of it averred, or the want of performance excused.

4. *Sawyer v. Wabash R. Co.*, 156 Mo. 468.

Rule When Payment Depends on Contingency. — Where the obligation of a party to a contract is to pay only upon a contingency, the happening of the contingency must be alleged in the complaint in an action for the recovery of the money. But if payment is not to be made if a certain contingency happens, it is not necessary to allege the failure of the contingency. *Root v. Childs*, 68 Minn. 142.

921. 3. *Iroquois Furnace Co. v. Bignall Hardware Co.*, 102 Ill. App. 68. See also *Jackson v. Martin*, (Tex. Civ. App. 1897) 41 S. W. Rep. 837.

Where the New Contract Is But an Extension and continuation of the original contract, it is proper to declare on both. *McLane v. Maurer*, (Tex. Civ. App. 1902) 66 S. W. Rep. 693.

Failure to Plead Modification. — If the plaintiff fails to plead an agreement modifying the original contract set out by him, such modifying agreement cannot be proved at the trial. *Pioneer Sav., etc., Co. v. Kasper*, 7 Kan. App. 813, 52 Pac. Rep. 623.

Where a defendant has alleged a written contract and its performance, he will not be allowed to prove a modification of such contract by parol. *Computing Scale Co. v. Churchill*, 109 Wis. 303.

Statement of Inconsistent Contracts. — A complaint set out an agreement between the plaintiff and the defendant and averred that the plaintiff had performed the contract. It then averred that the defendant claimed that the contract had been changed, and alleged that it had not been changed, and that even if it had, the defendant had not performed the contract as claimed to have been changed. It was held that the two contracts described were entirely inconsistent with each other, and it was impossible to tell upon which contract the plaintiff relied. *Gosline v. Albro Clem Elevator Co.*, 174 Mass. 38.

922. 2. *Durflinger v. Baker*, 149 Ind. 375, holding that a contract in writing, but treated by both parties in their pleadings as in parol, is not in issue.

Failure to State Contract as Oral or Written. — When a pleader declares on a contract, he may be called on to declare also whether it is an oral or a written contract. *Lombard v. Citizens' Bank*, 107 La. 183.

If the petition does not state whether the contract is oral or in writing, a demurrer thereto will not be sustained unless it is essential to the cause of action that the agreement should have been in writing. *Smith v. Patrick*, (Tex. Civ. App. 1896) 36 S. W. Rep. 762.

If a written contract is not so pleaded, evidence as to the terms thereof is nevertheless admissible where both parties allege in their pleadings the existence of a contract. *Gajewski v. Brzezinski*, 103 Wis. 519.

922. i. STATEMENT OF EXPRESS OR IMPLIED CONTRACT —
(1) *General Rule.* — See note 4.

923. (2) *Exceptions — Defendant Only to Pay Money.* — See note 1.

926. *Specific Agreement Corresponding to Legal Obligations.* — See note 1.

Where Contract Is at an End. — See note 2.

Presumption. — If an agreement is not alleged to have been written, it will be presumed to have been by parol. *Lowe v. Turpie*, 147 Ind. 652.

Proof of an Oral Contract cannot be admitted under a complaint upon a written contract, without amendment. *Brigger v. Mutual Reserve Fund L. Assoc.*, 75 N. Y. App. Div. 149; *Mutual L. Ins. Co. v. Robinson*, 24 N. Y. App. Div. 570, holding that where a pleading refers to a contract in such terms as fairly to justify the inference that the contract was in writing, evidence of a parol contract should be excluded.

922. 3. Contracts Partly in Writing and Partly Parol. — *American Contract Co. v. Bullen Bridge Co.*, 29 Oregon 549 [citing 4 ENCYC. OF PL. AND PR. 922]; *Trench v. Hardin County Canning Co.*, 168 Ill. 135; *Fulton County v. Gibson*, 158 Ind. 471.

In *Kansas*, where the petition alleges that the contract was verbal, and the evidence shows that it was partly verbal and partly written, there is no such variance as would authorize the court to sustain a demurrer to the evidence. *Kansas L. & T. Co. v. Love*, 4 Kan. App. 188.

Parol Contract Based on Written Contract. — A complaint pleading an oral agreement for extra work in addition to that provided for in a written contract between the parties, and alleging that such work was to be done in accordance with the terms of said contract, need not state what were the terms of the written contract. *O'Connor v. Adams*, (Ariz. 1899) 59 Pac. Rep. 105.

4. Sanders v. Hartge, 17 Ind. App. 243, citing 4 ENCYC. OF PL. AND PR. 922.

In *Iowa* a party may recover upon *quantum meruit* where he has not complied strictly with the terms of his contract, but he cannot so recover without so pleading. *Boyce v. Timpe*, (Iowa 1902) 89 N. W. Rep. 83.

If the Complaint Is Uncertain or Ambiguous as to whether the contract sued upon is express or implied, the defend-

ant's remedy is by demurrer. *Burgess v. Helm*, 24 Nev. 242.

923. 1. Indiana. — *Fulton County v. Gibson*, 158 Ind. 471.

Maine. — See *Rumford Falls Boom Co. v. Rumford Falls Paper Co.*, 96 Me. 96.

Missouri. — *Barnett v. Sweringen*, 77 Mo. App. 64.

926. 1. Ball v. Beaumont, 59 Neb. 631, citing 4 ENCYC. OF PL. AND PR. 926, and holding that what the law implies need not be averred.

In an *Action for Labor and Services*, a complaint which avers that the work was done for the defendant and was accepted and used by him is sufficient to raise an implied promise to pay the reasonable value of the services, without any allegation that its performance had been previously requested. *LaFayette R. Co. v. Tucker*, 124 Ala. 514.

2. California. — *San Francisco Bridge Co. v. Dumbarton Land, etc., Co.*, 119 Cal. 272, holding that where the defendant has refused to make monthly payments as agreed there is a substantial breach of the contract, and the plaintiff may refuse to proceed further and recover upon *quantum meruit*, the defense of a special contract not being available to the defendant.

Georgia. — See *Roberts v. Glass*, 112 Ga. 456.

Illinois. — *Foster v. McKeown*, 192 Ill. 339; *Sands v. Potter*, 165 Ill. 397; *Keeler v. Clifford*, 165 Ill. 544, holding that upon the failure of one party to a contract to make a payment as provided therein, the complying party may recover for the breach or may abandon the contract and recover *pro tanto*; *American Silica Sand Co. v. McGarry*, 68 Ill. App. 333, holding that where a contract appears to have been abandoned by mutual consent, a party to whom any sum is due thereunder may recover it under the common counts at the contract price. See also *Crane Elevator Co. v. Clark*, (C. C. A.) 80 Fed. Rep. 705.

Indiana. — *Fulton County v. Gibson*, 158 Ind. 471.

927. Where Special Contract Is Imperfect. — See note 1.

(3) *Pleading and Proof.* — See note 2.

928. 3. Consideration — a. NECESSITY OF PLEADING — (1) *General Rule.* — See notes 1, 2.

929. See note 1.

Maryland. — *Hartlove v. Durham*, 86 Md. 689.

Nebraska. — *Thompson v. Gaffey*, 52 Neb. 317, holding that where one party to an express contract is wrongfully prevented by the other party from completing it, he may sue upon the contract for a breach thereof, or may ignore the contract and declare upon a *quantum meruit* or *quantum valebat*.

New York. — *Simmons v. Ocean Causeway*, 21 N. Y. App. Div. 30.

Ohio. — *Wellston Coal Co. v. Franklin Paper Co.*, 57 Ohio St. 182.

927. 1. *Fulton County v. Gibson*, 158 Ind. 471.

Where a Special Contract Is Invalid the plaintiff may recover upon a *quantum meruit* for what the defendant actually received in value. *Simms v. Petaluma Gas Light Co.*, 131 Cal. 656.

2. *California.* — *Fladung v. Dawson*, (Cal. 1896) 43 Pac. Rep. 1107.

Colorado. — *Harper v. Lockhart*, 9 Colo. App. 430, holding, however, that where there is a question as to what the contract was, proof of the reasonable value of the services rendered may be given to aid the court in interpreting the oral contract.

Indiana. — *Davis v. Chase*, (Ind. 1902) 64 N. E. Rep. 88; *Sanders v. Harge*, 17 Ind. App. 243. Compare *Palmer v. Miller*, 19 Ind. App. 624.

Louisiana. — *Ferre Canal Co. v. Burgin*, 106 La. 309.

Missouri. — *Laclede Constr. Co. v. Tudor Iron Works*, 169 Mo. 137; *Cole v. Armour*, 154 Mo. 333, holding that where the plaintiff elects to stand upon a special contract, he cannot recover for money had and received to his use, or upon a *quantum meruit* for work and labor done or services rendered.

Nebraska. — *Dorrington v. Powell*, 52 Neb. 440.

New York. — *Dennison v. Musgrave*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 627. See also *Morris v. Sire*, (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 1098.

South Dakota. — See *Doyle v. Edwards*, 15 S. Dak. 648.

Texas. — *International, etc., R. Co. v. Masterson*, (Tex. Civ. App. 1899) 51

S. W. Rep. 644; *Lohner v. Wilcox*, (Tex. Civ. App. 1897) 43 S. W. Rep. 27.

Utah. — See *Heccla Gold Min. Co. v. Gisborn*, 21 Utah 68.

Wisconsin. — *Pearson v. Switzer*, 98 Wis. 397.

Where Both the Agreement and the Quantum Meruit Are Declared Upon, the plaintiff may recover as the evidence may show. *Fant v. Andrews*, (Tex. Civ. App. 1898) 46 S. W. Rep. 909.

But if the contract is admitted by the defendant, the plaintiff can recover thereon only, and not upon the *quantum meruit*. *Tuffree v. Steward*, 109 Iowa 600.

In Nevada, if the plaintiff sues upon an express agreement and an agreed rate of compensation for the services performed, he may recover upon proper proof of the services and their value, unless the defendant is misled thereby; likewise, under a complaint on a *quantum meruit*, where a specific contract fixing the price of services is proved, the plaintiff may recover the stipulated price. *Burgess v. Helm*, 24 Nev. 242.

Partial Performance by Plaintiff. — In *Missouri*, where the plaintiff has partially performed and such performance has been accepted by and is of value to the defendant, the plaintiff may recover upon *quantum meruit*, although suing upon an express contract. *West v. Freeman*, 76 Mo. App. 96.

928. 1. See *Chambers v. Talladega Real Estate, etc., Assoc.*, 126 Ala. 296, citing 4 ENCYC. OF PL. AND PR. 928.

Nudum Pactum. — Where the contract is upon its face a *nudum pactum*, it is necessary for the plaintiff to allege and prove a consideration. *Platt v. Scribner*, 9 Ohio Cir. Dec. 771.

2. Bond Not Showing Consideration. — In an action upon a bond for liquidated damages, where the bond does not show any consideration to support it, the complaint should contain further allegations sufficiently showing the consideration. *Franz v. Bieler*, 126 Cal. 176.

929. 1. *Negotiable Contracts.* — In *Indiana* contracts negotiable under

- 929.** (2) *Statutory Changes.* — See note 2.
- 932.** 4. *Performance* — *b.* CONDITIONS CONCURRENT. — See notes 1, 2.
- 933.** *c.* INDEPENDENT COVENANTS — (1) *Rule as to Allegations of Performance.* — See note 1.
- 934.** (2) *How Independent Covenants Determined.* — See note 2.
- 935.** See note 1.
- 936.** See note 1.
- 937.** 7. *Breach* — *a.* NECESSITY OF AVERMENT. — See note 3.
- 938.** *b.* EFFECT OF FAILURE TO STATE, OR OF DEFECTIVE STATEMENT — *Aider by Verdict.* — See note 2.
- 939.** *Special Demurrer.* — See note 1.
- c.* HOW TO STATE BREACH — (1) *By Negating Words of Covenant.* — See note 2.

the law merchant or assignable under the provisions of the statute import a consideration, and in an action thereon no consideration need be averred. *Magic Packing Co. v. Stone-Ordean Wells Co.*, 158 Ind. 538.

929. 2. *Indiana.* — Where a written contract which discloses the consideration, or an oral one which imports it, is relied upon, it will not be necessary to aver the consideration more specifically. *Louisville, etc., R. Co. v. Barnes*, 16 Ind. App. 312.

932. 1. *Magic Packing Co. v. Stone-Ordean Wells Co.*, 158 Ind. 538 [citing 4 ENCYC. OF PL. AND PR. 932]; *Baldwin v. Central Sav. Bank*, (Colo. App. 1901) 67 Pac. Rep. 179; *Leslie v. Casey*, 59 N. J. L. 6.

2. *New York.* — *Kelly v. Baker*, 26 N. Y. App. Div. 217. See also *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435.

United States. — *McCabe v. Cruikshank*, 106 Fed. Rep. 648, holding that an allegation of notice of readiness to perform, without an allegation of readiness in fact, is not sufficient.

933. 1. *Greenville v. Greenville Water Works Co.*, 125 Ala. 625 [citing 4 ENCYC. OF PL. AND PR. 933]; *San Francisco Bridge Co. v. Dumbarton Land, etc., Co.*, 119 Cal. 272.

934. 2. *Johnson v. Heaton*, 28 Ind. App. 475; *Romel v. Alexander*, 17 Ind. App. 257.

935. 1. See *Litchfield Mfg. Co. v. Gallagher*, 98 Iowa 390.

936. 1. *Greenville v. Greenville Water Works Co.*, 125 Ala. 625, citing 4 ENCYC. OF PL. AND PR. 935, and holding that where the terms of a contract

provide for the payment of certain instalments of rent in advance, an action may be brought to recover one such instalment before the termination of the contract.

When Independent Covenants Become Concurrent. — Though a contract contains independent covenants and it might be possible for the plaintiff to sue thereunder without any performance on his part, yet if he makes default before suit in the performance of an act required by him, he must treat all the preceding agreements of the defendant which remain unperformed as concurrent, since he cannot enforce the performance on the defendant's part of a contract while he is in default in the performance of his part of it. *Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co.*, 120 Cal. 521.

937. 3. *Indiana.* — *Drudge v. Leiter*, 18 Ind. App. 694.

Louisiana. — See *Alexandria v. Morgan's Louisiana, etc., R., etc., Co.*, (La. 1902) 33 So. Rep. 65.

Missouri. — See *Brewer v. Swartz*, 94 Mo. App. 392.

New Jersey. — *Melick v. Foster*, 64 N. J. L. 394.

938. 2. See *Kraft v. Rice*, 45 N. Y. App. Div. 569.

939. 1. See *Tozer v. George*, 123 Cal. 650.

2. *California.* — *Franz v. Bieler*, 126 Cal. 176.

United States. — *Seebass v. Mutual Reserve Fund L. Assoc.*, 82 Fed. Rep. 792, holding that an assignment of a breach in the words of the contract is good when no question of law is involved.

939. (2) *When Negating Words of Covenant Insufficient.* — See note 3.

941. (3) *Breach Assigned Not Narrower than Covenant.* — See note 2.

(6) *Several Breaches.* — See note 3.

942. (7) *Contract for Payment of Money.* — See note 5.

944. 8. *Execution.* — See note 1.

V. PLEA OR ANSWER — 2. Denial of Execution. — See notes 2, 3.

946. 3. *Want of Consideration — Necessity for and Manner of Pleading* — *c.* UNDER STATUTES. — See note 1.

When Time for Defendant to Perform Is Not Fixed. — A complaint seeking to recover upon a contract for services to be performed by the defendant, but within no fixed time, sufficiently alleges a breach by alleging performance by the plaintiff and nonperformance by the defendant. If the obligation of the defendant has not matured, it is matter of defense. *Crafton v. Carmichael*, (Ind. App. 1902) 64 N. E. Rep. 627.

939. 3. *Staver Carriage Co. v. Park Steel Co.*, (C. C. A.) 104 Fed. Rep. 200, citing 4 ENCYC. OF PL. AND PR. 939, 940.

941. 2. *Fairman v. Ford*, 70 Vt. 111, holding that under a declaration alleging that the defendant undertook to lay tin upon the plaintiff's roof "well, carefully, and skillfully, shutting out all rain and water," evidence could not be given to show that the defendant undertook to keep out the rain absolutely, but that the allegation imported only a contract to keep out the rain as completely as the construction of the roof would permit.

3. *Pryor v. Kansas City*, 153 Mo. 135.

942. 5. *Franz v. Bieler*, 126 Cal. 176, holding that nonpayment need be alleged only in cases of contracts for the payment of money only, that is, contracts which can be broken in no other way than by nonpayment. *Hurley v. Ryan*, 119 Cal. 71.

Contra. — In *Connecticut*, in an action to recover for professional services, it is not essential to allege that the debt remains unpaid. *Morehouse v. Throckmorton*, 72 Conn. 449.

944. 1. See *Fuqua v. Pabst Brewing Co.*, (Tex. Civ. App. 1896) 36 S. W. Rep. 479.

2. Illinois — Verification of Plea. — Without plea verified by affidavit, evidence cannot be introduced tending to disprove the execution of a contract.

Snell v. E. Tosetti Brewing Co., 71 Ill. App. 650.

3. *Stewart v. Thayer*, 170 Mass. 560; *National Cash Register Co. v. Riggs*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 716. But see *Denney v. Stout*, 59 Neb. 731, holding that any affirmative defense to the enforcement of a contract, such as the rescission or modification thereof, should be pleaded in the answer.

In Texas if the defendant desires to show that the written contract pleaded does not embrace the entire terms of a contract, he should allege such fact in his pleading, and further allege that it was omitted through either fraud, accident, or mistake. *Janes v. Ferd-Hein Brewing Co.*, (Tex. Civ. App. 1897) 44 S. W. Rep. 896; *Sanborn v. Plowman*, 13 Tex. Civ. App. 95.

Showing Special Instead of Implied Contract. — In an action upon *quantum meruit* to recover for the services of a minor, the defendant may prove, under a general denial and allegation of payment, a written agreement made by the minor and subsequently ratified. It is not necessary that the agreement be set forth in the answer. *McDonald v. Sargent*, 171 Mass. 492.

Showing that Contract Was Not Personal. — Where the declaration does not aver that the contract was in writing or set it out *verbatim*, and the plea is the general issue, without denying the execution of the contract, the defendant may nevertheless prove that the contract was not a personal one on his part. *Armstrong v. Andrews*, 109 Mich. 537.

946. 1. *Insufficiency of Consideration.* — In *New Jersey*, under the statute providing that in an action upon a sealed instrument any party may plead and set up as a defense thereto the want or failure of consideration, a plea

946. *d.* UNDER CODE — When Necessary to Plead. — See notes 2, 3.

948. How to State Want of Consideration. — See note 1.

Nonexistence of Consideration for Contract. — See note 2.

949. 4. Failure of Consideration — *b.* UNDER STATUTES —

(1) *Necessity of Pleading.* — See note 7.

950. (2) *How Pleased.* — See note 1.

951. (4) *Showing Partial Failure under Plea of Total Failure.* — See note 2.

challenging the sufficiency of the consideration as set forth in the agreement is not proper, as the remedy is by demurrer or plea of *non est factum*. *Raritan R. Co. v. Middlesex, etc., Traction Co.*, (N. J. 1902) 51 Atl. Rep. 623.

946. 3. *Recknagel v. Steinway*, 58 N. Y. App. Div. 352; *Mutual L. Ins. Co. v. Yates County Nat. Bank*, 35 N. Y. App. Div. 218.

In *South Carolina* it seems that while failure of consideration of an obligation under seal may be set up as a defense to an action on such an instrument, yet want of consideration cannot, as the seal imports a consideration. *Duckworth v. McKinney*, 58 S. Car. 418.

3. *Greer v. Latimer*, 47 S. Car. 176; *Griffith v. Wright*, 21 Wash. 494, both cases citing 4 ENCYC. OF PL. AND PR. 946.

Where the Defendant Has Pleased a Written Instrument in defense, the plaintiff, though he has not served and filed an affidavit denying the instrument or the existence of any consideration therefor, may nevertheless by evidence controvert the instrument upon any and all grounds, including want of consideration, except that he cannot controvert its due execution or its genuineness. *Brooks v. Johnson*, 122 Cal. 569.

948. 1. *Eagle Ins. Co. v. Blymyer*, 10 Ohio Dec. 417, quoting 4 ENCYC. OF PL. AND PR. 947, 948, and holding that the defense of no consideration to a note pleaded in general terms may be required by the plaintiff to be made more definite by a statement of the facts upon which the defense is based; *Griffith v. Wright*, 21 Wash. 494, holding, however, that "while the formula alleging that a promissory note is without consideration is justly subject to the criticism that the statement may be a conclusion of law, yet it may also be construed as an issuable fact where the parties go to trial and place such construction upon it."

Waiver of Objection. — In *Ohio* a de-

fense of no consideration pleaded in general terms is good in the absence of objection by the plaintiff. *Clark v. Clark*, 9 Ohio Cir. Dec. 476.

In *Totidem Verbis*. — Though the answer does not set up in so many words that there was a "want of consideration" or a "failure of consideration," it is sufficient if it sets up facts which go to sustain such a defense. *Duckworth v. McKinney*, 58 S. Car. 418.

2. *Dalrymple v. Wyker*, 60 Ohio St. 108, citing 4 ENCYC. OF PL. AND PR. 948.

949. 7. *Plea Raised on Appeal.* — In *Texas* the plea of failure of consideration may be set up on a trial *de novo* in the County Court, though not pleaded in the justice's court. *McDonald v. Young*, (Tex. Civ. App. 1897) 41 S. W. Rep. 885.

Where the Failure of Consideration Is Total, as where nothing of value has been received by the defendant under it and the plaintiff cannot perform it, no notice of rescission is required, but the defendant may plead want or failure of consideration. *Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co.*, 120 Cal. 521.

950. 1. *Port Huron Engine, etc., Co. v. Clements*, 113 Wis. 249, quoting 4 ENCYC. OF PL. AND PR. 947, 948, 950.

Plea Sufficiently Showing Failure of Consideration Illustrated. — In an action upon a note, allegations in the answer that the note was executed as merely collateral security for the payment of court costs which were otherwise secured by a cost bond, and that the giving of the note in no way prevented the plaintiff from collecting the debt before the note became due, negative the idea that the execution of the note was in consideration of an extension of time for the payment of the debt, and sufficiently show failure of consideration. *McDonald v. Young*, (Tex. Civ. App. 1897) 41 S. W. Rep. 885. See also *Forgoston v. Cragin*, 62 N. Y. App. Div. 243.

951. 2. See *Russ Lumber, etc.,*

953. 5. Illegality of Consideration — 6. UNDER STATUTES. — See note 1.

Illegality, How Stated. — See note 2.

7. Nonperformance by Plaintiff — Necessity of Pleading. — See note 3.

How Pleading. — See note 4.

Co. v. Muscupiabe Land, etc., Co., 120 Cal. 521, holding that a failure of consideration, either total or partial, may be pleaded as a defense to an action upon a promissory note, either wholly or *pro tanto*.

953. 1. Kansas. — See *Missouri, etc., R. Co. v. Bagley*, 60 Kan. 424.

Missouri. — *McDermott v. Sedgwick*, 140 Mo. 172. But see *School Dist. v. Sheidley*, 138 Mo. 672.

Where Illegality Is Evident. — A defendant cannot take advantage of the fact that a contract which he has entered into is illegal without pleading such defense, except in those cases where the contract itself, or the testimony offered to establish its existence or to support some other issue, shows that it is illegal. *Jefferson v. Burhans*, (C. C. A.) 85 Fed. Rep. 949; *Wright v. Cudahy*, 168 Ill. 86.

Invalidity. — The defense of invalidity is not available under a general denial, but must be pleaded. *Kearns v. New York, etc., Ferry Co.*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 19.

2. Barber Asphalt Paving Co. v. Botsford, 56 Kan. 532.

Fraud, as a defense to an action on a contract, cannot be pleaded in general terms, but the facts from which the inference of fraud may be deduced should be stated. *Eccardt v. Eisenhauer*, 74 N. Y. App. Div. 35; *Fire Extinguisher Mfg. Co. v. Perry*, 8 Okla. 429. See also FRAUD.

3. Lozier v. Hannan, 12 Colo. App. 59; *Ottawa Tribe No. 15 v. Munter*, 60 N. J. L. 459; *Joske v. Pleasants*, 15 Tex. Civ. App. 433, holding that a failure on the part of the plaintiff to

give a bond which was necessary to consummate the contract cannot be shown by the defendant under a general denial, where such requirement as to the bond does not appear from the complaint.

In Michigan, where the plaintiff seeks to recover according to the terms of a written contract, it is competent for the defendant to show, under the general issue, that the contract has not yet been completed. *Brown v. Kriser*, (Mich. 1902) 89 N. W. Rep. 51.

Nonperformance as to a Particular Part of the contract cannot be shown by the defendant under a general denial. *Brush Electric Light, etc., Co. v. Montgomery*, 114 Ala. 433.

When Defense of Nonperformance Unavailable. — A party to a contract whose failures to perform it have contributed to the failures of the other party to perform cannot urge that the failures of the latter are an absolute defense to an action brought by him to recover for partial performance. *Delafield v. Westfield*, 41 N. Y. App. Div. 24.

4. Philip Schneider Brewing Co. v. American Ice Mach. Co., (C. C. A.) 77 Fed. Rep. 138; *U. S. v. Dixey*, 71 Fed. Rep. 846. See also *Loucheim v. Maguire*, 6 Pa. Super. Ct. 635.

Defendant Bound by Facts Pleading. — Where the defendant makes specific the items wherein he contends that the plaintiff has failed to perform, he must in his proof be held to the particular matter so pleaded, and will not be permitted to avail himself of a general denial for the purpose of proving that the plaintiff has failed in some other particular not named. *Mutual L. Ins. Co. v. Dingley*, (C. C. A.) 100 Fed. Rep. 408.

CONTRIBUTORY NEGLIGENCE.

1. I. DECLARATION OR COMPLAINT — 1. Negating Contributory Negligence. — See note 1.

4. 2. Different Doctrine in Some States. — See note 2.

1. 1. The Declaration Need Not Negative Contributory Negligence. — *Berry v. Lake Erie, etc.*, R. Co., 70 Fed. Rep. 193. See also *Evans v. Lake Erie, etc.*, R. Co., 78 Fed. Rep. 782; *Clark v. Canadian Pac. R. Co.*, 69 Fed. Rep. 543.

Authoritative Expressions — *California*. — In *Matthews v. Bull*, (Cal. 1897) 47 Pac. Rep. 773, which was an action for personal injuries, the court said: "In this state the law seems to be settled that in this class of cases it is not necessary to allege in the complaint that the injury was done without fault or negligence on the part of the plaintiff."

Indiana. — In *Baltimore, etc., R. Co. v. Young*, 146 Ind. 377, the court, citing 5 ENCYC. OF PL. AND PR. 7, said: "The general allegation of freedom from fault * * * has always been held sufficient in this state."

In the Federal Courts. — In *Berry v. Lake Erie, etc.*, R. Co., 70 Fed. Rep. 193, the court said: "It is too firmly settled by repeated decisions in the federal courts to be longer open for question here that in actions for personal injuries the plaintiff is not required * * * to prove freedom from contributory negligence," and, "he is under no obligation to aver it."

Prevalence of the Rule — *California*. — *Matthews v. Bull*, (Cal. 1897) 47 Pac. Rep. 773.

Connecticut. — In *Brockett v. Fair Haven, etc.*, R. Co., 73 Conn. 428, it was held that in a complaint sounding in tort, to recover for an injury due to the negligence of another, a direct allegation that the injury was caused by the defendant's negligence involves the allegation that the negligence of the plaintiff did not contribute to the injury.

Illinois. — In *Chicago, etc., R. Co. v. Eselin*, 86 Ill. App. 94, it was held that the complaint should allege that

the plaintiff was in the exercise of ordinary care for his own safety.

In *Gerke v. Fancher*, 158 Ill. 375, the court stated: "It is the well-settled rule in this state that before a plaintiff can recover damages for an injury caused by the defendant's negligence he must aver and prove the absence of contributory negligence on his own part," but held that a declaration which avers facts from which the plaintiff's freedom from contributory negligence may be inferred will be deemed sufficient after verdict.

Minnesota. — *Thompson v. Great Northern R. Co.*, 70 Minn. 219, quoting 5 ENCYC. OF PL. AND PR. 1.

Montana. — *Cummings v. Helena, etc., Smelting, etc., Co.*, 26 Mont. 434.

New Hampshire. — *Valley v. Concord, etc.*, R. Co., 68 N. H. 546.

New Jersey. — *Purcell v. Paterson, etc., Gas, etc., Co.*, (N. J. 1902) 53 Atl. Rep. 235, holding that if the declaration does not show affirmatively that the plaintiff was guilty of contributory negligence it is sufficient. See also *Warshawsky v. Raritan Traction Co.*, (N. J. 1902) 52 Atl. Rep. 296.

Tennessee. — *Illinois Cent. R. Co. v. Davis*, 104 Tenn. 442.

Texas. — Where the facts alleged do not develop contributory negligence it is unnecessary for the complaint to allege the exercise of due care on the part of the plaintiff. *Galveston, etc., R. Co. v. Bohan*, (Tex. Civ. App. 1898) 47 S. W. Rep. 1050.

Virginia. — *Winchester v. Carroll*, 99 Va. 727.

Washington. — *Johnson v. Bellingham Bay Imp. Co.*, 13 Wash. 455.

4. 2. Plaintiff Must Negative Contributory Negligence — *Indiana* — *Rule Changed by Statute*. — In *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 232, the court quoting 5 ENCYC. OF PL. AND PR. 1, held that Laws Ind. (1899), p. 58 (*Horner's Stat. Ind.* 1901, § 284a),

7. Sufficiency of General Averments. — See note 1.

providing that the plaintiff in an action for personal injuries need not allege or prove the want of contributory negligence, and that contributory negligence is made a matter of defense provable under the general denial, is not in violation of Const. Ind., art. 4, § 22, which prohibits the passage of local or special laws regulating the practice in courts of justice; and that under such act it is not necessary to aver freedom from contributory negligence. See also to the same effect *Frank Bird Transfer Co. v. Krug*, (Ind. App. 1902) 65 N. E. Rep. 309; *Evansville v. Christy*, (Ind. App. 1902) 63 N. E. Rep. 867; *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 414; *Southern Indiana R. Co. v. Peyton*, 157 Ind. 690.

Iowa. — *Decatur v. Simpson*, 115 Iowa 348.

Oklahoma. — In *Guthrie v. Nix*, 3 Okla. 136, it is held that as Code Civ. Pro. Okla. was adopted from the state of Indiana, the settled rules of interpretation and construction applied to it by the Supreme Court of that state are adopted and applied as the proper rules of interpretation and construction in courts in this territory, and that therefore in an action for personal injuries the complaint must negative contributory negligence.

Freedom from Contributory Negligence Shown by Facts. — In *Pittsburgh, etc., R. Co. v. Welch*, 12 Ind. App. 433, it was held that where the facts show that the plaintiff was without fault he need not directly negative contributory negligence.

But a statement that the injured party was violently thrown from a hack by reason of the negligence of appellant in the management of the horses and vehicle is held to be an insufficient showing in this respect. *Wahl v. Shoulders*, 14 Ind. App. 665.

Injury in Disaster of Great Magnitude. — In *Franklin Printing, etc., Co. v. Behrens*, 80 Ill. App. 373, an action for injuries received while attempting exit from an elevator, the court said: "We do not think that the declaration was materially defective in omitting to aver that the appellee was exercising ordinary care at the exact instant of receiving the injuries complained of."

Allegations Sufficient After Verdict. — In *Baltimore, etc., R. Co. v. Then*, 159 Ill. 535, it was held that where the

declaration failed to negative contributory negligence, such omission is cured by verdict.

In Actions for Injuries to Infants — *Due Care on Part of Child Only.* — In *Elwood v. Addison*, 26 Ind. App. 28, it was held that where the complaint alleges that the child was seven years of age and without fault, and there is no averment from which it can be said as a matter of law that the child was *sui juris*, the complaint need not aver facts from which it can be determined that he did not comprehend the danger to which he was exposed, since it is for the jury to determine whether he was *sui juris*.

In *Elwood Electric St. R. Co. v. Ross*, 26 Ind. App. 258, it was held that a child four years and nine months old was *non sui juris*, the court saying: "It is an ancient rule, sustained by the great weight of authority, that contributory negligence cannot be imputed to a child when of such tender years, and that it is, by legal presumption, incapable of judgment or discretion."

Allegations that the defendants through their agent permitted the plaintiff, who was sixteen years old, a person of inexperience, ignorance, and incapacity in respect to the danger of the machinery, to be and remain alone for several hours in close proximity thereto while the same was in motion, were held to be sufficient to negative contributory negligence. *White v. San Antonio Water Works Co.*, 9 Tex. Civ. App. 465.

In *South Covington, etc., St. R. Co. v. Herrklotz*, 104 Ky. 400, it is held that erroneously sustaining a demurrer to the plea of contributory negligence is harmless where the evidence shows that the plaintiff was a child incapable of such negligence.

Negligence of Druggist. — In *Iowa*, in an action against a druggist for negligence in giving injurious medicine to the plaintiff, the complaint must allege want of contributory negligence. *Rabe v. Sommerbeck*, 94 Iowa 656.

7. 1. In support of the text see *Citizens' St. R. Co. v. Sutton*, 148 Ind. 173; *Sprinkle v. Bart*, 25 Ind. App. 681; *Keeley Brewing Co. v. Parnin*, 13 Ind. App. 588; *Gregory v. Woodworth*, 93 Iowa 246; *Chicago, etc., R. Co. v. Lagerkrans*, (Neb. 1902) 91 N. W. Rep. 358.

8. 3. Overcoming Presumption Arising from Facts — Prima Facie Negligence. — See note 1.

Conclusive Facts. — See note 2.

Negating in General Terms. — In *Chicago, etc., R. Co. v. Thomas*, 147 Ind. 35, it was held that an allegation that the decedent was injured "while passing over said crossing without carelessness or negligence on his part, and while using due care and caution," was insufficient in not showing that care was used before going upon the crossing, but that a general allegation that the injury was received without the fault of the injured would have been sufficient.

Where the second paragraph of the complaint concludes, "all of which was done by the defendant without any fault on part of plaintiff," and "all the acts occurred and were done without the fault of this plaintiff," it was held (under Burns's Rev. Stat. Ind. 1901, § 379, which provides that pleadings are to be liberally construed) that the allegations were sufficient, though neither paragraph contained any statement of facts showing that the plaintiff was not guilty of contributory negligence. *Wabash R. Co. v. Schultz*, (Ind. App. 1902) 64 N. E. Rep. 481.

In an action against a railway company for death caused by alleged negligence in running its train, the plaintiff need not state the facts constituting due care and caution on the part of the deceased. *Winifred v. Rutland R. Co.*, 71 Vt. 48.

In *Chicago, etc., R. Co. v. Putnam*, 45 Neb. 440, it was held that the plaintiff need not allege the particular precautions taken by him to avoid injury. But in *Cincinnati, etc., R. Co. v. Voght*, 26 Ind. App. 665, it was held that where the concluding part of each paragraph states that the accident was caused by the wrongfulness, carelessness, and negligence of the defendant, without any fault on the plaintiff's part, and the averments are not in any way connected with the specific acts of negligence charged, they do not in any way aid the complaint.

Want of Knowledge. — In *Indiana* it has been held that where recovery is sought for a master's negligence in reference to a safe place and appliances, in addition to the general averment of freedom from negligence on the part of the injured servant and knowledge of the defect by the master, want of

knowledge by the servant must be affirmatively shown. *New Kentucky Coal Co. v. Albani*, 12 Ind. App. 497.

§. 1. Prima Facie Negligence Shown by Facts. — In an action for injuries caused by the fall of heavy timber which had been carelessly and negligently left wholly unsecured by the defendant and its servants, an allegation that the injury was received while the plaintiff "was standing within one or two feet of said pile of timbers in the exercise of due care," is sufficient to withstand the objection that the plaintiff was not in the exercise of due care at the time of the injury. *Brennan v. Berlin Iron Bridge Co.*, 72 Conn. 386.

In *Cummings v. Helena, etc., Smelting, etc., Co.*, 26 Mont. 434, it was held that although the absence of contributory negligence need not be pleaded, yet if the complaint shows the proximate cause of the injury to have been the act of the plaintiff, he must aver his freedom from negligence in the doing of the act.

Facts which show that the plaintiff had some knowledge of the danger will not overcome the general allegation. *Citizens' St. R. Co. v. Sutton*, 148 Ind. 173.

And see *Brennan v. Berlin Iron Bridge Co.*, 72 Conn. 386; *D. H. Davis Coal Co. v. Pollard*, 158 Ind. 607; *Cleveland, etc., R. Co. v. Griffin*, 26 Ind. App. 368; *Hopkins v. Boyd*, 18 Ind. App. 63; *Frank Bird Transfer Co. v. Krug*, (Ind. App. 1902) 65 N. E. Rep. 309; *Homan v. Franklin County*, 98 Iowa 692; *Birmingham v. Duluth, etc., R. Co.*, 70 Minn. 474.

For Injuries to Infants. — In *Lake Erie, etc., R. Co. v. Mackey*, 53 Ohio St. 370, it was held that an averment that the plaintiff was a boy nine years of age and that he was of immature judgment was sufficient to rebut any presumption of contributory negligence arising from the facts alleged.

2. Facts Showing Contributory Negligence Conclusively. — *Decatur v. Stoops*, 21 Ind. App. 401, wherein the court cited 5 ENCYC. OF PL. AND PR. 8, and held that an allegation that the plaintiff was free from fault must be controlled by the fact which, specially pleaded, showed to the contrary. See

8. 4. **Averting Due Care on Part of Others than Plaintiff.** — See note 3.

9. 6. **Wilful Wrongs.** — See note 2.

10. II. **DEMURRER.** — See note 1.

III. **PLEA OR ANSWER** — 1. **General Denial.** — See note 4.

11. See note 1.

also *Wolfe v. Peirce*, 24 Ind. App. 684.

In *Pittsburgh, etc., R. Co. v. Martin*, 157 Ind. 216, it was held that a general allegation that the plaintiff was free from contributory negligence is sufficient, unless the specific averments show such general averment to be false.

In *Louisville, etc., R. Co. v. Treadway*, 142 Ind. 475, it was held that specific statements as to the conduct of the plaintiff were sufficient to overcome a general allegation that she was injured without fault or negligence on her part.

Where Contributory Negligence Need Not Be Negatived. — In a state where the plaintiff is not required to negative contributory negligence it was held that if the facts in the complaint do not show conclusively as a matter of law that the plaintiff was guilty of contributory negligence, the complaint is good. *Lydecker v. St. Paul City R. Co.*, 61 Minn. 414.

8. 3. **Negativing Negligence of Third Persons.** — In *Elenz v. Conrad*, 115 Iowa 183, an action for injuries received by a wife while riding in a wagon which her husband was driving, it was held that contributory negligence of the husband need not be denied.

In *Birmingham v. Duluth, etc., R. Co.*, 70 Minn. 474, it was held that the allegations of the complaint did not show that the injuries were caused by the negligence of a fellow servant.

9. 2. **Wilful Negligence.** — *Baltimore, etc., R. Co. v. Keck*, 84 Ill. App. 159, affirmed 185 Ill. 400; *Cleveland, etc., R. Co. v. Miller*, 149 Ind. 490; *Miller v. Miller*, 17 Ind. App. 611.

A complaint alleging that the defendant negligently sold cartridges to a minor, and that one of the cartridges exploded causing the injury complained of, does not show a wilful wrong relieving the plaintiff of the burden of denying contributory negligence. *Gartin v. Meredith*, 153 Ind. 16.

The rule as to the allegation of want

of contributory negligence has been changed by statute in *Indiana*. See *supra*, I. 2. *Different Doctrine in Some States*, note 2.

10. 1. **Demurrer to Complaint Showing Contributory Negligence.** — *Abrams v. Waycross*, 114 Ga. 712; *Stillwell v. South Louisville Land Co.*, (Ky. 1900) 58 S. W. Rep. 696.

In *Smith v. Southern R. Co.*, 129 N. Car. 374, it was held that the question of contributory negligence cannot be raised by demurrer.

Failure to Obtain Knowledge of Defect in Appliance. — In an action by a brakeman for injuries received on account of defective appliances for coupling cars, a complaint which alleged that when injured the plaintiff was in the discharge of his duties and exercising due care and that he had no knowledge of the defect, is not on general demurrer open to the objection that it fails to allege that the plaintiff could not have obtained such knowledge by the exercise of ordinary care and diligence. *Denver, etc., R. Co. v. Smock*, 23 Colo. 456.

4. **Must Be Specially Pleaded.** — In *Alabama Midland R. Co. v. Johnson*, 123 Ala. 197, it was held that contributory negligence must be specially pleaded, that where the cause is tried upon the general issue contributory negligence is not in issue, and that such issue cannot be raised on appeal. See also *Willis v. Perry*, 92 Iowa 297; *Texas, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1896) 34 S. W. Rep. 186.

Imputed Negligence. — In *Evans v. Lake Erie, etc., R. Co.*, 78 Fed. Rep. 782, it was held that an answer setting up the negligence of the driver of a vehicle as the proximate cause of the injury is demurrable.

11. 1. In *Canadian Pac. R. Co. v. Clark*, (C. C. A.) 73 Fed. Rep. 76, it was held that in an action against a corporation for injuries received by the negligent acts of its servants, the defendant under the plea of not guilty may show that the injury was due to the plaintiff's negligence. See also *In-*

12. 2. Confession and Avoidance. — See note 1.

3. Averment of Facts. — See note 3.

13. 4. Defense Available Without Plea. — See note 1.

IV. REPLY — When Necessary. — See note 2.

dianapolis St. R. Co. v. Robinson, 157 Ind. 414.

Indiana Statute. — Laws Ind. (1899), p. 58, makes contributory negligence a matter of defense under the general denial. Southern Indiana R. Co. v. Peyton, 157 Ind. 690. See *supra*, 1. 2. *Different Doctrine in Some States*, note 2.

General Denial and Special Plea. — An answer which contains a general denial and sets up contributory negligence and the negligence of a third party is demurrable. Levy v. Metropolitan St. R. Co., (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 220.

Where a special plea of contributory negligence is followed by the general denial no act can be proved that is not set up in the special plea. Texas, etc., R. Co. v. Johnson, (Tex. Civ. App. 1896) 34 S. W. Rep. 186.

12. 1. See in support of the text, Louisville, etc., R. Co. v. Marbury Lumber Co., 125 Ala. 260, quoting 5 ENCYC. OF PL. AND PR. 11.

In Fowler v. Brooks, 65 Kan. 861, 70 Pac. Rep. 600, it was held that where the defendant denied negligence and also pleaded contributory negligence, the latter plea did not admit negligence.

Confession of Culpable Negligence. — In Leavenworth Light, etc., Co. v. Waller, 65 Kan. 514, 70 Pac. Rep. 365, it was held that a general denial and the plea of contributory negligence are not inconsistent with each other, and that the latter is not a plea in confession where accompanied by the former.

3. In San Antonio, etc., R. Co. v. Belt, (Tex. Civ. App. 1898) 46 S. W. Rep. 374, it was held that unless the plaintiff's petition shows that he is *prima facie* guilty of negligence, or unless the evidence shows contributory negligence on his part, the defendant to make that defense must allege the acts relied on as constituting contributory negligence.

In Cogdell v. Wilmington, etc., R. Co., 130 N. Car. 313, it is held that an answer which avers "that the death of intestate was not caused by any negligence of defendant, but was caused by the negligence and fault of

plaintiff's intestate himself," sufficiently raises the issue of contributory negligence.

But in Chesapeake, etc., R. Co. v. Smith, 101 Ky. 104, it was held that a general plea of contributory negligence is sufficient, without the allegation of facts constituting such negligence.

13. 1. Missouri, etc., R. Co. v. Jamison, 12 Tex. Civ. App. 689; Clark v. Oregon Short Line R. Co., 20 Utah 401; Bunnell v. Rio Grande Western R. Co., 13 Utah 314.

See *contra*, Alabama G. S. R. Co. v. Burgess, 114 Ala. 587, wherein it is held that if there is no plea of contributory negligence the question of such negligence does not arise.

In Birmingham R., etc., Co. v. City Stable Co., 119 Ala. 615, it was held that contributory negligence cannot be the subject of a charge to the jury where it is not pleaded as a defense.

2. Florida Statute. — In Green v. Sansom, 41 Fla. 94, it was held that in an action for personal injuries where the defendant pleads that the injury was caused by the negligence and improper conduct of the plaintiff the general replication provided for in Rev. Stat. Fla., § 1055, was sufficient.

Kentucky Statute. — In Gore v. Illinois Central R. Co., (Ky. 1895) 32 S. W. Rep. 754, it was held that as Bullitt's Civ. Code Ky. (1895), § 386, requires that "judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him," the appellant's failure to deny the allegation of the answer which showed that the injury was the result of the appellant's contributory negligence entitles the appellee to judgment *non obstante veredicto*.

Waiver by Reply. — In Brown v. Seattle City R. Co., 16 Wash. 465, it was held that in an action for personal injuries where the plaintiff negated contributory negligence in the complaint and the defendants filed an answer, and the plaintiff did not move to make the answer more specific nor demur thereto, but replied, an objection to any evidence of contributory negligence on the ground that the

14. V. MOTIONS ON PLEADINGS — 3. In Arrest of Judgment. —
See note 4.

affirmative defense in the answer did not constitute a defense was properly overruled.

14. 4. *Rabe v. Sommerbeck*, 94 Iowa 656.

In *Gerke v. Fancher*, 158 Ill. 375, it was held that while the declaration fails to state in terms that the plaintiff was in the exercise of due care, yet if it states facts from which the plaintiff's freedom from contributory negligence

may be inferred, it must on motion in arrest of judgment or on error be held to be sufficient.

In *Decatur v. Simpson*, 115 Iowa 348, it was held that even after the defendant's demurrer had been overruled and he had answered, the question of the sufficiency of the complaint in this respect could be raised by motion in arrest. See *contra*, *Baltimore, etc., R. Co. v. Then*, 159 Ill. 535.

CONVICTS.

15. III. INDICTMENTS AGAINST. — See note 3.

15. 3. In *Williams v. State*, 130 Ala. 31, it was held that an indictment which charged that the defendant, "who was then and there a convict sentenced to imprisonment for life for murder in the first degree in the Criminal Court of Jefferson county, to wit, the 18th day of March, 1899, and while

said sentence was yet in force against him," killed another person, was sufficient under a code provision that "any convict sentenced to imprisonment for life who commits murder in the first degree while such sentence remains in force against him must on conviction suffer death."

COPYRIGHT.

17. I. JURISDICTION AT LAW AND IN EQUITY — Penalties and Forfeitures. — See note 3.

Form of Action. — See note 4.

II. FEDERAL AND STATE JURISDICTION. — See note 5.

18. Common-law Copyright. — See note 2.

III. PARTIES — Holder of Legal Title. — See note 5.

19. IV. NECESSARY ALLEGATIONS—2. Authorship.—See note 4.

17. 3. Circuit Court. — Under Rev. Stat. U. S., § 629, subdiv. 9, which vests in the Circuit Court original jurisdiction "of all suits at law or in equity arising under the patent or copyright laws of the United States," such court has jurisdiction of a suit under Rev. Stat. U. S., § 4965, to recover the penalty of one dollar for every sheet of an infringing copy of a copyrighted photograph found in the possession of the defendant. *Falk v. Curtis Pub. Co.*, 100 Fed. Rep. 77.

Action for Damages. — An action for damages under Rev. Stat. U. S., § 4966, for the alleged violation of a dramatic copyright, is not an action to recover a penalty or forfeiture, and the Circuit Court has jurisdiction thereof under Rev. Stat. U. S., § 629, subdiv. 9. *Brady v. Daly*, 175 U. S. 148.

4. Replevin. — In *Morrison v. Pettibone*, 87 Fed. Rep. 330, it was held that under Rev. Stat. U. S., § 4965, providing that the offender "shall forfeit to the proprietor all the plates" and sheets constituting the infringement, replevin will lie to obtain possession of sheets and plates infringing on a copyrighted photograph.

5. Rev. Stat. U. S., § 4966, confers upon the courts of the *United States* their only jurisdiction in an action between citizens of the same state for the recovery of damages for the unauthorized public performance and representation of a copyrighted dramatic composition. *Daly v. Brady*, 69 Fed. Rep. 285.

Suit Against Officers and Agents of State. — In *Howell v. Miller*, (C. C. A.) 91 Fed. Rep. 129, it was held that the federal court has jurisdiction in a suit

against officers and agents of the state to prevent them from infringing a copyright of the annotated statutes of such state, although such officers and agents are acting under direct authority of a state statute and the matter constituting the alleged infringement is owned and controlled by the state.

18. 2. Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 84 Hun (N. Y.) 12.

5. One who, at the time he applied for and obtained a registry of copyright of a play, was neither the author nor proprietor thereof cannot maintain an action for its infringement, nor can he maintain an action as trustee of the proprietor of the manuscript when the latter has failed to perfect his copyright. *Koppel v. Downing*, 11 App. Cas. (D. C.) 93.

19. 4. Close Reproductions. — Where the cut or engraving complained of is a close reproduction of the complainant's, the bill will not be dismissed on demurrer, although it is highly probable that when the proofs are taken it will appear that the illustration alleged to be pirated was not an original production. *Lillard v. Sun Printing, etc., Assoc.*, 87 Fed. Rep. 213.

Example. — In *Falk v. City Item Printing Co.*, 79 Fed. Rep. 321, it was held that the petition in a suit for infringement of a copyright in photographs must aver the "existence of facts of originality, of intellectual production, of thought, and conception on the part of the author."

Copyright as Proprietor. — In a suit to enjoin the alleged infringement of a copyrighted production, it was held that an averment that the complainants

20. 3. Compliance with Conditions Precedent. — See note 1.

V. ALLEGATIONS AND PROOF. — See note 4.

21. VI. LACHES. — See note 5.

22. VIII. PENALTIES AND FORFEITURES. — See note 5.

were, prior to the time of securing the copyright, proprietors of the book containing the production is a sufficient averment of proprietorship. *Lillard v. Sun Printing, etc., Assoc.*, 87 Fed. Rep. 213.

Exhibit. — Where the copyrighted book and the defendant's article complained of have been filed with the bill and are referred to in it they need not be set forth. *Lillard v. Sun Printing, etc., Assoc.*, 87 Fed. Rep. 213.

20. 1. Deposit of Copies with Librarian. — A bill to enjoin the defendants from an alleged infringement of a copyrighted book must aver that within ten days after publication two copies of the book were deposited in the office of the librarian of Congress. *Burnell v. Chown*, 69 Fed. Rep. 993.

Averment of Compliance with Statute. — An averment that the printed title was furnished to the librarian of Congress and that "thereafter, within the time and in the manner prescribed by law," the plaintiff "did all the things required by law to be done in order to secure to himself the full enjoyment of all rights and privileges granted by the laws of the land governing copyright," is insufficient to entitle him to protection. *Burnell v. Chown*, 69 Fed. Rep. 993.

Demand for Infringing Sheets. — In an action under Rev. Stat. U. S., § 4965, to recover a penalty and forfeiture of the sheets of a picture made in violation of copyright, the complaint need not allege a demand for the return of such sheets. *Hegeman v. Springer*, (C. C. A.) 110 Fed. Rep. 374.

Answer. — An answer which avers that the title page of a book marked in the amended bill of the complaint as "Complainant's Book" has been removed and another page substituted therefor is defective in not showing affirmatively that the title page was removed after the publication of the book. *Osgood v. A. S. Aloe Instrument Co.*, 69 Fed. Rep. 291.

4. West Pub. Co. v. Lawyers' Cooperative Pub. Co., (C. C. A.) 79 Fed. Rep. 756, reversing 64 Fed. Rep. 360, and holding that where the defense shows that by the misconduct of the defendant's employees a part of a

printed copyrighted work has been appropriated by the defendant and so mingled with the original matter contained in his publication that no one except his own employees who did the wrong could segregate the pirated from the original matter, the whole work, or so much of it as is tainted by the unfair usage, will be enjoined and accounted for.

In *Williams v. Smythe*, 110 Fed. Rep. 961, where the proof showed that the defendant, in making up his directory, appropriated portions of the plaintiff's copyrighted directory, a preliminary injunction was issued against the publication of the whole directory, subject to modifications on a showing that the defendant had eliminated the matter which he had appropriated.

In an action for the infringement of a copyrighted photograph, where it is alleged that the plaintiff is the author, inventor, designer, and proprietor of such photograph, proof that the copyrighted photograph was printed from a negative in which a slight change had been made by etching after photographs printed therefrom had been published without copyrighting is insufficient. *Snow v. Laird*, (C. C. A.) 98 Fed. Rep. 813.

21. 5. Statute of Limitation. — Under Rev. Stat. U. S., § 4964, which provides that every person who shall without the consent of the proprietor of the copyright, print or publish, sell or expose for sale, any copy of the copyrighted book, shall forfeit every copy thereof to such proprietor and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor, an action for damages for the alleged violation of a copyright of the annotated statutes of a state owned by the plaintiff was held, in *Wheeler v. Cobbe*, 70 Fed. Rep. 487, to be an action for forfeiture and hence, if not brought within two years after cause of action arose, to be barred by Rev. Stat. U. S., § 4968, providing that any penalty or any forfeiture arising under the copyright laws must be sued for within that time.

22. 5. In an action under Rev. Stat. U. S., § 4965, for the recovery of a forfeiture for an alleged infringe-

22. Action for Penalty. — See note 8.

23. See note 1.

False Notice of Copyright. — See note 5.

IX. REFERENCE TO MASTER. — See note 6.

ment of a copyright, the complaint must allege the number of copies of the infringing article found in the possession of the defendant before the suit was brought, since the statute limits the amount of the recovery to the number of the infringing copies found in the possession of the defendant before the suit was brought. *Falk v. Curtis Pub. Co.*, 98 Fed. Rep. 989.

22. 8. In an action under Rev. Stat. U. S., § 4965, against a corporation, to recover a penalty of one dollar for every infringing copy of a copyrighted photograph found in the possession of the defendant company, where the complaint states that the copies were found in the possession of the defendant, it is not necessary for it also to state which of its officers or agents had the actual custody of them, or that he was acting therein within the scope of his authority; nor need it allege that at the time the copies were found in the possession of the defendant it was actually engaged in the act of printing or publishing them, or exposing them for sale. And a statement that the copies were made within two years next before the commencement of the action and were found in the defendant's possession prior to the bringing thereof sufficiently specifies the time when they were so found. It is not necessary to allege that such copies were found by the plaintiff or by some one acting on his behalf in the premises. *Falk v. Curtis Pub. Co.*, 100 Fed. Rep. 77.

23. 1. In *Johnston v. Klopsch*, 88 Fed. Rep. 692, it was held that where an action to recover a penalty for the infringement of a copyright under Rev. Stat. U. S., § 4965, is brought in a federal court an answer which contains a general denial is sufficient under § 4969, without the incongruity of combining a code complaint with a common-law plea.

All actions at law in the courts of the United States between citizens of the same state for the recovery of money as damages or penalties against a person who without consent has given public representations of a copyrighted dramatic composition are controlled by

the provisions of Rev. Stat. U. S. § 4966. *Daly v. Brady*, 69 Fed. Rep. 285.

Joinder of Causes of Action. — In an action for penalties under Rev. Stat. U. S., § 4965, for infringements of copyrights, several causes of action may be joined both at common law and under the Ohio Code of Civil Procedure.

5. A complaint founded upon Rev. Stat. U. S., § 4963, to recover a penalty for inserting a notice of copyright in an uncopyrighted book, which states that on a certain date "the defendant, at the city of New York, in the state of New York, did publish and issue a certain book entitled * * * [giving title], and in and upon said book did knowingly insert and impress a false and untruthful notice that the same was copyrighted, which notice was in the following words: 'Copyright, 1896, by Raphael Tuck & Sons, Ltd.,' " is not demurrable because it fails to deny that the book is made up of copyrighted matter; nor on the ground that it fails to state the locality where the fictitious notice was inserted; nor because it does not allege that the false notice was inserted on the title page or the page immediately following. But a statement that the book was not copyrighted by the defendant is not equivalent to a statement that the defendant had not obtained a copyright thereon, and is demurrable. *Rigney v. Raphael Tuck, etc., Co.*, 77 Fed. Rep. 173.

6. Should Be Made Before Hearing. — In *Howell v. Miller*, (C. C. A.) 91 Fed. Rep. 129, which was a suit to enjoin the officers and agents of a state from the infringement of copyright of the annotated statutes of such state, the motion for injunction in the lower court was heard without a reference. The Circuit Court of Appeals said: "Under ordinary circumstances we should remand the cause, with directions to send the case to a master before the application for an injunction was finally disposed of. But we refrain from adopting that course in deference to the suggestion on behalf of the state that the public interests

- 24. X. INJUNCTION — At What Stage of Suit. —** See note 4.
 Temporary Injunction. — See note 7.
- 25. XII. DECREE —** See note 6.

might be injured by any serious delay in determining the case."

24. 4. In *Colliery Engineer Co. v. United Correspondence Schools Co.*, 94 Fed. Rep. 152, it was held that in a suit for the infringement of a copyright, when the piracy is not made clear by the evidence in support of the motion for a preliminary injunction, the injunction will not be granted till a final hearing has been had.

7. In *American Trotting Register Assoc. v. Gocher*, 70 Fed. Rep. 237, it was held that in order to entitle the complainant to a temporary injunction he must show affirmatively and beyond any doubt that he has complied with the copyright law. See also *Trow Directory, etc., Co. v. Boyd*, 97 Fed. Rep. 586, where an order was made

requiring the defendant to give security for any damages that might be adjudged against him, and that he make a monthly statement of the sales of the infringing directory complained of, and providing that if he failed to give such security or to make such statement a preliminary injunction might issue.

25. 6. In *Brady v. Daly*, (C. C. A.) 83 Fed. Rep. 1007, *affirmed* 175 U. S. 148, it was held that where the plaintiff brought a suit in equity for an injunction and an accounting of profits when there was no adjudication on the subject of profits, the decree would not bar him from suing for damages or penalties. A decree in such a suit that a copyright is valid is conclusive in a subsequent action between the same parties for damages.

CORAM NOBIS AND CORAM VOBIS.

28. II. OFFICE OF WRIT — 1. Errors of Fact Before Trial —
Relief from Errors of Fact. — See notes 4, 5, 6.

29. Newly Discovered Evidence. — See note 4.
Adjudicated Issue. — See note 5.

2. Ministerial Errors. — See note 6.

30. III. STATUS IN MODERN PRACTICE. — See note 4.

28. 4. Fraud. — In *State v. Superior Ct.*, 15 Wash. 339, it was held that even if a writ *coram nobis* would lie to inquire into certain alleged misstatements by a witness, it would not lie when based upon the claim that the testimony of the witness "was not in accordance with the facts, but was fraudulent and untrue."

5. Jurisdictional Facts. — A writ of error *coram nobis* will lie when the court has committed an error of fact vital to its jurisdiction, when such error does not appear upon the face of the proceedings. *State v. Clarkson*, 88 Mo. App. 553; *State v. White*, 75 Mo.

App. 257; *State v. Horine*, 63 Mo. App. 1.

6. Astell v. State, 62 Kan. 209, *citing* 5 ENCYC. OF PL. AND PR. 27, and affirming generally the principles laid down in the text.

29. 4. Dobbs v. State, 63 Kan. 321; *Asbell v. State*, 62 Kan. 209. See also *Mason v. Grubel*, 64 Kan. 835.

5. Dobbs v. State, 63 Kan. 321; *Asbell v. State*, 62 Kan. 209. See also *Mason v. Grubel*, 64 Kan. 835.

6. Lincoln Nat. Bank v. Perry, (C. C. A.) 66 Fed. Rep. 887.

30. 4. Consolidated Coal Co. v. Oeltjen, 91 Ill. App. 123.

CORONER'S INQUESTS.

38. I. IN GENERAL — 2. When Coroner to Hold Inquest. — See note 2.

39. See notes 1, 2.

40. See notes 1, 4.

38. 2. Inquest Subject to Statutory Provisions. — The coroner must hold an inquest in accordance with the provisions of the statute. *Palenzke v. Bruning*, 98 Ill. App. 644.

39. 1. Duty of Coroner to Investigate Cause of Death. — See *State v. Bellows*, 62 Ohio St 307, *affirming* 8 Ohio Cir. Dec. 376. In *Naftel v. Montgomery County*, 127 Ala. 563, it was held that no fees should be paid for holding an inquest when it is publicly known before a coroner's jury is summoned by what means the deceased came to his death, or when the slayer is under arrest for the homicide.

2. Duty to Hold Inquest and Cause Arrest. — *Sand. & H. ig. Stat. Ark.*, § 751, provides that if the dead body of a person is found, and the circumstances of the death are unknown, or if a person dies, and the circumstances of his death, although known, "indicate that he has been foully dealt with," information shall be given to the coroner, who, upon receipt of such information, shall hold an inquest over the body; and under § 764 of the statute, if it is found by the inquisition that the death has been caused by the act of any person, it is the duty of the coroner to cause the arrest of such person or persons, "unless it appears by the inquisition to be a case of excusable homicide." *Jefferson County v. Cook*, 65 Ark. 557.

Preliminary Investigation. — A preliminary investigation by a coroner to determine whether an inquest should be held does not constitute an inquest itself. The result of an inquest is a judicial determination of the manner in which the deceased person came to his death, and, if the death is the result of criminal means, to find, if possible, who is guilty thereof. *People v. Coombs*, 36 N. Y. App. Div. 284.

Abuse of Discretion in Holding Inquest.

— A coroner is not warranted in holding an inquest upon "a lot of bones bleached by time," a part of a human skeleton found on the banks of a stream and presumably unearthed or washed up by its waters. Such bleached remains do not fall under the descriptive words "dead bodies." *Meads v. Dougherty County*, 98 Ga. 697.

Fees and Costs. — See *Kistler v. Hennepin County*, 65 Minn. 262, holding that under the *Minnesota* statute a coroner is entitled to only one fee for making separate examinations of two different dead bodies on the same day, or holding an inquest on one body and making an examination of another on the same day; *Carmack v. Dade County*, 127 Mo. 527.

Mileage of Coroner. — A coroner is not entitled to mileage for visiting his deputies after holding views of dead bodies by them; but when he personally travels from the county-seat and makes a view or holds an inquest and makes a return of his proceedings, he is entitled to mileage for every mile necessarily traveled between the county-seat and the scene of death; and when his deputy performs the same service the coroner is entitled to the same compensation for the mileage of his deputy. *Troutman v. Chambers*, 9 Pa. Dist. 533.

Fees of Deputy Coroners. — A deputy coroner is entitled to the same fees as a coroner, which includes mileage from the court house of the county to the place of viewing the body. *Echard v. Fayette County*, 5 Pa. Dist. 371.

40. 1. Authority of Coroner Judicial. — In *Idaho* it is held that in holding an inquest the coroner exercises judicial functions. *Fairchild v. Ada County*, (Idaho 1898) 55 Pac. Rep. 654.

- 41. 3. Coroner Absent or Impossible of Access.** — See note 1.
42. 4. Number of Inquests — Upon Same Body. — See note 1.
II. PROCEDURE PRELIMINARY TO TRIAL OR INQUEST —
1. Jury of Inquest, How Obtained, etc. — Summoning. — See note 2.
43. 2. Witnesses, Attendance, and Character — Physician or Surgeon May Be Summoned. — See note 3.
45. III. PUBLICITY OF PROCEEDINGS — 1. Post Mortem Examination. — See note 1.

But in *Illinois* the coroner and his jury do not constitute a court, and are not clothed with judicial powers. *Palenzke v. Bruning*, 98 Ill. App. 644.

40. 4. An Inquisition Held Without a Jury is void. *National Gross Loge v. Jung*, 65 Ill. App. 313.

41. 1. The *Illinois* statute does not authorize a justice of the peace to hold an inquest when the coroner is in the county. *Iroquois County v. Viets*, 59 Ill. App. 175.

42. 1. Two Inquests on Same Body Unauthorized. — A coroner has no power, *ex mero motu*, to hold a second inquest upon a body, and cannot bind the county for the expenses of a subsequent inquest. As long as the first inquest stands the matter is at an end and is conclusive. Nor does the statute recognize such a thing as a supplemental verdict. *Fountain County v. Van Cleave*, 19 Ind. App. 643.

2. Personally Summoning Jury. — Under Pen. Code Ga., § 1112, a coroner is not entitled to extra fees for personally summoning a jury in an inquest. *Davis v. Bibb County*, 116 Ga. 23.

43. 3. Employment of Physician Discretionary. — *Fairchild v. Ada County*, (Idaho 1898) 55 Pac. Rep. 654; *Fountain County v. Van Cleave*, 19 Ind. App. 643.

Limitations to Right of Coroner to Cause Autopsy. — The office of coroner carries with it no general right at his mere pleasure to perform an autopsy. This can be done only when the deceased person is "supposed to have come to his or her death by violence, casualty, or undue means," and he is then required to summon a jury "forthwith to inquire into the cause and manner of death." *Palenzke v. Bruning*, 98 Ill. App. 644.

Compensation of Physician. — A justice of the peace acting as coroner at an inquest, in the absence of the county physician or where it is impracticable to secure his presence, may order a regular practicing physician to attend and

make an autopsy to determine whether the death was caused by violence, and, if so, the nature and character of the violence used; and the fees for such services are to be paid by the county where the inquest is held, after investigation by the county commissioners, and are to be in proportion to the amount and nature of the services actually performed. *Polk County v. Phillips*, (Tex. Civ. App. 1899) 51 S. W. Rep. 535.

The coroner has no authority to bind the county as to what shall be a reasonable fee for a physician subpoenaed and ordered by him to conduct an autopsy, and the board of county commissioners should allow only the reasonable value of such services. Nor is a physician entitled to witness fees as an expert, but only to such fees as are allowed to other witnesses. *Fairchild v. Ada County*, (Idaho 1898) 55 Pac. Rep. 654.

In *Alabama* but one fee is allowed to a physician or surgeon for attending an inquest and giving his professional opinion after making examination of the dead body, however much skill or labor may have been required in order to render that opinion, and the amount of that fee is specifically prescribed by statute. *Nafiel v. Montgomery County*, 127 Ala. 563.

Selection of Physicians. — *Kempner v. Pulaski County*, 64 Ark. 139.

New York City. — In *People v. Zucca*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 260, it was held that under the New York City Consolidation Act, § 1769, providing that each coroner of said city should, on assuming the office, appoint a qualified physician, to be known as a "coroner's physician," the coroner was not authorized to remove his appointee at pleasure, as that power resided in the board of coroners alone and could be exercised only for cause.

45. 1. Unnecessary Violation of Remains. — It is both the duty and the

45. IV. PROCEDURE AT TRIAL OR INQUEST — 1. Qualification of Jury — Should Be Sworn. — See note 2.

48. 3. Testimony — Testimony to Be Reduced to Writing. — See note 2.

51. [IX. REVIEW OF PROCEEDINGS. — See note 1a.]

right of relatives to protect the body from unnecessary violation at a post mortem examination, and any infringement upon such right is ground for an action for damages. *Palenske v. Bruning*, 98 Ill. App. 644.

45. 2. Process-verbal Showing that Jurors Were Sworn. — Where the *process-verbal* itself sets forth the fact that the jurors were sworn, an objection to it as evidence to show the fact and cause of death, because it was not first shown that the jurors who signed it were sworn, and by whom, is without force. In such case the law presumes the regularity of the proceedings. *State v. Baptiste*, 108 La. 234.

48. 2. Fountain County v. Van Cleave, 19 Ind. App. 643.

51. 1a. Proceedings had before a coroner cannot be removed by certiorari to the Court of Common Pleas on the petition of the physician summoned as a witness before the coroner's jury, because the coroner in his charge to the jury reflected upon the physician's conduct towards the body, or because the jury, in its verdict, found that he had made false statements in respect to the death certificate given by him, or because the jury did not view the body, or because *ex parte* affidavits had been read to the jury. *Ralston's Petition*, 9 Pa. Dist. 514.

CORPORATIONS.

54. I. RIGHT TO SUE AND LIABILITY TO BE SUED. — See notes 1, 2, 3.

56. III. PARTIES — 1. Generally — Suit by Stockholders. — See note 3.

57. 2. Where Property or Franchises Concerned. — See note 1.
3. Corporate Wrongs. — See note 2.

58. 5. Interest of Corporation Passing to Successor. — See note 2.

60. 8. Individual Members. — See note 1.

9. Creditors. — See note 2.

54. 1. J. Walter Thompson Co. v. Whitehed, 185 Ill. 454.

2. J. Walter Thompson Co. v. Whitehed, 185 Ill. 454; *Schmidt, etc., Co. v. Mahoney*, 60 Neb. 20.

3. Boston Base Ball Assoc. v. Brooklyn Base Ball Club, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 521.

Appointment of Receiver Pendente Lite. — In *New York* a foreign corporation does not lose its right to sue because in another jurisdiction a United States court has appointed a receiver *pendente lite*. *Sigua Iron Co. v. Brown*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 50, *affirmed* 58 N. Y. App. Div. 436.

Payment of Tax. — Under Laws Md. 1894, c. 114, § 88F, providing that before a corporation shall exercise its corporate power it shall pay a certain tax, a corporation has no capacity to sue until the tax is paid. *Maryland Tube, etc., Works v. West End Imp. Co.*, 87 Md. 207.

56. 3. Miesse v. Loren, 8 Ohio Dec. 448, *citing* 1 [5] ENCYC. OF PL. AND PR. 56, 57. See also *Moody v. Noyes*, 15 Wash. 128.

57. 1. Foreclosure of Mortgage. — In an action to foreclose a mortgage executed by a corporation, it is improper to make the officers of such corporation parties defendant. *Johnes v. Outwater*, 55 N. J. Eq. 398. See also *Swan v. Mutual Reserve Fund L. Assoc.*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 722, in which case it was held that the officers of a corporation are not necessary parties in an action to compel the corporation to create a re-

serve fund in the interest of policy holders.

2. Friedenwald Co. v. Asheville Tobacco Works, 117 N. Car. 544.

58. 2. Necessary Parties. — When a mercantile business which has been a partnership is incorporated, and the corporation takes over all its choses in action, the members thereof are not necessary parties to a suit by the corporation to collect debts due to the defunct partnership. *Lottman Bros. Mfg. Co. v. Houston Waterworks Co.*, (Tex. Civ. App. 1896) 38 S. W. Rep. 357. See also *Moody v. Noyes*, 15 Wash. 128; *Smith v. Cornelius*, 41 W. Va. 59.

Merely to allege that one corporation assumed the liabilities of another is insufficient, as stating conclusions of law and not facts. *Rhorer v. Middlesboro Town, etc., Co.*, 103 Ky. 146.

60. 1. When Stockholders Necessary Parties. — Under Code W. Va., c. 53, § 59, the stockholders of a corporation are necessary parties to an action brought by a creditor to collect a debt from a domestic corporation which has been dissolved. *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838.

2. When the members of two different corporations are identical it is not necessary that both corporations should be made parties plaintiff in an action by one corporation against a third party; but if the defendant has a right of action against the second corporation arising out of the same transaction, he may require such corporation to be made a party to the action brought by

61. IV. PLEADINGS — 1. All Rules of Pleading Applicable to Corporations. — See note 2.

63. 2. In What Name to Sue and Be Sued — a. GENERALLY — Names of Officers. — See note 1.

65. Amendment. — See note 2.

68. d. WHERE CONTRACT WITH OR BY CORPORATION IS IN WRONG NAME. — See note 4.

69. e. HOW MISNOMER TAKEN ADVANTAGE OF. — See note 1.

70. 3. Corporate Existence — a. WHETHER NECESSARY TO ALLEGE — (2) Authorities Holding that No Averment Is Necessary — (a) Rule under Early Decisions. — See note 1.

71. See note 1.

72. (6) Estoppel. — See note 4.

75. b. WHAT IS SUFFICIENT ALLEGATION — (1) Legal Conclusion. — See note 1.

76. (3) Sufficient Allegations. — See note 3.

the first corporation. *Bloch Queensware Co. v. Metzger*, 70 Ark. 232.

61. 2. Corporate Seal Affixed to Pleading. — A corporation answering in equity must affix its seal to the answer. *R. Frank Williams Co. v. U. S. Baking Co.*, 86 Md. 475.

63. 1. Smith v. Cornelius, 41 W. Va. 59.

65. 2. An Amendment Is Permitted to allow the complainant to allege incorporation of the defendants where the original complaint simply alleged that the defendant was an "organization." *Nelson v. Brenham Compress Oil, etc., Co.*, (Tex. Civ. App. 1899) 51 S. W. Rep. 514.

68. 4. Riemann v. Tyroler, 104 Ill. App. 413, citing 5 ENCYC. OF PL. AND PR. 68.

69. 1. Riemann v. Tyroler, 104 Ill. App. 413, citing 5 ENCYC. OF PL. AND PR. 68.

70. 1. Illinois. — *Wheatley v. Chicago Trust, etc., Bank*, 167 Ill. 480.

Nebraska. — *Loan, etc., Sav. Bank v. Stoddard*, (Neb. 1902) 89 N. W. Rep. 301; *Fletcher v. Co-operative Pub. Co.*, 58 Neb. 511.

Ohio. — *Brady v. National Supply Co.*, 64 Ohio St. 267.

Oregon. — *Law Trust Soc. v. Hogue*, 37 Oregon 544.

In *Bauer v. Jung Brewing Co.*, (Ind. 1896) 42 N. E. Rep. 827, it was held that where a corporation is plaintiff it need not allege corporate existence.

71. 1. Law Trust Soc. v. Hogue, 37 Oregon 544.

72. 4. Christian, etc., Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340; *Brooksville R. Co. v. Byron*, (Ky. 1899) 50 S. W. Rep. 530.

75. 1. Colorado. — *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158.

Illinois. — *Freie v. No. 4 Fidelity Bldg., etc., Union*, 166 Ill. 128, affirming 66 Ill. App. 152.

New York. — *Kohlmetz v. Calkins*, 16 N. Y. App. Div. 518.

Contra. — *Brooksville R. Co. v. Byron*, (Ky. 1899) 50 S. W. Rep. 530.

76. 3. "The Chicago Trust and Savings Bank, plaintiff in this suit, by John G. Henderson," etc., is a sufficient allegation of corporate existence. *Wheatley v. Chicago Trust, etc., Bank*, 167 Ill. 480.

"That the above-named defendant, the Charleston Bridge Co., is a corporation under the laws of South Carolina, and owns and operates a bridge with a draw therein, across Ashley river, in the county of Charleston, S. C.," was held, in *Lockwood v. Charleston Bridge Co.*, 60 S. Car. 492, to be a sufficient allegation of the corporate existence of the plaintiff at the time the defendant sustained an alleged injury, if read in connection with the other paragraphs of the complaint.

In *Holmes Fuel, etc., Co. v. Commercial Nat. Bank*, 23 Colo. 210, an averment that "the plaintiff is a national bank, doing business under the act of Congress," was held to be a sufficient allegation of corporate existence.

78. c. DENIAL OF CORPORATE EXISTENCE — (1) General Issue — At Common Law. — See note 1.

79. Corporate Existence of Defendant. — See note 1.

Under Code — See note 2.

80. (2) Special Pleas — (a) Generally. — See note 2.

81. See note 1.

Pleading Over to Merits. — See note 4.

82. (b) Nul Tiel Corporation — Pleading of Plaintiff — See note 1.

78. 1. Illinois. — *Grace v. Oakland Bldg. Assoc.*, 63 Ill. App. 339.

Nebraska. — *Fletcher v. Co-operative Pub. Co.*, 58 Neb. 511.

Texas. — But compare *Taber v. Interstate Bldg., etc., Assoc.*, 91 Tex. 92.

79. 1. Chicago, etc., R. Co. v. Glenny, 70 Ill. App. 510; *Indiana Millers' Mut. F. Ins. Co. v. People*, 65 Ill. App. 355.

Statutory Requirements. — In denying the existence of a defendant corporation the denial must follow the language of the statute. *Willis v. Smith*, 17 Tex. Civ. App. 543. See also *Arnau v. Florida First Nat. Bank*, 36 Fla. 398; *Douglass v. Kanawha, etc., R. Co.*, 44 W. Va. 267.

Sued by Corporate Name. — When quo warranto was issued against a corporation defendant, designating such defendant by its corporate name, the plaintiff was thereby estopped from denying the corporate existence of the defendant. *People v. Central Union Telephone Co.*, 192 Ill. 307.

2. South Dakota. — *Stoddard Mfg. Co. v. Mattice*, 10 S. Dak. 253.

80. 2. Gage v. Consumers' Electric Light Co., 194 Ill. 30, citing 5 ENCYC. OF PL. AND PR. 80. See also the following cases:

Florida. — *Arnau v. Florida First Nat. Bank*, 36 Fla. 398.

Minnesota. — *Holden v. Great Western Elevator Co.*, 69 Minn. 527.

New York. — *O'Reilly, etc., Co. v. Greene*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 423.

When the Corporate Existence Is Questioned by a Pleading in Abatement the plea must be specific, and an allegation that the "Brotherhood Firemen" is not a corporation, when the pleadings and process in the case designate it as the "Grand Lodge of the Brotherhood of Locomotive Firemen," is insufficient. *Grand Lodge, etc., v. Cramer*, 164 Ill. 9.

But see *Christian, etc., Grocery Co. v. Fruitdale Lumber Co.*, 121 Ala. 340.

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in which it was held that the corporate existence of the litigant could be attacked collaterally.

81. 1. Corporation de Facto. — The existence of a corporation *de facto* plaintiff is admitted by pleading to the merits. *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480.

4. Moynihan v. Drobaz, 124 Cal. 212; *Tyler v. Mutual Dist. Messenger Co.*, 17 App. Cas. (D. C.) 85; *Arnau v. Florida First Nat. Bank*, 36 Fla. 398; *West Missouri Land Co. v. Kansas City Suburban Belt R. Co.*, 161 Mo. 595; *Bennett v. Millville Imp. Co.*, 67 N. J. L. 320; *Perris Irrigation Dist. v. Thompson*, (C. C. A.) 116 Fed. Rep. 832. But compare *Law Trust Soc. v. Hogue*, 37 Oregon 544.

A General Denial does not put in issue the corporate existence of the plaintiff. *Brady v. National Supply Co.*, 64 Ohio St. 267.

82. 1. Davis v. Nebraska Nat. Bank, 51 Neb. 401, citing 5 ENCYC. OF PL. AND PR. 82, and the cases therein collated.

Estoppel to Plead Nul Tiel Corporation.

— The mere fact that a corporation is a corporation *de facto* and not *de jure* will not estop the defendant from pleading *nul tiel* corporation. *Singer, etc., Stone Co. v. Hutchinson*, 72 Ill. App. 366.

De Facto Corporate Existence is all that need be proved when the defendant enters the plea of *nul tiel* corporation. *Cozzens v. Chicago Hydraulic-Press Brick Co.*, 166 Ill. 213.

New York. — Under Code Civ. Pro. N. Y., § 1776, providing that it is unnecessary for a plaintiff corporation to prove its corporate existence unless it is specifically denied in the answer, a corporation suing in a municipal court, the pleadings being oral, need not prove its corporate existence when the answer of the defendant is simply a general denial. *Riley v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 789. See also *Gillin*

83. Whether in Bar or in Abatement. — See notes 1, 2, 3.

85. Pleadings of Defendant. — See note 1.

87. (3) Answer. — See note 1.

Denial of Knowledge or Information. — See note 2.

88. Particularity Required in Denial. — See note 2.

90. *d.* DEMURRER. — See note 1.

e. ADMISSION OF CORPORATE EXISTENCE. — See note 4.

92. *f.* HOW DISSOLUTION PLEADED. — See notes 1, 2.

4. How to Allege Corporate Acts. — See note 3.

Printing Co. *v.* Traphagen, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 774.

In *Law Trust Soc. v. Hogue*, 37 Oregon 544, the court said: "A plea of *nul tiel* corporation goes to the merits, and is a plea in bar," holding that it does not, therefore, waive a defense by being joined with a plea to the merits.

83. 1. *Law Trust Soc. v. Hogue*, 37 Oregon 544.

2. In *Wood v. Friendship Lodge No. 5*, 106 Ky. 424, it was held that the plea of *nul tiel* corporation is a plea in abatement and not available as a plea in bar.

3. In *Davis v. Nebraska Nat. Bank*, 51 Neb. 401, the court said: "The Nebraska cases cited intimate that this court has considered it [a plea *nul tiel*] to be in the nature of a plea in abatement."

85. 1. See *Singer, etc., Stone Co. v. Hutchinson*, 176 Ill. 48.

87. 1. *Accompanying Affidavit.* — Under Code Va., § 3280, it is necessary that a pleading putting in issue the corporate existence of the defendant be accompanied by an affidavit denying such incorporation. *Richmond Union Pass. R. Co. v. New York, etc., R. Co.*, 95 Va. 386.

2. *Saratoga Springs First Nat. Bank v. Slattery*, 4 N. Y. App. Div. 421; *Snow v. Hall*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 655; *Stoddard Mfg. Co. v. Matice*, 10 S. Dak. 253; *Northwestern Cordage Co. v. Galbraith*, 9 S. Dak. 634.

No Knowledge of Corporate Existence. — The averment that the defendant does not know the corporate character of the plaintiff and asks for strict proof thereof is not a denial and presents no issue. *Chicago First Nat. Bank v. Stoll*, 57 Neb. 758; *National L. Ins. Co. v. Martin*, 57 Neb. 350.

88. 2. *Negative Pregnant.* — Where a relator alleged corporate existence, a denial that it "is a corporation incorporated under and pursuant to the laws of the state of Nebraska" was held to

be insufficient as being merely a negative pregnant. *State Ins. Co. v. Farmers' Mut. Ins. Co.*, (Neb. 1902) 90 N. W. Rep. 997. See to the same effect *State v. Cass County*, 53 Neb. 767.

90. 1. *Minnesota.* — *Holden v. Great Western Elevator Co.*, 69 Minn. 527.

Facts of Complaint. — A demurrer based on the legal incapacity of a corporation to sue must rest upon the allegations set out in the pleading and not upon the absence of allegations. *S. C. Herbst Importing Co. v. Hogan*, 16 Mont. 384; *Sly v. Palo Alto Gold Min. Co.*, 28 Wash. 485.

In *New York* lack of capacity of a corporation to sue cannot be raised by a general demurrer. *O'Reilly, etc., Co. v. Greene*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 423.

4. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158.

92. 1. See also *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838.

2. In *Merritt v. Gate City Nat. Bank*, 100 Ga. 147, it was held that a plea that said bank "has been dissolved by a forfeiture of its charter and by misuser of its franchises" was a sufficient allegation on a general demurrer.

3. *Topeka Capital Co. v. March*, 10 Kan. App. 40; *Topeka Capital Co. v. Remington Paper Co.*, 61 Kan. 6, each of which cases cited 5 ENCYC. OF PL. AND PR. 92; *Indiana Bicycle Co. v. Willis*, 18 Ind. App. 525.

Acts of Agent. — In a suit for trespass against a corporation, the complaint need not specify that the trespass complained of was the act of an agent or officer of the corporation. *Com. Co. v. Nunn*, (Colo. App. 1902) 67 Pac. Rep. 342.

Implied Admission of Authority. — When an answer admits that an instrument was executed by a corporation, it impliedly admits that the agent or officers who affixed the corporate seal and executed the instrument acted

93. See note 1.

5. Specially Pleading Defenses. — See note 2.

94. **6. Pleading Charter or By-laws.** — See note 1.

95. **7. Ultra Vires.** — See notes 1, 3.

96. See note 1.

V. ABATEMENT OF ACTION BY DISSOLUTION OR CONSOLIDATION — **1. Right to Sue After Dissolution.** — See note 2.

97. See note 1.

2. Liability to Be Sued After Dissolution. — See note 3.

within their authority by direction of the corporation. *Leonard, etc., Real-Estate, etc., Co. v. Bank of America*, (C. C. A.) 86 Fed. Rep. 502.

93. **1. Topeka Capital Co. v. Remington Paper Co.**, 61 Kan. 6, *quoting* 5 ENCYC. OF PL. AND PR. 92.

Authority of Agent. — It has been held that a petition should clearly state that the agent of a corporation had ample authority to execute an instrument on which such corporation was sued. *Topeka Capital Co. v. Remington Paper Co.*, 61 Kan. 1. See also *A. D. Farmer, etc., Type-Founding Co. v. Humboldt Pub. Co.*, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 314; *Blades Lumber Co. v. Kent, etc., Lumber Co.*, 2 Marv. (Del.) 302, in which latter case it was held that an affidavit of demand signed by officers of a corporation must allege in the body thereof that they are such officers.

2. Noncompliance with Statute by Corporation. — Where a statute which provided that a corporation executing a contract creating a liability in excess of one hundred dollars should reduce such contract to writing and attach its corporate seal thereto has not been complied with, in an action to enforce a contract in excess of one hundred dollars, objection of noncompliance with such statute must be taken by a special plea. *Friedenwald Co. v. Asheville Tobacco Works*, 117 N. Car. 544.

94. **1. Pleading By-laws.** — It is unnecessary to plead by-laws of a corporation *in hæc verba*. They may be stated in substance and according to their legal effect without reciting their precise language. *Seal v. Cameron*, 24 Wash. 62.

95. **1. Com. Title Ins., etc., Co. v. Cummings**, 83 Fed. Rep. 767.

3. National Guarantee L. & T. Co. v. Yeatman, 121 Ala. 594; *Greene v. Middlesborough Town, etc., Co.*, (Ky. 1901) 61 S. W. Rep. 288; *New Iberia Rice Milling Co. v. Romero*, 105 La.

439; *Citizens State Bank v. Pence*, 59 Neb. 579; *Hess v. Sloane*, 66 N. Y. App. Div. 522; *Keating v. American Brewing Co.*, 62 N. Y. App. Div. 501.

In *Hart v. Phenix Ins. Co.*, 113 Ga. 859, it was held that a general allegation that the acts of the corporation were *ultra vires* is insufficient as being too general.

96. **1. In Bell v. Mendenhall**, 71 Minn. 331, it was held that where a corporation is seeking to enforce a contract, the defense of *ultra vires* cannot be interposed by demurrer unless it is plain from the facts of the complaint that the corporation exceeded its authority in entering into the contract.

2. Fitts v. National L. Assoc., 130 Ala. 413. See also *Weatherly v. Capital City Water Co.*, 115 Ala. 156; *Morgan v. New York Nat. Bldg., etc., Assoc.*, 73 Conn. 151; *Copp v. Colorado Coal, etc., Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 109.

Recognition of the Fact that a Corporation Is Dissolved will estop a stockholder from thereafter contending that such dissolution is void. *Matter of Grand Cent. Bank*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 116.

Sale of Property. — The mere fact that the property of a corporation has been sold under a decree does not constitute a "dissolution" which will be a bar to an action against it. *Chesapeake, etc., R. Co. v. Hanmer*, (Ky. 1902) 66 S. W. Rep. 375; *Webster v. Whitworth*, (Tenn. Ch. 1901) 63 S. W. Rep. 290.

In *Texas* a corporation which has been regularly dissolved as such cannot maintain an action in trespass to try the title to real estate. *Baldwin v. Johnson*, (Tex. 1901) 65 S. W. Rep. 171.

97. **1. In Nebraska** under Comp. Stat. Neb., c. 16, § 63, dissolution of a corporation will not necessarily abate an action commenced by it. *Schmitt v. Mahoney*, 60 Neb. 20.

3. Contra. — *Jones v. Spartanburg Herald Co.*, 44 S. Car. 526.

98. 3. Consolidation. — See note 1.

99. [Statutory Conditions Precedent. — In several states statutes have been enacted requiring foreign corporations to file certificates of incorporation with the proper officer and to pay a specified fee before they can maintain an action; and a compliance with these provisions must be pleaded. See note 1a.]

In New York. — Under Code Civ. Pro. N. Y., § 1798, an action may be maintained against a corporation which has been dissolved, provided that permission of court is first obtained, and in such case the permission to bring the action must be alleged. *People v. Ramapo Water Co.*, 51 N. Y. App. Div. 145.

In Pyro-Gravure Co. v. Staber, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 658, it was held that in an action to collect taxes past due a corporation cannot plead in abatement the annulment of its charter.

In West Virginia. — There can be no suit against an expired domestic incorporation except one in equity as provided by Code W. Va., c. 53, §§ 57, 59, to wind up its affairs for the benefit of creditors and stockholders. *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838.

98. 1. Alton R., etc., Co. v. Mayfield, 95 Ill. App. 146.

See *Wagner v. Atchison, etc., R. Co.*, 9 Kan. App. 661, which held that a railroad company consolidated with another railroad company under a new name ceases to exist as a corporation, and an action brought by or against such railroad before its consolidation cannot afterwards be prosecuted against it in its original name.

The Rule in Illinois is that while the consolidation of corporations will not abate the suit pending, it may require an amendment of the pleading to suit the circumstances of the case. *Frank-*

lin L. Ins. Co. v. Hickson, 97 Ill. App. 387.

Effect of Consolidation. — If the effect of a consolidation of corporations was to dissolve several constituent corporations and create a new one out of the component bodies, a claim for salary against one of the corporations so dissolved is barred by such dissolution and consolidation. *Copp v. Colorado Coal, etc., Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 109.

99. 1a. Henderson v. J. B. Brown Co., 125 Ala. 566; *California Sav., etc., Soc. v. Harris*, 111 Cal. 133; *Byars v. Union Cent. L. Ins. Co.*, 17 Ind. App. 101; *Maryland Tube, etc., Works v. West End Imp. Co.*, 87 Md. 207; *Taber v. Interstate Bldg., etc., Assoc.*, 91 Tex. 92; *Continental Nat. Bank v. Buford*, 107 Fed. Rep. 188; *Young Reversible Lock-Nut Co. v. Young Lock-Nut Co.*, 72 Fed. Rep. 62. See also *Kephart v. People*, 28 Colo. 73; *Richardson v. U. S. Mortg., etc., Co.*, 89 Ill. App. 670; *Davis Provision Co. v. Fowler*, 163 N. Y. 580; *Security Co. v. Panhandle Nat. Bank*, 93 Tex. 575.

In Missouri it has been held that the proper way to take advantage of a failure to comply with the statute in regard to filing the necessary certificate by a foreign corporation is by a plea in bar. *Parlin, etc., Co. v. Boatman*, 84 Mo. App. 67.

Plea in Abatement. — The failure to file the certificate required by statute should be taken advantage of by a plea in abatement. *California Sav., etc., Soc. v. Harris*, 111 Cal. 133.

COSTS.

- 106. 1. INTRODUCTORY** — 1. Definition. — See note 1.
107. Distinguished from Disbursements and Fees. — See note 1
108. 2. Classes — Between Party and Party, and Between Attorney and Client. — See note 1.
3. History. — See note 2.
In This Country. — See note 3.
109. 4. Nature — *a.* RELATION TO DAMAGES. — See note 1.
As Punishment and as Recompense. — See note 2.

106. 1. *Wallace v. Sheldon*, 56 Neb. 55, *citing* 5 ENCYC. OF PL. AND PR. 106.

Other Definitions. — Costs are certain allowances authorized by statute to reimburse the successful party for expenses incurred in prosecuting or defending an action or special proceeding *Stevens v. Central Nat. Bank*, 168 N. Y. 560.

The term means those expenses incident to litigation which are recognized by law. *Perry Tp. v. Red Bank Tp.*, 8 Pa. Dist. 526.

Costs are charges or expenditures which are either allowed and fixed by statute or are authorized by statute to be allowed and fixed by the court. *Turner v. Butler*, 66 Mo. App. 380.

In *Ohio* the term includes only those expenditures which are by law taxable. *State v. Meigs County*, 7 Ohio Cir. Dec. 351.

An Extra Allowance is not included within the term costs; it is a sum in addition to costs. *Hascall v. King*, 54 N. Y. App. Div. 441. See also ADDITIONAL ALLOWANCES OF COSTS.

107. 1. Distinguished from Fees. — *Irwin v. Hanthorn*, 5 Pa. Dist. 671.

Technically there is a distinction between costs and fees, the former being an indemnity to a party for expenses, the latter being a recompense to an officer for services. *Bryan v. Ream*, 59 S. Car. 340.

In *Pennsylvania* costs properly require taxation, but fees do not. *Irwin v. Hanthorn*, 5 Pa. Dist. 671.

Distinguished from Disbursements. — "Costs" are certain sums allowed the prevailing party by way of indemnity

for his attorney fees in an action, and "disbursements" comprise such expenditures as are necessary to maintain or defend the same, and include fees of officers and witnesses, the necessary expense of taking depositions, the publication of the summons or notices, outlays for postage, compensation of referees, and the necessary expenses of copying records. *Rader v. Barr*, 37 Oregon 453.

In *Minnesota* the term "costs" in civil actions, as defined by Stat. Minn. (1894), § 5497 *et seq.*, means a fixed amount to be recovered by the prevailing party, and "disbursements," as defined by § 5500, are the expenses necessarily paid or incurred by the prevailing party. *Hennepin County v. Wright County*, 84 Minn. 267.

Witness Fees belong to that class known as disbursements. *Lewis v. Hinson*, 57 S. Car. 193.

108. 1. *Perry Tp. v. Red Bank Tp.*, 8 Pa. Dist. 526

2. *Castle v. Roach*, 11 Ohio Dec. 358 [*citing* 5 ENCYC. OF PL. AND PR. 108]; *Northern v. Hanners*, 121 Ala. 587; *Wilson v. Fussell*, 60 Ark. 194; *Hastings v. Mills*, 50 Neb. 842; *State v. Meigs County*, 7 Ohio Cir. Dec. 351; *Scott v. Fairfield*, 23 Pa. Co. Ct. 114.

In *Pennsylvania* the statute of Gloucester so broadened and construed is in force. *Scott v. Fairfield*, 23 Pa. Co. Ct. 114; *Savage v. McHale*, 8 Pa. Dist. 560.

3. *State v. Estes*, 34 Oregon 196.

109. 1. *Stevens v. Central Nat. Bank*, 168 N. Y. 560.

2. *Northern v. Hanners*, 121 Ala. 587, holding that under the system of

109. b. RELATION TO JUDGMENT. — See note 3.

Debt — Interest. — See note 5.

110. II. POWER TO AWARD COSTS — 1. At Law — Dependent upon Statute — a. GENERALLY. — See note 2.**111. Stipulation by Parties.** — See note 1.

costs and fees as provided by the *Alabama* statute costs are not in the nature of damages, but are in the nature of a penalty; *Heath v. Walton*, 9 Pa. Dist. 218, holding that statutes giving costs are considered in their nature penal; *Perry Tp. v. Red Bank Tp.*, 8 Pa. Dist. 526.

The theory upon which they are allowed to a plaintiff is that the default of the defendant made it necessary to sue him, and to a defendant that the plaintiff sued him without cause. *Stevens v. Central Nat. Bank*, 168 N. Y. 560; *Schildwachter v. New York*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 52.

In *Castle v. Roach*, 11 Ohio Dec. 358, the court said: "In contemplation of law the parties to a suit pay their own costs as they are incurred during the progress of a case, and judgment for costs is rendered in favor of the prevailing party, upon the theory that he has paid or is liable for the costs incurred by him, and to reimburse him therefor."

109. 3. *Begbie v. Begbie*, 128 Cal. 154; *State v. Dorland*, 106 Iowa 40; *State v. Judges*, 107 La. 69; *Gaude v. Williams*, 47 La. Ann. 1325; *McRoberts v. McArthur*, 66 Minn. 74; *Bronner Brick Co. v. M. M. Canda Co.*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 681.

They go with an irregular judgment (which is not void for want of jurisdiction) the same as with a regular judgment. *McRoberts v. McArthur*, 66 Minn. 74.

5. *McMahon v. Smith*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 305. But see *Northern v. Hanners*, 121 Ala. 587, which holds that a judgment in favor of the successful party for costs has no element of debt in it.

Imprisonment for Costs. — *Northern v. Hanners*, 121 Ala. 587.

110. 2. *Northern v. Hanners*, 121 Ala. 587; *McMahon v. Smith*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 305, each citing 5 ENCYC. OF PL. AND PR. 110. See also the following cases:

California. — *Begbie v. Begbie*, 128 Cal. 154.

Kansas. — *Prest v. Black*, 63 Kan. 682.

Louisiana. — *State v. Judges*, 107 La. 69.

Massachusetts. — *Alger v. Boston*, 168 Mass. 516.

Missouri. — *Witson v. Ruthrauff*, 87 Mo. App. 226; *Baldwin v. Boulware*, 82 Mo. App. 321; *State v. Duestrow*, 70 Mo. App. 311.

Nebraska. — *Wallace v. Sheldon*, 56 Neb. 55; *Hastings v. Mills*, 50 Neb. 842.

New York. — *Stevens v. Central Nat. Bank*, 168 N. Y. 560; *Levene v. Hahner*, 62 N. Y. App. Div. 195; *Hausauer v. Machawicz*, 54 N. Y. App. Div. 23; *Miller v. Bush*, 29 N. Y. App. Div. 117; *Barry v. Winkle*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 171; *Eastman v. Gray*, 81 Hun (N. Y.) 362; *Matter of Grade Crossing Com'rs*, 20 N. Y. App. Div. 271.

Ohio. — *Castle v. Roach*, 11 Ohio Dec. 358; *State v. Meigs County*, 7 Ohio Cir. Dec. 351.

Oregon. — *State v. Estes*, 34 Oregon 106.

Pennsylvania. — *Heath v. Wagon*, 9 Pa. Dist. 218; *Perry Tp. v. Red Bank Tp.*, 8 Pa. Dist. 526; *Hotchkiss v. Harvey*, 25 Pa. Co. Ct. 80; *Braintrim v. Independent School Dist.*, 23 Pa. Co. Ct. 510.

Tennessee. — *Henley v. State*, 98 Tenn. 665.

Washington. — *Larson v. Winder*, 14 Wash. 647.

Wisconsin. — *Auerbach v. Marks*, 94 Wis. 668; *Everett v. Gores*, 89 Wis. 421.

Ultimately the power to impose costs must be found in a statute, but the legislature must grant the power in general terms to the courts, and these tribunals may then establish by rule or order a fee bill that will have the binding force of a legislative act. *Tesla Electric Co. v. Scott*, 101 Fed. Rep. 524.

In *Missouri* costs in actions at law are by statute left to the discretion of the court. *Hecht v. Heilmann*, 81 Mo. App. 370.

111. 1. *Wallace v. Sheldon*, 56 Neb. 55.

Only those who join in the contract are bound. *Schawacker v. McLaughlin*, 139 Mo. 333.

- 111.** *b.* CONSTRUCTION OF STATUTES. — See notes 2, 3.
112. *c.* WHAT STATUTE GOVERNS — (1) *In Point of Time.* — See note 1.
113. *Legislative Changes.* — See note 1.
 Whether Statutes Apply to Pending Suits. — See note 2.
114. 2. *In Equity.* — See note 1.
115. 3. *Who May Award* — *a.* COURT. — See note 1.
117. 4. *Where There Is Lack of Jurisdiction* — *a.* IN GENERAL. — See note 1.
118. See note 1.
121. 5. *Time of Awarding* — *Question of Costs Alone.* — See note 2.

A stipulation to have the testimony of the trial taken by a stenographer cannot operate to make the expense of a transcript of the notes taxable as costs without an express stipulation to that effect. *Momahan v. Godkin*, 100 Fed. Rep. 106.

111. 2. *Baldwin v. Boulware*, 82 Mo. App. 321; *Hecht v. Heimann*, 81 Mo. App. 370; *State v. Duesrow*, 70 Mo. App. 311; *State v. Meigs County*, 7 Ohio Cir. Dec. 351; *Heath v. Walton*, 9 Pa. Dist. 218; *Perry Tp. v. Red Bank Tp.*, 8 Pa. Dist. 526.

3. *Benson v. Braun*, 134 Cal. 41; *Stevens v. Central Nat. Bank*, 168 N. Y. 560; *Roberson v. Rochester Folding Box Co.*, 68 N. Y. App. Div. 528; *Cotzhausen v. H. W. Johns Mfg. Co.*, 107 Wis. 59; *Evans v. Kemp*, 104 Wis. 87.

The fact that the court included in the judgment further relief equitable in its character cannot deprive one of his statutory right to costs. *Evans v. Kemp*, 104 Wis. 87.

In *New Jersey* § 32 of the Chancery Act (Gen. Stat. N. J., p. 378), which provides that when a bill is demurred to "if the plea or demurrer be allowed the complainant shall pay costs," is mandatory and leaves nothing to the discretion of the court. *Canon v. Ballard*, 63 N. J. Eq. 797.

112. 1. *State v. Dorland*, 106 Iowa 40 [citing 5 ENCYC. OF PL. AND PR. 111-113]; *Begbie v. Begbie*, 128 Cal. 154.

113. 1. *State v. Dorland*, 106 Iowa 40 [citing 5 ENCYC. OF PL. AND PR. 111-113]; *Wilson v. Jenkins*, 147 Ind. 533; *Liquidating Com'rs v. Marrero*, 106 La. 130; *Castle v. Roach*, 11 Ohio Dec. 358.

2. *State v. Dorland*, 106 Iowa 40, citing 5 ENCYC. OF PL. AND PR. 111-113.

114. 1. The English law courts de-

rived their right to award costs from legislative provisions, and it seems to have been thought necessary specially and expressly to authorize the English chancery courts to exercise the power by Act of Parliament. In the *United States* the power of the courts, both federal and state, does not exist if not founded in statute or contract of the parties. *Wallace v. Sheldon*, 56 Neb. 55.

115. 1. *Disqualification of Judge.* — If costs are incurred in good faith they are none the less a proper charge because the judge is afterwards found to be disqualified. *Meyer v. San Diego*, 132 Cal. 35.

117. 1. *Clendenning v. Guise*, 8 Wyo. 91, citing 5 ENCYC. OF PL. AND PR. 117. See also *Citizens' Bank v. Cannon*, 164 U. S. 319.

118. 1. *State v. Judges*, 107 La. 69 [citing 5 ENCYC. OF PL. AND PR. 118]; *Clendenning v. Guise*, 8 Wyo. 91.

In such a case the plaintiff, by bringing his action, has submitted himself to the jurisdiction of the court. *Day v. Sun Ins. Office*, 40 N. Y. App. Div. 305.

Authority of Legislature to Regulate. — The legislature possesses authority to regulate the matter by statute upon the theory that the statute authorizing the judgment for costs has conferred upon the court jurisdiction for that purpose. *Clendenning v. Guise*, 8 Wyo. 91.

121. 2. *Thomas v. Craig*, 60 Minn. 501.

When the subject-matter of an action has been destroyed by accident, compromise, or otherwise, the court will not try the case on the merits merely to determine which side should pay the costs. *Blount v. Simmons*, 120 N. Car. 19; *Wikel v. Jackson County*, 120 N. Car. 451.

191. III. RIGHT TO AND LIABILITY FOR COSTS—1. When Right Vests.—See note 3.

192. 2. Ownership.—See note 1.

3. Prevailing Party—*a.* IN GENERAL.—See notes 2, 3.

194. *d.* BY STATUTE.—See note 1.

191. 3. State *v.* Dorland, 106 Iowa 40.

192. 1. Davis *v.* Swedish-American Nat. Bank, 78 Minn. 408 [*citing* 5 ENCYC. OF PL. AND PR. 122]; Taylor *v.* Long Island R. Co., (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 11. But see Adams *v.* Niagara Cycle Fittings Co., (Supm. Ct. Spec. T.) 10 N. Y. Annot. Cas. 401, in which case the court held that a judgment for costs only belongs to the attorney of the successful party.

Attorney's Lien.—See Taylor *v.* Long Island R. Co., (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 11.

Costs Incurred under Void Order.—A party is not to lose costs that he necessarily incurred because they were incurred under a void order. Meyer *v.* San Diego, 132 Cal. 35.

3. Northern *v.* Hanners, 121 Ala. 587; Wallace *v.* Sheldon, 56 Neb. 55.

3. Alabama.—Northern *v.* Hanners, 121 Ala. 587.

Iowa.—Matter of Proctor, 103 Iowa 232; McGuire *v.* Montross, 102 Iowa 20.

Kansas.—Nation *v.* Littler, 59 Kan. 773, 52 Pac. Rep. 96.

Nebraska.—Wallace *v.* Sheldon, 56 Neb. 55.

New York.—Stevens *v.* Central Nat. Bank, 168 N. Y. 560.

Ohio.—Castle *v.* Roach, 11 Ohio Dec. 358.

South Dakota.—Lee *v.* Neumen, 15 S. Dak. 642.

Tennessee.—Davis *v.* Jackson, (Tenn. Ch. 1897) 39 S. W. Rep. 1067.

Texas.—Unknown Heirs *v.* Morgan, 18 Tex. Civ. App. 627; West End Dock Co. *v.* Galveston City Co., (Tex. Civ. App. 1900) 55 S. W. Rep. 752.

It is of no consequence whether the plaintiff or the defendant is the prevailing party. If the defendant is the successful party he recovers his costs of the plaintiff, for which judgment must be rendered. Northern *v.* Hanners, 121 Ala. 587. See also Dows *v.* Glaspel, 4 N. Dak. 251, holding that in all cases in which the plaintiff is not

entitled to costs the defendant recovers them as a matter of course.

The Mere Fact that a Defense Was Made in Good Faith and upon reasonable grounds forms no exception to this rule. Matter of Proctor, 103 Iowa 232.

Exceptions to Rule.—To the rule that costs follow the judgment and are awarded to the successful party and taxed against the losing party there are some exceptions, one of which is the allowance to an executor of the necessary costs and expenses incurred by him in unsuccessfully defending a contest against the will of his testator. The courts justify this exception on the theory that the executor is a trustee, and having accepted the trust is bound to defend the trust estate. In cases in which an executor, devisee, or legatee of a will applies to the court for the construction of the will, costs will not be awarded against him. Wallace *v.* Sheldon, 56 Neb. 55.

In Arkansas Sand. & H. Dig. Stat. Ark., § 787, provides as follows: "If the plaintiff recover judgment, he shall have judgment for costs against the defendant." Section 788 provides: "If the plaintiff shall be nonsuited, or discontinue his action after the appearance of the defendant, or final judgment shall go against him, then the defendant shall have judgment for costs against the plaintiff." Davies *v.* Robinson, 65 Ark. 219.

In New Hampshire in all actions or petitions in the Supreme Court costs may be limited as the court may deem just. Pub. Stat. N. H., c. 229, § 3; Fisher *v.* Carpenter, 67 N. H. 569.

New York.—Under Code Civ. Pro. N. Y., § 3240, costs in a special proceeding are within the discretion of the court, but such discretion will not be exercised against a party who has prevailed upon the issue. Ward *v.* Ward, 67 N. Y. App. Div. 121.

Texas.—Rev. Stat. Tex., art. 1425, requires the costs to be taxed against the losing party. Unknown Heirs *v.* Morgan, 18 Tex. Civ. App. 627.

194. 1. Canon *v.* Ballard, 63 N. J. Eq. 797.

125. 4. Various Terminations of Suit — a. NONSUIT. — See note 2.

126. b. DISCONTINUANCE. — See note 2.

130. c. ON ABATEMENT. — See note 1.

131. 5. Upon Various Pleadings — a. DEMURRER. — See notes 3, 4.

132. c. DISCLAIMER. — See note 3.

133. See note 1.

134. 6. Where There Are Several Defendants — b. RECOVERY BY SOME DEFENDANTS ONLY — (1) Legislation Concerning. — See note 1.

125. 2. Thompson v. Southern R. Co., 116 Fed. Rep. 890.

126. 2. Where There Are Several Defendants the award of costs should be made only to those of the defendants opposing the motion. *Bloomingtondale v. Lochow*, 70 N. Y. App. Div. 613.

130. 1. Begbie v. Begbie, 128 Cal. 154.

After Judgment. — This rule is the same when the action abates after judgment and pending an appeal. *Begbie v. Begbie*, 128 Cal. 154.

Death of Party. — Under Code Civ. Pro. Cal., § 1021 *et seq.*, costs are not taxable or recoverable until a judicial determination is had in the action in which they have been incurred. If by death of one of the parties the court loses power to render the judgment, it cannot render judgment for costs. *Begbie v. Begbie*, 128 Cal. 154.

131. 3. In New York costs on demurrer are in the discretion of the court where an issue of law and an issue of fact are joined between the same parties to the same action, and the issue of fact remains undisposed of when an interlocutory judgment is rendered upon the issue of law. Code Civ. Pro. N. Y., § 3232; *Keller v. Shady*, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 833; *Garrett v. Wood*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 7; *Marsh v. Graham*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 263.

Where an order is made sustaining or overruling a demurrer to the whole complaint in a common-law action the successful party is entitled to costs as a matter of law. *Marsh v. Graham*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 263.

4. Combs v. Pridmore, (Ky. 1898) 44 S. W. Rep. 107.

Bullitt's Civ. Code Ky. (1895), § 93, par. 2, requires a party to demur before

he files other pleadings, or be liable for all costs which result from a failure to demur. *Moore v. Moxey*, (Ky. 1897) 39 S. W. Rep. 420; *Mast v. Lehman*, 100 Ky. 464.

132. 3. Keller v. Bading, 169 Ill. 152; *Brown v. Follette*, 155 Ind. 316; *Fowler v. Brown*, 51 Neb. 414, the court saying that Code Civ. Pro. Neb., § 618, which provides that where defendants disclaim having any title or interest in the subject-matter of the action, they shall recover their costs unless for special reasons the court decides otherwise, is declaratory of the rule in equity; *League v. State*, 93 Tex. 553.

How Made. — Such a disclaimer must be made in the pleadings. *Cooper v. Great Falls Cotton Co.*, 94 Tenn. 588.

If the authority of the court to act is denied by demurrer when a disclaimer should be filed, the costs may be adjudged against the defendant. *Keller v. Bading*, 169 Ill. 152.

133. 1. League v. State, 93 Tex. 553.

134. 1. Separate Answers. — Under Code Civ. Pro. N. Y., § 3229, costs may be awarded in the discretion of the court to any defendant against whom the plaintiff is not entitled to costs, where he did not unite in the answer and was not united in interest with the defendant against whom the plaintiff is entitled to costs. *Churchill v. Wagner*, (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 595.

Ex Contractu and Ex Delicto. — If a plaintiff maintains his action against one of several defendants he may have costs against that one, and the other defendants may have judgment against the plaintiff for costs. This rule is alike applicable to actions *ex contractu* and actions *ex delicto*. *Lull v. Anamosa Nat. Bank*, 110 Iowa 537.

136. d. JOINT OR SEVERAL BILLS OF COSTS—(2) Where Defendants Sever.—See note 3.

139. Where There Are Several Suits—a. GENERALLY.—See note 2.

140. See note 1.

141. c. WHERE SEVERAL SUITS ARE OR MIGHT BE CONSOLIDATED.—See note 2.

142. 8. Apportionment and Division—a. WHERE SUCCESS IS DIVIDED—(1) Generally.—See note 2.

144. b. WHERE THERE ARE SEVERAL COUNTS OR ISSUES—(1) Counts.—See note 1.

146. (4) Issues of Law and Fact.—See note 2.

148. 11. Various Classes of Parties—a. PARTIES TO SUIT—(1) In General.—See note 1.

149. (2) Nominal Party.—See note 3.

136. 3. Practice in New York.—Successful defendants who have interposed separate answers and have separately appeared may insist that their several bills of costs be taxed by the clerk as of course; and the plaintiff, if contesting the taxation, must sustain the burden of showing that the defendants' interests were identical and that the severance was collusive. *Wolf v. Di Lorenzo*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 323.

139. 8. Smith v. Nelson, 23 Utah 512, citing 5 ENCYC. OF PL. AND PR. 139.

140. 1. Woodworth v. Brooklyn El. R. Co., 22 N. Y. App. Div. 501, wherein the court said: "The multiplication of unnecessary actions ought not to be aided by multiplication of costs."

141. 2. Where there were separate and distinct actions affecting separate and distinct persons and property, which were consolidated for the purpose of convenience, it was held that this did not have the effect of making them one action in the sense that only one judgment should be entered. Each defendant was entitled to costs. Gray's Harbor Boom Co. v. McAmant, 21 Wash. 465.

142. 2. Heaton v. Ainley, (Iowa 1898) 74 N. W. Rep. 766, in which case, in view of the special circumstances, costs were apportioned.

Partition Proceedings.—Usually in the partition of estates the costs are divided proportionally between the parties. *Hitchcock v. Blagge*, (Tex. Civ. App. 1898) 45 S. W. Rep. 931.

In Missouri, by statute, the appor-

tionment of costs in cases where there are several defenses or counterclaims is a matter within the discretion of the court. *Schwacker v. McLaughlin*, 139 Mo. 333.

144. 1. See New Marlborough v. Brewer, 170 Mass. 16a.

Iowa.—Code Iowa, § 3854, provides: "Where there are several causes of action embraced in the same petition, or several issues, the plaintiff shall recover costs upon the issues determined in his favor, and the defendant upon those determined in his favor." See *McGuire v. Montross*, 102 Iowa 20.

146. 2. In New York, where an issue of law and an issue of fact are joined between the same parties to the same action, and the issue of fact remains undisposed of when an interlocutory judgment is rendered upon the issue of law, costs are in the discretion of the court. Code Civ. Pro. N. Y., § 3232; *Garrett v. Wood*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 7.

148. 1. McMahon v. Smith, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 305, citing 5 ENCYC. OF PL. AND PR. 148.

149. 3. Edwards v. Loy, (Ky. 1902) 68 S. W. Rep. 1091.

Order to Indemnify Nominal Party.—Where a person prosecutes a suit in the name of another he is bound to indemnify and protect him against the payment of costs. To obtain such protection, it is the duty of the nominal plaintiff to make application to the court for an order on the beneficial plaintiff to indemnify him. *Keystone Mfg. Co. v. Watts*, 100 Ill. App. 11.

151. d. GOVERNMENTS OR MUNICIPALITIES. — See notes 4, 5.

152. Suit in Name of State on Relation. — See note 2.

e. PUBLIC OFFICERS. — See note 3.

157. m. ESTATE OR FUND — (1) *In General.* — See note 1.

159. IV. COSTS DEPENDENT ON AMOUNT IN CONTROVERSY OR SUM RECOVERED — 2. *Costs Dependent on Amount of Recovery* — *a. IN GENERAL* — (1) *Statute Governs.* — See notes 1, 2.

151. 4. While the rule is well settled that costs cannot be taxed against the United States, the rule is universal in civil cases that the United States recovers costs as if it were a private individual. *Pine River Logging Co. v. U. S.*, 186 U. S. 279.

By the Act of Congress of 1887 it is provided that "if the government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party." Act Cong. March 3, 1887, c. 359, § 15, 24 U. S. Stat. at L. 508. Outside of this statute and some other statutes relating to special cases, there is no authority which permits the rendition of a judgment for costs against the government of the United States. *Carlisle v. Cooper*, (C. C. A.) 64 Fed. Rep. 472.

5. *Henley v. State*, 98 Tenn. 665, *citing* 5 ENCYC. OF PL. AND PR. 151, 152, and approving generally the text on those pages. See also *Louisville, etc., R. Co. v. Coulter*, (Ky. 1900) 59 S. W. Rep. 513.

Construction of Statutes. — A statute making the state liable for all costs of criminal cases is construed to mean only state costs, and not costs of the defendant; and a statute giving costs in general terms, though unqualified, will not make the state liable therefor. *Henley v. State*, 98 Tenn. 665.

152. 2. In *Tennessee* complainants filing a bill in the name of the state on relation are liable for costs. *State v. Watson*, (Tenn. Ch. 1896) 39 S. W. Rep. 536.

Right of Public Nature. — In the absence of statute, one who seeks to enforce a right of a public nature in which he has no more interest than any other citizen is not liable for costs to the defendant if a nonsuit is granted. *Blount v. Simmons*, 120 N. Car. 19.

3. See *Power v. May*, 123 Cal. 147, *citing* 5 ENCYC. OF PL. AND PR. 151, 152,

and holding that costs are chargeable personally against a county treasurer in mandamus proceedings under Code Civ. Pro. Cal., §§ 1022, 1095.

Michigan. — Comp. Laws Mich., § 11,277, provides that "in all civil suits and proceedings by or in the name of the people of this state, instituted by any officer duly authorized for that purpose, and not brought on the relation or for the use of any citizen, or upon any penal statute, the people shall be liable for costs in the same cases and to the same extent as if such suit or proceeding were instituted by an individual." See *Flint, etc., R. Co. v. State Auditors*, 102 Mich. 500.

157. 1. The right to charge a fund with costs and expenses depends on the question whether the litigation in which the costs and expenses were incurred was in promotion of the interests of those eventually found to be entitled to the fund. *Tarr's Estate*, 10 Pa. Super. Ct. 554.

Executor. — *Wallace v. Sheldon*, 56 Neb. 35.

Widow's Allowance. — Solicitor's fees are properly allowed out of the estate where a widow brings proceedings to fix her allowance. *McLean v. Thomas*, 52 Ill. App. 161.

159. 1. *U. S. Mortg. Co. v. Willis*, 41 Oregon 481; *Altree v. Gregson*, 40 Oregon 599; *Loring v. Morrison*, 25 N. Y. App. Div. 139, holding that it is immaterial how the verdict is made up if the total amount awarded by the jury equals or exceeds the sum of fifty dollars; and where the principal sum due on a note is less than fifty dollars, interest can be regarded as part of the recovery for the purpose of fixing the right to costs under Code Civ. Pro. N. Y., § 3228.

3. *New York.* — *Levene v. Hahner*, 62 N. Y. App. Div. 195.

Wisconsin. — *Field v. Elroy*, 99 Wis. 412.

170. e. COSTS IN SPE
Chattels and Choses in Action.

173. f. COSTS IN AC
Issue as to Title — (a) In Gene

178. g. NO MORE CO
eral. — See note 2.

182. V. DOUBLE AND T
See note 1.

184. VII. COSTS IN E
note 3.

170. 1. In Wisconsin, in an action of trover, the plaintiff must recover at least fifty dollars damages in order to be entitled to costs. Stat. Wis., § 322, subdiv. 5; *Bugbee v. Lombard*, 130 Wis. 326.

173. 1. California. — Code Civ. Cal., § 1022, subdiv. 5, allows costs as a matter of course to the plaintiff upon a judgment in his favor in an action which involves the title or possession of real estate. The words "of course" are construed as a matter of right. *Schmidt v. Klotz*, 130 Cal. 223.

In New Jersey the Practice of the Supreme Court, Gen. Stat. N. J., p. 2586, par. 3, provides that the plaintiff in an action commenced in the Supreme Court shall be entitled to costs where he does not recover above one hundred dollars, exclusive of costs, except where title to land is in question, or "where the parties to the suit in which the amount recovered exclusive of costs, exceeds one hundred dollars do not reside in the county." *Goat, etc., Skin Imp.*, 60 N. J. L. 137.

178. 2. In New York, by Code Civ. Pro. N. Y., § 3228, subdiv. 2, where the plaintiff recovers less than fifty dollars in an action for an assault, battery, false imprisonment, slander, criminal conversation, seduction, or malicious prosecution, or for a civil penalty in which the people of the state are a party, the amount of costs cannot exceed his damages. *O'Connor v. Union R. Co.*, (Sup. Ct. N. Y.) 33 Misc. (N. Y.) 728.

In Pennsylvania the statute of 1837, c. 9, is in force, and provides that, before, in an action for damages for assault and battery, the plaintiff is entitled to more costs than defendant unless the judge who tried the case certifies that an assault and battery was sufficiently proved by the plaintiff. *Miller v. Good*, 25 Pa. Co. Ct.

185. See notes 1, 2.

186. See note 1.

Express Award. — See note 4.

2. Prevailing Party. — See note 5.

187. See note 1.

188. 3. When Costs Will Be Apportioned or Not Awarded. — See note 2.

189. Other Cases. — See note 1.

4. Dismissal. — See note 2.

192. IX. COSTS IN APPELLATE COURT — 1. General Discretion
— Subject Only to Statutory Limitation. — See note 4.

Rep. 277; *Pennsylvania Co. v. Jacksonville, etc., R. Co.*, (C. C. A.) 66 Fed. Rep. 421.

The discretion is a legal discretion to be exercised according to equitable principles, otherwise it is a subject for review. *Highley v. Deane*, 168 Ill. 266.

If each party succeeds as to part of the matter in litigation between them, costs are not allowed to either as against the other. *Cross v. Smith*, 85 Hun (N. Y.) 49.

Decree Pro Confesso Improperly Entered.

— Where a decree *pro confesso* has been prematurely and improperly entered, an application promptly made to set it aside should be granted, and the applicant should not be held liable for costs of the proceeding up to the time of the application. *Woodford v. Alexander*, 35 Fla. 333.

In Illinois the statute leaves it to the discretion of the court to award costs in all chancery cases except when the bill is dismissed by the applicant or on the motion of the defendant for want of prosecution. *North v. Roodhouse*, 52 Ill. App. 17.

185. 1. *Spengler v. Hahn*, 95 Wis. 472 [citing 5 ENCYC. OF PL. AND PR. 185]; *Hamilton v. DuPre*, 103 Ga. 795; *Mack v. Wurmser*, 135 Mo. 58; *Roberts v. New York El. R. Co.*, 155 N. Y. 31; *Woods v. Douglas*, 46 W. Va. 657; *Tyler Min. Co. v. Sweeney*, (C. C. A.) 79 Fed. Rep. 277.

The discretion is a sound legal discretion and should be so exercised as to work no injustice. *North v. Roodhouse*, 52 Ill. App. 17.

2. *Spengler v. Hahn*, 95 Wis. 472, citing 5 ENCYC. OF PL. AND PR. 185, and holding that where the parties have contracted for the allowance of solicitors' fees in addition to taxable costs, it requires a very strong case against such allowance on equitable

principles to justify a total denial of costs and solicitors' fees.

Before it can be reviewed the record must disclose the facts and circumstances which induced the entering of the order. *Highley v. Deane*, 168 Ill. 266.

186. 1. *Highley v. Deane*, 168 Ill. 266. See also *Enright v. Amsden*, 70 Vt. 183.

4. *Stevens v. Central Nat. Bank*, 168 N. Y. 560.

5. *Stevens v. Central Nat. Bank*, 168 N. Y. 560 [citing 5 ENCYC. OF PL. AND PR. 186]; *Mack v. Wurmser*, 135 Mo. 58; *Davis v. Jackson*, (Tenn. Ch. 1897) 39 S. W. Rep. 1067; *Everett v. Haulenbeck*, 77 Fed. Rep. 12.

187. 1. *Davis v. Jackson*, (Tenn. Ch. 1897) 39 S. W. Rep. 1067.

188. 2. Where substantial issues are found for one party and like issues found for another, the costs may be divided. *Mack v. Wurmser*, 135 Mo. 58.

189. 1. Amicable Suit. — Where suits in equity are amicable, though contentious, no costs will generally be allowed against either party. *Rotch v. Livingston*, 91 Me. 461.

2. *Langlois v. Matthiessen*, 155 Ill. 230.

192. 4. In Connecticut Pub. Acts 1897, p. 894, § 28, provides that when the Supreme Court remands a cause for a new trial the whole costs of the cause, except those accruing in the Supreme Court, shall be taxed in favor of the prevailing party, but those in the Supreme Court shall be taxed in favor of the plaintiff in error or appellant, except that the fee of twenty dollars to the prevailing party in the Supreme Court and that for the expense of printing briefs shall be in the discretion of the court. *Beach v. Travelers Ins. Co.*, 73 Conn. 475.

- 193.** See note 1.
194. Prevailing Party Usually Receives Costs. — See note 1.
195. Appellant Must Obtain More Favorable Judgment. — See note 1.
197. 3. Affirmance — Authority of Court Generally Limited by Statute. — See note 2.
199. 4. Dismissal — Dismissal Operates as Affirmance. — See note 1.
200. 5. Reversal — According to Attending Circumstances. — See note 3.
202. 6. Partial Affirmance or Reversal — Appellant Prevails. — See note 3.

Iowa. — Code Iowa, § 2450, provides that on appeal in certain proceedings involving statements of consent to the establishment of saloons, costs shall be taxed against the losing party. *Porter v. Butterfield*, 116 Iowa 725.

New York. — By Code Civ. Pro. N. Y., § 3238, no discretion is given to the court as to costs of an appeal in certain cases. See *McMoran v. Lange*, 25 N. Y. App. Div. 11; *Thornall v. Turner*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 363.

Rhode Island. — Gen. Laws R. I., c. 247, § 20, provides that the Appellate Court may award costs in its discretion, according to the circumstances of the case. *Bassett v. Loewenstein*, 22 R. I. 468.

193. 1. Costs incurred upon one appeal cannot be taxed as part of the costs of an appeal subsequently taken. *Louisville Steam Forge Co. v. Mehler*, (Ky. 1901) 65 S. W. Rep. 129.

Improper Conduct of Party. — If the conduct of a party is not such as to commend itself to a sense of justice no costs will be allowed. *Russell v. North American Ben Assoc.*, 116 Mich. 699.

194. 1. *McMoran v. Lange*, 25 N. Y. App. Div. 11; *Clark v. Malzacher*, 20 N. Y. App. Div. 301; *Thornall v. Turner*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 363; *Illinois Cent. R. Co. v. Southern Seating, etc., Co.*, 104 Tenn. 568. See also *Porter v. Butterfield*, 116 Iowa 725.

Mere Change of Form of Judgment. — Where there is a reversal which merely changes the form of the judgment rendered, the appellant must be deemed the unsuccessful party and must pay the costs. *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706.

195. 1. *Iowa.* — *Ritchey v. Adlenger*, 102 Iowa 144.

Washington. — *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111.

"More Favorable Judgment." — The expression "more favorable judgment" does not mean a few dollars or cents larger or smaller than the one recovered below, but one substantially more favorable, which is to be determined by the court in view of the circumstances of each case. *State v. First Judicial Dist.*, (Nev. 1901) 66 Pac. Rep. 743; *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111.

197. 2. *Martin v. Tarbox*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 761, holding that if both parties appeal and judgment is affirmed, costs will be awarded to each with a provision that they be offset.

199. 1. A dismissal of the appeal is an affirmance of the judgment for the purpose of giving damages for delay. *Neagle v. Dawson*, 64 Ill. App. 538.

200. 3. **Error Curable by Motion.** — Where an error would undoubtedly have been cured without appeal had the matter been called to the attention of the trial court by motion, no costs will be allowed on a reversal. *Winner v. Kuehn*, 97 Wis. 394.

202. 3. *Illinois.* — *Romberg v. McCormick*, 194 Ill. 205.

North Carolina. — *Hawkins v. Richmond Cedar Works*, 122 N. Car. 87.

South Dakota. — *American Banking Co. v. Lynch*, 13 S. Dak. 34; *Sorenson v. Donahoe*, 12 S. Dak. 204.

Wisconsin. — *Rock Springs Nat. Bank v. Luman*, (Wyo. 1896) 47 Pac. Rep. 73.

In *Montana* the code provides that when the judgment of the court below shall be affirmed in part, the court shall divide the costs between the parties according to the justice of the case. *Parrott v. Morase*, 20 Mont. 61.

204. 7. Remittitur — *a.* OF AMOUNT — Costs Charged to Party Entering Remittitur. — See note 1.

205. *b.* OF RECORD. — See note 1.

206. 8. Appeals from Magistrates — Unsuccessful Party Liable for Costs. — See note 2.

210. 11. Negligence or Default as Affecting Costs — *a.* IN GENERAL — Negligent or Defaulting Party Must Pay Costs. — See note 1.

211. Party Pleading Defectively Must Pay Costs. — See note 1.

212. *c.* APPEAL ON POINT NOT MADE BELOW. — See note 1.

213. 12. Prolix Transcripts — Only Necessary Part of Record Taxable as Costs. — See note 1.

214. Superfluous Matter Taxable to Party in Fault. — See note 2.

204. 1. *Chapman v. J. W. Belts*, etc., Co., 48 W. Va. 1 [*quoting* 5 ENCYC. OF PL. AND PR. 204]; *Travis County v. Trogdon*, (Tex. Civ. App. 1895) 29 S. W. Rep. 405.

205. 1. *Hascall v. King*, 54 N. Y. App. Div. 441, *citing* 5 ENCYC. OF PL. AND PR. 205.

206. 2. *Olson v. Rushfeldt*, 81 Minn. 381.

210. 1. Costs which a party has caused unnecessarily and unreasonably to accumulate will not be taxed in his favor. *Davies v. Robinson*, 65 Ark. 219.

211. 1. Noncompliance with Rules of Court. — Costs will be granted as a penalty for failure to make a proper abstract and statement of the case in accordance with the rules of court. *Spratt v. Early*, 169 Mo. 357.

212. 1. *Cook v. Minneapolis*, etc., R. Co., 98 Wis. 624.

213. 1. *California*. — *Jones v. Iverson*, 131 Cal. 101.

North Dakota. — *State v. Heinrich*, (N. Dak. 1902) 88 N. W. Rep. 734.

Oregon. — *Ferguson v. Byers*, 40 Oregon 468; *Hammer v. Downing*, 39 Oregon 504; *Albert v. Salem*, 39 Oregon 466; *Young v. State*, 36 Oregon 417.

Washington. — *Deering v. Holcomb*, 26 Wash. 588.

Wisconsin. — *Willev v. Lewis*, 113 Wis. 618; *Dufur v. Paulson*, 110 Wis. 281; *Delsoy v. Milwaukee Electric R., etc., Co.*, 110 Wis. 412; *Dodge v. O'Dell*, 106 Wis. 296; *Milwaukee Cold Storage Co. v. Dexter*, 99 Wis. 214.

United States. — *Nederland L. Ins. Co. v. Hall*, (C. C. A.) 86 Fed. Rep. 741; *Ecaubert v. Appleton*, (C. C. A.) 67 Fed. Rep. 917.

Defective Bill of Exceptions. — Where a bill of exceptions containing over two hundred pages was not indexed,

and was presented in an improper and confused condition, no costs for it were allowed. *Central Coal, etc., Co. v. John Henry Shoe Co.*, 69 Ark. 302.

Extended Quotation. — In *Swenson v. Christopherson*, 10 S. Dak. 342, it was held that costs for extended quotations from text books and reports printed in a brief could not be taxed.

214. 2. *California*. — *Jones v. Iverson*, 131 Cal. 101.

Georgia. — *Weaver v. Stoner*, 114 Ga. 165; *Cochran v. Hudson*, 110 Ga. 762.

Illinois. — *Richardson v. Cassidy*, 63 Ill. App. 482.

Iowa. — *Commercial State Bank v. Hayes*, (Iowa 1900) 82 N. W. Rep. 454; *Hawkeye Loan, etc., Co. v. Gordon*, 115 Iowa 561; *Newberry v. Newberry*, 114 Iowa 704; *McWhirter v. Crawford*, 104 Iowa 550; *Bucknell v. Deering*, 99 Iowa 548.

Kentucky. — *Forest Hill Bldg., etc., Assoc. v. McEvoy*, (Ky. 1902) 66 S. W. Rep. 1031.

Maryland. — *Chappell v. Stewart*, 95 Md. 76.

North Carolina. — *Finch v. Strickland*, 130 N. Car. 44; *Scranton, etc., Land, etc., Co. v. Jennett*, 128 N. Car. 3; *Gray v. Little*, 127 N. Car. 304; *Baker v. Hobgood*, 126 N. Car. 149.

Oregon. — *Albert v. Salem*, 39 Oregon 466.

Texas. — *Mutual Reserve Fund L. Assoc. v. Lovenberg*, 24 Tex. Civ. App. 355; *McLennan County v. Graves*, 94 Tex. 635.

United States. — *Ecaubert v. Appleton*, (C. C. A.) 67 Fed. Rep. 917.

Additional Abstract. — Where an appellant moves to tax the costs of an additional abstract to the appellee upon the ground that the matter therein contained is immaterial, the motion will be overruled even if the matter

215. See note 1.

217. 13. Revision of Costs — *a.* GENERAL DOCTRINE — *Presumption in Favor of Proper Action Below.* — See note 1.

220. 14. Interpretation of Decrees — "With Costs." — See note 1.

"With Costs in Both Courts." — See note 3.

"Costs to Abide Event." — See note 4.

[*Appeal Taken for Delay.* — In many of the states there are statutes providing for the assessment of additional costs as a penalty for taking an appeal for the purpose of delay. See note 5*a.*]

set out is immaterial to the questions the court actually considered, but is material to other questions discussed, and which would have been considered had the conclusion upon the issue of facts been different. *Fitzgerald v. Nolan*, 102 Iowa 283.

Where a party filed an additional abstract, seven pages of which were entirely unnecessary to the decision, the costs of printing were taxed against him. *Lakenan v. Smith*, (Iowa 1897) 73 N. W. Rep. 347.

Where an additional abstract presents only matter about which there is no question, costs will be taxed against the party filing it. *Fox v. Gray*, 105 Iowa 433.

Division of Costs. — See *Rider v. Kirk*, 82 Mo. App. 120, in which case the abstract was unnecessarily long and the court divided the costs.

215. 1. *Ferguson v. Byers*, 40 Oregon 468.

In *North Carolina*, by rule of court, such matters will be taxed against the party causing it to be sent up, regardless of the issues of the appeal. *Finch v. Strickland*, 130 N. Car. 44.

217. 1. *Chicago City R. Co. v. Burke*, 102 Ill. App. 661.

220. 1. *People v. Mercantile Credit Guaranty Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 755; *Hascall v. King*, 54 N. Y. App. Div. 441.

Where the findings were in the plaintiff's favor, a decision that judgment be entered "with costs of this action" means that it be entered in favor of the plaintiff with costs. *Foley v. Foley*, 15 N. Y. App. Div. 276.

3. See *Hascall v. King*, 54 N. Y. App. Div. 441.

4. *Hascall v. King*, 54 N. Y. App. Div. 441.

5*a.* *California.* — In *California*, where an uncontradicted affidavit shows that an appeal was taken for delay, damages will be allowed on the dismissal of the

appeal. *McFadden v. Dietz*, 115 Cal. 697.

Georgia. — 2 Code Ga., § 4473, provides that if on the trial of any appeal, except from a justice's court, it appears to the jury that the appeal was frivolous and intended for delay only, the jury shall assess damages against the appellant, not exceeding twenty-five per cent. on the principal sum which it shall find due; and if the judgment of the Superior Court should be that an appeal from a justice's court is frivolous and intended for delay only, such court shall, in addition to the final judgment in the case, enter judgment against the appellant for twenty per cent. damages on such frivolous appeal. *Adams v. Carnes*, 111 Ga. 505.

Illinois. — *Starr & Curt. Annot. Stat. Ill.* (1896), c. 33, par. 23, provides that on appeal or writ of error, "if the judgment or decree be affirmed in the whole, the party prosecuting such writ of error or appeal shall pay to the opposite party a sum not exceeding ten per centum on the amount of the judgment or decree so attempted to be reversed, at the discretion of the court, and in addition to the costs shall have judgment and execution therefor: Provided, the Supreme Court shall be of opinion that such appeal or writ of error was prosecuted for delay." *Baker v. Prebis*, 185 Ill. 191. See also *Wallen v. Cummings*, 88 Ill. App. 45, *affirmed* 187 Ill. 451; *Calumet Electric St. R. Co. v. Lewis*, 168 Ill. 249.

This statute is applicable to the Appellate Court as well as to the Supreme Court. *Dorn v. Smith*, 85 Ill. App. 516.

The presumption is that in awarding statutory damages against an appellant the Appellate Court was of opinion that the appeal was prosecuted for delay. *Baker v. Prebis*, 185 Ill. 191.

If no claim is made nor motion pre-

324. X. COSTS ON INTERLOCUTORY AND SPECIAL PROCEEDINGS —
2. In Special Proceedings. — See note 1.

XI. TAXATION OF COSTS — 1. What Is Taxable — a. IN
GENERAL — (1) Between Party and Party. — See note 3.

sented asking that statutory damages be allowed, such damages should not be awarded. *Dorn v. Smith*, 85 Ill. App. 516.

Kentucky. — Bullitt's Civ. Code Ky. (1895), § 764, provides that upon affirmation of a judgment for payment of money the collection of which in whole or in part has been superseded, ten per cent. damages on the amount superseded shall be awarded against the appellant. *Phoenix Ins. Co. v. McKernan*, 104 Ky. 224.

If the appellee has no personal or pecuniary interest in the fund whose collection was suspended by the execution of the supersedeas bond he is not entitled to damages. *Hendrick v. Posey*, 104 Ky. 8.

Missouri. — Where an appeal appears to have been taken in good faith damages will not be awarded under Rev. Stat. Mo., § 867, on the theory that the appeal was frivolous or vexatious. *Jaco v. Southern Missouri, etc., R. Co.*, 94 Mo. App. 567.

If there is no just or reasonable ground for an appeal the statutory penalty will be awarded. *Tyler v. Giesler*, 85 Mo. App. 278.

North Dakota. — In *Phoenix Assur. Co. v. McDermott*, 7 N. Dak. 172, ten per cent. damages were awarded for delay under Rev. Codes N. Dak., § 5575.

Pennsylvania. — Act Pa. May 10, 1897, last clause of section 21, is a substitute for Act Pa., May 25, 1874, P. L. 227, and provides as follows: "In all cases where the Appellate Court shall be of opinion that the appeal was sued out merely for delay, it shall award, as further costs, additional attorney's fees of twenty-five dollars and damages at the rate of six per centum per annum in addition to legal interest." *Bromley v. Lippincott*, 184 Pa. St. 462. See also *Smead v. Stuart*, 104 Pa. St. 578; *Richardson v. Richardson*, 193 Pa. St. 279; *Radigan's Estate*, 13 Pa. Super. Ct. 131, wherein, because of delay, twenty-five dollars attorney's fee and damages at the rate of six per cent. per annum in addition to the lawful interest were awarded. *In re School Dist.*, 23 Pa. Co. Ct. 416.

The fact that an appeal was sued

out for delay merely ought to be free from doubt. *Thirteenth Ward Bldg., etc., Assoc. v. Coyle*, 19 Pa. Super. Ct. 238.

Where a petition alleged among other things that the attorney for the appellant stated to the attorney for the appellee that "perhaps we will not win in the Superior Court, but we will keep you waiting that much longer for your money," the court held that this made out a proper case for imposing the penalty. *Brannan v. Bond*, 18 Pa. Super. Ct. 535.

Where a result of an appeal has been an unnecessary and vexatious delay of nearly a year in prosecuting the case to a final decree, damages will be awarded. *Richardson v. Richardson*, 193 Pa. St. 279.

Texas. — See *Cox v. Patten*, (Tex. Civ. App. 1902) 66 S. W. Rep. 64.

Wisconsin. — Stat. Wis., § 2951, provides that the Supreme Court may, in its discretion, adjudge to the respondent in any appeal in any civil action, on affirmation, damages for his delay in addition to interest not exceeding ten per cent. on the amount of the judgment affirmed, and may also, in its discretion, award to him double costs. *Perkins v. Jacobs*, 99 Wis. 409.

324. 1. Hornellsville Electric R. Co. v. New York, etc., R. Co., 83 Hun (N. Y.) 407.

3. *Bathgate v. Irvine*, 126 Cal. 135; *Mott v. State*, 145 Ind. 353; *Tarr's Estate*, 10 Pa. Super. Ct. 554; *Matter of Bender*, 86 Hun (N. Y.) 570.

In *Pennsylvania* party costs require taxation, but officer's fees do not. *Irwin v. Hanthorn*, 5 Pa. Dist. 671.

Traveling expenses, hotel bills, time spent in carrying on a lawsuit, and expenditures made in qualifying witnesses to testify in the cause are not taxable. *Perry Tp. v. Red Bank Tp.*, 8 Pa. Dist. 526.

Amount Left Blank. — Where a court rendered a judgment for an appellant that he recover of the appellee "all his costs and charges in said action laid out and expended, taxed at \$—," it was held that this included the amount authorized by law, and that the judgment was left blank to be filled by

- 226.** *b. ATTORNEY'S FEES—(1) Appearance or Docket Fee.*
— See note 2.
- 227.** See note 1.
- 228.** *One Prosecuting or Defending His Own Suit.* — See note 3.
(2) Reasonable Fees for Services. — See note 4.
- 229.** See note 1.
- 230.** *c. FEES OF VARIOUS OFFICERS.* — See note 1:

the clerk when execution issued. *Wilson v. Jenkins*, 147 Ind. 533.

Practice in Federal Courts. — In the federal courts, in the absence of controlling authority, the practice of taxing costs will follow the state courts where it appears that a certain practice is pursued therein. *Nead v. Millersburg Home Water Co.*, 79 Fed. Rep. 129; *Primrose v. Fenno*, 113 Fed. Rep. 375, wherein the court said: "While * * * we are to follow the local practice except so far as it has been modified by statute or by special usages of this court, we are not required to hold ourselves so far bound by it as to embarrass us in doing justice between parties."

226. 2. In Federal Practice, concerning the allowance of a docket fee, see *Carter v. Sweet*, 84 Fed. Rep. 16; *John Shillito Co. v. McClung*, (C. C. A.) 66 Fed. Rep. 22.

No docket fee is allowed where a motion to remand has been sustained. *Smith v. Western Union Tel. Co.*, 81 Fed. Rep. 242.

Final Hearing. — As to what constitutes a final hearing see *Luxfer Prism Patents Co. v. Elkins*, 99 Fed. Rep. 29; *Carter v. Sweet*, 84 Fed. Rep. 16; *Kaempfer v. Taylor*, 78 Fed. Rep. 795.

227. 1. Hannah, etc., Mercantile Co. v. Mosser, 105 Mich. 18, holding that where only one record and one brief are presented for several cases belonging to the same party, only one solicitor's fee will be taxed.

228. 3. See *Garrett v. Peirce*, 74 Ill. App. 225, holding that it is against public policy to allow fees to an attorney for his own professional service in his own cause.

4. Miller v. Kehoe, 107 Cal. 340.

For a short time the law of *California* allowed certain attorney's fees to the prevailing party in an action; but that provision was repealed in 1855 (Stat. 1855, p. 250), and since then "the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied,

of the parties." *Miller v. Kehoe*, 107 Cal. 340.

Guardian ad Litem. — *Fellows v. Fellows*, 89 Ill. App. 482, wherein it was held that an allowance of four hundred dollars was unreasonable; *Connellee v. Eastland County*, (Tex. Civ. App. 1895) 31 S. W. Rep. 552, wherein a fee of twenty-five dollars was allowed in view of the amount involved in the suit.

229. 1. Determination as to Reasonable Fees. — In determining what amount should be allowed for attorney's fees the judge or chancellor should exercise his own judgment, and not be wholly governed by the opinion of attorneys as to the value of the services. *Beall v. Robinson*, 91 Ill. App. 247.

But in *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, it was held that a court cannot take judicial knowledge of the value of services rendered by solicitors.

And in *Gathe v. Broussard*, 49 La. Ann. 312, it was held that where no evidence is taken for the purpose of fixing the value of attorney's fees, the amount should not be determined.

In *Iowa* it is provided that in an action on a written contract providing for attorney's fees the amount allowed shall be ten per cent. on the first two hundred dollars or fractional part thereof, five per cent. on the next three hundred dollars, three per cent. on the excess of five hundred dollars up to one thousand dollars, and one per cent. on all over the latter amount. Code Iowa, § 3869; *Bankers' Iowa State Bank v. Jordan*, 111 Iowa 324.

In *Louisiana*, where a plaintiff claims property sequestered and damages, attorney's fees cannot be taxed. *Rabb v. Pillot*, 52 La. Ann. 1534.

In *Pennsylvania* counsel fees are not recoverable as "costs of the cause." They are allowable to the opposite party only when expressly stipulated for. *Tarr's Estate*, 10 Pa. Super. Ct. 554.

230. 1. Sheriff. — In *Idaho* a sheriff

231. *d.* STENOGRAPHER'S FEES. — See note 1.

232. Fees for Copy of Minutes. — See note 2.

233. *e.* SURVEYOR'S FEES. — See note 1.

is entitled to keeper's fees only when allowed by order of court, and then not to exceed three dollars per day. *Berry v. G. V. B. Mining Co.*, (Idaho 1897) 51 Pac. Rep. 746.

Receiver. — The amount allowed to a receiver as compensation and expenses is properly costs of a suit. *Ephraim v. Pacific Bank*, 136 Cal. 646.

Where a receivership is procured under the assertion of an unjust and unreasonable claim, and the receiver is authorized to take possession of the property of another on such wrongful assertion, the court can protect the injured party by returning the property without its being diminished to pay the receiver's charges, and costs will be taxed against the party asserting such wrongful claim. *Highley v. Deane*, 168 Ill. 266.

It is a general rule that the costs of a receivership must be paid out of the funds in the receiver's hands, yet there are exceptions to this rule. *Highley v. Deane*, 168 Ill. 266.

231. 1. *Gallagher v. Baird*, 60 N. Y. App. Div. 29; *Cox v. Patten*, (Tex. Civ. App. 1902) 66 S. W. Rep. 64; *Killfoil v. Moore*, (Tex. Civ. App. 1898) 45 S. W. Rep. 1024.

The right to costs of compensation paid to a stenographer can exist only by statute, and such statute must be strictly considered. *Baldwin v. Boulware*, 82 Mo. App. 321.

Cases in Which Stenographer's Fees Were Not Allowed. — See *Schawacker v. McLaughlin*, 139 Mo. 333; *Baldwin v. Boulware*, 82 Mo. App. 321; *State v. Gans*, 72 Mo. App. 638; *State v. District Ct.*, 25 Mont. 1; *Shaver v. Eldred*, 86 Hun (N. Y.) 51.

Fees of a stenographer who was not the official stenographer, but was employed for a hearing before a referee for the convenience of the parties, cannot be included in the taxed costs. *Schawacker v. McLaughlin*, 139 Mo. 333.

Extortionate Charges. — Charges for taking only five depositions which extend over only ninety-six pages of the record, amounting to sixty-nine dollars and forty cents for the stenographer and eighty-five dollars for the commissioner, are so unreasonable and ex-

tortionate that they should not be allowed. *Collins v. Rosenham*, (Ky. 1897) 43 S. W. Rep. 726.

232. 2. *Kentucky.* — The cost of the transcript of the stenographer's notes made under Stat. Ky. (1894), § 4639, cannot be taxed as costs against the successful party unless such transcript is ordered by the court to be made. *Albin v. Louisville R. Co.*, (Ky. 1902) 67 S. W. Rep. 17.

Montana. — Code Civ. Pro. Mont., § 1866, provides that a party is entitled to include in his bill of costs the legal fees paid to stenographers for *per diem* or for copies. *State v. District Ct.*, 25 Mont. 1.

New York. — Formerly, in the Superior Court of New York city, where stenographer's minutes were required in order to aid the court in reaching a decision, the court might, under Code Civ. Pro. N. Y., § 289, direct that one-half the expenses be paid by each of the parties, and the amount so paid, by compulsory order, became a necessary disbursement. *King v. Munzer*, (N. Y. Super. Ct. Spec. T.) 31 Abb. N. Cas. (N. Y.) 482.

On Appeal. — Disbursements made for stenographer's minutes when necessary to prepare amendments upon an appeal and when use of the appellant's copy of such minutes cannot be obtained by the respondent, are taxable. *Park v. New York Cent.*, etc., R. Co., 57 N. Y. App. Div. 569, 33 Misc. (N. Y.) 320.

In *North Dakota* a successful appellee may tax as costs the amount paid for a stenographer's transcript when such expense is shown to have been necessary by reason of the defects in the appellant's bill of exceptions. *Novotny v. Danforth*, 9 S. Dak. 412.

An appellant is not entitled to stenographer's fees in preparing the case on appeal where the clerical work might have been done by his counsel. *Ferguson v. Byers*, 40 Oregon 468; *Young v. Hughes*, 39 Oregon 586.

233. 1. *Bathgate v. Irvine*, 126 Cal. 135, holding that fees for surveying and making maps at the instance of one of the parties not acting under direction of the court are not taxable.

233. *g.* PRINTING AND TRANSCRIBING — (1) *In General.* — See note 2.

234. See note 1.

235. (3) *On Appeal* — (a) *Record.* — See note 1.

(b) *Briefs.* — See note 2.

h. TERM, TRIAL, AND ARGUMENT FEES — (1) *Term Fees.* — See note 4.

233. 2. *Zeust v. Staffan*, 13 App. Cas. (D. C.) 388; *Baldwin v. Boulware*, 82 Mo. App. 321; *Lee Injector Mfg. Co. v. Penberthy Injector Co.*, (C. C. A.) 109 Fed. Rep. 964; *Pine River Logging Co. v. U. S.*, 186 U. S. 279.

Federal Courts — **Transcript for Personal Use of Counsel.** — Rev. Stat. U. S., § 983, which provides that the amount paid to printers for copies of papers necessarily obtained for use on trials shall be taxable, does not include a transcript of the evidence for the personal use of counsel in preparing a case for the Appellate Court. *Pine River Logging Co. v. U. S.*, 186 U. S. 279.

Additional Abstract. — Where an appellee is justified in furnishing an additional abstract by reason of some important omission in the appellant's abstract, he may tax the costs of the additional abstract. *Calumet Grain, etc., Co. v. Williams*, 97 Ill. App. 36; *Lane v. Sechler Carriage Co.*, 96 Ill. App. 610.

Transcript of Another Case. — The costs of a transcript in another case may be taxed where the other case is a link in the complainant's chain of title which is involved in the present case. *Smith v. Hutchison*, 104 Tenn. 394.

234. 1. **Where No Directions Are Given** to the clerk, he will tax for such disbursements according to the established rules. *Collins v. Janesville*, 111 Wis. 348.

235. 1. *Black v. Minneapolis, etc., Elevator Co.*, 8 N. Dak. 96, *citing* 5 ENCYC. OF PL. AND PR. 235.

2. *State v. District Ct.*, 25 Mont. 1; *Colusa Parrot Min., etc., Co. v. Anaconda Copper-Min. Co.*, 104 Fed. Rep. 514.

In Oregon, by rule of court, costs of printing briefs are allowed "unless in equity cases, for special reasons apparent in the record, it is otherwise ordered." *Hammer v. Downing*, 39 Oregon 504.

Failure to Comply with Rule. — Where the appellant did not comply with a rule of court requiring that all the in-

structions given on the trial be set out in the abstract, and a reversal was asked on account of error in instructions, it was held that no costs for printing briefs would be taxed in his favor. *Brinkley Car Co. v. Cooper*, 70 Ark. 331.

In Missouri. — Rev. Stat. Mo. (1889), § 2253 (Rev. Stat. 1899, § 813), authorizing the Appellate Court to adjudge as costs in favor of the successful party a reasonable sum for expenses of abstracts, does not include briefs. *Wilson v. Ruthrauff*, 87 Mo. App. 226.

In North Dakota no printed abstracts or briefs are required where the amount of the judgment appealed from does not exceed three hundred dollars; hence the expense of printing such abstracts and briefs is not taxable. *Ingwaldson v. Skrivseth*, 8 N. Dak. 544.

In the Federal Courts in no case is printing of the record and briefs taxable except where there is a rule of court requiring them to be printed or where there is a stipulation to the same effect. *Kelly v. Springfield R. Co.*, 83 Fed. Rep. 183.

In the Second Circuit a rule of court requires the printing of records and briefs, and they are therefore chargeable. *Kelly v. Springfield R. Co.*, 83 Fed. Rep. 183.

Disrespectful Brief. — If disrespectful language is incorporated in the brief concerning the trial court, costs of printing will be disallowed. *Dufur v. Paulson*, 110 Wis. 281.

4 *Deyo v. Morss*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 497.

In Michigan, under the statute providing that a term fee will be charged for every term at which a cause is regularly on the calendar and not reached or is postponed, it is held that the prevailing party in a suit is entitled as a matter of right to such fee, even if it is apparent from the nature of the business of the court that the cause could not be reached. *Martin v. Wayne Circuit Judge*, 111 Mich. 71.

In New York. — **Term fees for terms**

237. (2) *Trial Fees.* — See note 1.

(3) *Argument Fees.* — See note 2.

238. j. OTHER ITEMS. — See note 3.

during which a cause is necessarily upon the general calendar awaiting trial in the usual course may be taxed by the successful party. Code Civ. Proc. N. Y., § 3251, subdiv. 3; Kahn v. Coen, (C. Pl. Spec. T.) 31 Abb. N. Cas. (N. Y.) 478.

The right of the successful party to the term fee depends upon the single fact that the cause is "necessarily on the calendar." The cause is "necessarily on the calendar" when it is at issue and in readiness for trial. Deyo v. Morss, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 497.

Such right is not waived where the cause goes over the term by mutual consent for mutual convenience. Deyo v. Morss, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 497.

On Appeal. — One term fee can be charged on an appeal to the Court of Appeals for each calendar year, and that term at which the cause is argued or otherwise disposed of must be excluded. Degener v. Underwood, (N. Y. Super. Ct. Spec. T.) 31 Abb. N. Cas. (N. Y.) 479.

237. 1. Hudson v. Erie R. Co., 57 N. Y. App. Div. 98.

Jury Failing to Agree. — Thirty dollars may be taxed for every abortive trial, as where the jury disagrees. Hudson v. Erie R. Co., 57 N. Y. App. Div. 98.

The Withdrawal of a Juror in the progress of a trial does not affect the right of the successful party to the taxation of costs for trial fees. Browning v. Goldman, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 272.

2. In South Dakota, under the statute now embodied in Annot. Stat. S. Dak. (1901), § 6409, where the plaintiff and the respondent make no argument, either oral or printed, five dollars should be allowed "before argument," but nothing "for argument." Searle v. Lead, 10 S. Dak. 405.

238. 3. *Witness Fees.* — Where witnesses have been summoned in good faith with the intention of making use of them their fees are taxable, even though it turns out that they are not needed. Meyer v. San Diego, 132 Cal. 35; Pennsylvania F. Ins. Co. v. Carnahan, 10 Ohio Cir. Dec. 225. And the

mere fact that the testimony is immaterial or inadmissible will not deprive a party of the fees necessarily paid or incurred. Mankato Lime, etc., Co. v. Craig, 81 Minn. 224.

Fees of witnesses subpoenaed who are wholly incompetent to testify or whose testimony is wholly irrelevant or immaterial to the issue and is for that reason excluded by the court cannot be taxed against the losing party as costs. Com. v. Lucas, 24 Pa. Co. Ct. 126.

A Party to a suit is not entitled to witness fees even though he may be called by the adverse party. Texas Midland R. Co. v. Parker, (Tex. Civ. App. 1902) 66 S. W. Rep. 583; Cole v. Angel, (Tex. Civ. App. 1894) 28 S. W. Rep. 93.

Costs of a commission to take the testimony of a party are not taxable, but it is otherwise as to witnesses who are not parties. Sattler v. Aultman, etc., Machinery Co., 9 Pa. Dist. 73.

Wife of Party. — The fees of a wife of a party cannot be taxed. Texas Midland R. Co. v. Parker, (Tex. Civ. App. 1902) 66 S. W. Rep. 583; Cole v. Angel, (Tex. Civ. App. 1894) 28 S. W. Rep. 93.

Witnesses Not Testifying. — In State v. Gayhart, (Nev. 1902) 68 Pac. Rep. 113, it was held that where a witness attended court under a subpoena and was not called, and it did not appear why he was required as a witness and why he was not called, his fees could not be collected as costs.

In Vermont costs are not allowed for witnesses not testifying unless it is shown affirmatively that they were summoned in good faith and for such cause and occasion as justified their attendance. Dean v. Cass, 73 Vt. 314.

Travel and Attendance Fees. — In the absence of some showing that extra travel was for the purpose of unnecessarily increasing the costs, a witness may waive his exemption in regard to distance from the place of trial, and obey the process, and his traveling fees will be taxed for the actual travel. Briggs v. M. Rumely Co., 96 Iowa 202.

When a case is in order for trial with a prospect that it will be reached

242. 2. Procedure — *a.* BY WHOM COSTS ARE TO BE TAXED — In Practice. — See note 1.

b. AFFIDAVIT TO BILL OF COSTS. — See note 3.

243. See note 1.

speedily, and a person who may be wanted as a witness actually attends at a place in close proximity to the court house, with the purpose and expectation of going, if necessary, to the court room to be present at the trial of the case as a witness, he may fairly and reasonably be said to attend as a witness in the case, and it is immaterial that after having so attended he is suffered to depart for the rest of that day. In such a case witness fees may be taxed as costs. *Reid v. Wright*, 181 Mass. 306.

In *New York Code Civ. Pro. N. Y.*, § 3318, regulates the amount of fees to which a witness is entitled in an action in the Supreme Court, and provides that a witness is entitled "to fifty per cent. for each day's attendance; and if he resides more than three miles from the place of attendance, to eight cents for each mile, going to the place of attendance." *Matter of Bender*, 86 Hun (N. Y.) 570.

Costs for Limited Number. — In *Indiana* the statute (now *Horner's Stat. Ind.* 1901, § 488) provides that "If any party summon more than three witnesses to prove the same fact he shall pay the costs occasioned by the additional number of witnesses, unless the court shall otherwise order." *Wilson v. Jenkins*, 147 Ind. 533.

In the *Federal Courts* witness fees as prescribed by law are one dollar and fifty cents for each day's attendance in court and five cents a mile in going from the witness's residence to the court and five cents a mile for returning. *Rev. Stat. U. S.*, § 848. There is no provision of law for any other compensation, and time occupied in going to and returning from court cannot be computed at one dollar and fifty cents per day. *Carter v. Sweet*, 84 Fed. Rep. 16.

Expert Testimony. — Although it may be necessary in order to secure expert evidence to pay for the service which is required of the witness outside of the allowance prescribed by law for his attendance, it is well settled that the sum so paid cannot be included in the taxable disbursements of the action. *Randall v. Morning Journal Assoc.*,

(*Supm. Ct. App. T.*) 22 Misc. (N. Y.) 715.

Exemplifications and Copies of Papers. — By *Rev. Stat. U. S.*, § 983, "lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party shall be taxed by a judge or clerk of the court." *Pine River Logging Co. v. U. S.*, 186 U. S. 279.

Copies of Patents. — The sum paid to the commissioner of patents for copies of patents for insertion in the printed record is taxable, as it is part of the cost of printing the record. *Lee Injector Mfg. Co. v. Penberthy Injector Co.*, (C. C. A.) 109 Fed. Rep. 964.

Expense of Models in Patent Case. — The expense of making or procuring models in patent cases cannot be included among the taxable costs, nor can such models be properly classed as "exemplifications." *Kelly v. Springfield R. Co.*, 83 Fed. Rep. 183.

Expense of Appeal Bond. — The sum paid to a surety company for furnishing an appeal bond is not taxable. *Lee Injector Mfg. Co. v. Penberthy Injector Co.*, (C. C. A.) 109 Fed. Rep. 964.

242. 1. *Turner v. Butler*, 66 Mo. App. 380.

An item included in the verified memorandum of costs properly filed is *prima facie* correct, and the burden is upon the moving party to show that the charge is not a legal and proper one. *Meyer v. San Diego*, 132 Cal. 35.

3. *Stickney v. Berry*, (Idaho 1900) 62 Pac. Rep. 924; *State v. Dorland*, 106 Iowa 40; *Irwin v. Hanthorn*, 5 Pa. Dist. 671.

Attendance of Witnesses. — In *South Carolina* in order for the prevailing party to be able to tax the costs of the witnesses as disbursements he must show by affidavit that he has paid such costs. *Mitchell v. Barrs*, 64 S. Car. 197.

243. 1. In *Idaho* the prevailing party is not required to show in his cost bill each specific item paid to the clerk or sheriff, and it is sufficient to state the fees to each in a lump sum as one item. *Berry v. G. V. B. Mining Co.*, (Idaho 1897) 51 Pac. Rep. 746.

243. c. NOTICE OF TAXATION — (1) Failure to Give. — See note 2.

244. (2) Failure to Appear and Object. — See note 3.

245. d. TIME OF TAXATION. — See note 2.

246. XII. REVIEW OF TAXATION — 1. In Lower Court — a. PROPER PROCEDURE. — See note 2.

243. 2. Under the California Code a cost bill must be filed within five days after notice of the decision of the court, or, if the entry of judgment on a verdict be stayed, then before such entry is made. *Taylor v. McConigle*, 120 Cal. 123.

Code Civ. Pro. Cal., § 1033, which provides for motions to have the costs taxed by the court, does not specify what the notice must contain, nor upon what kind of evidence it shall be heard. *Senior v. Anderson*, 130 Cal. 290.

The universal practice has been to serve and file a written notice of the motion to tax the cost bill as the equivalent of filing a motion within five days, and on the day designated in the notice or the day to which the hearing shall have been postponed, to call up the notice and make the motion *viva voce*, a note of the motion being made by the clerk on his minutes. *Kishlar v. Southern Pac. R. Co.*, 134 Cal. 636; *Carpy v. Dowdell*, 129 Cal. 244.

In *Idaho* it is provided by statute that a memorandum of the costs must be filed within five days after the verdict or notice of the decision with the clerk and served upon the adverse party or his attorney. This statute is held to be mandatory, and failure to file the memorandum within the time required by the statute will be a ground for striking out the cost bill. *Stickney v. Berry*, (Idaho 1900) 62 Pac. Rep. 924.

244. 3. Ferguson v. Byers, 40 Oregon 468; *Hammer v. Downing*, 39 Oregon 504; *Colusa Parrot Min., etc., Co. v. Anaconda Copper-Min. Co.*, 104 Fed. Rep. 514.

Definiteness. — The objections to the cost bill ought to be sufficiently definite to notify the prevailing party wherein it is claimed the disputed items are unwarranted and to what extent they are unreasonable. *Ferguson v. Byers*, 40 Oregon 468.

Waiver. — The filing of a counter affidavit in response to objections to the cost bill waives the right to insist that such objections were not filed in time. *Hammer v. Downing*, 39 Oregon 504.

245. 2. Failure to file the cost bill within the time limited by statute operates as a waiver of costs. *State v. First Judicial Dist.*, (Nev. 1901) 66 Pac. Rep. 743.

In *Montana* the memorandum of costs must be filed within two days. *Parrott v. Morase*, 20 Mont. 61.

In *Oregon* the memorandum must be filed within five days in order that disbursements may be allowed by the clerk, but may be filed at any time after five days if a copy is also served upon the opposite party. *Rader v. Barr*, 37 Oregon 453.

In *Washington* ten days is the limit. *Matheson v. Ward*, 24 Wash. 407, holding that no excuse is furnished by the fact that counsel relied upon a party to supply him with the items for the bill of costs and the party neglected so to do.

246. 2. District of Columbia. — *Williams v. Getz*, 17 App. Cas. (D. C.) 388, in which case the court said: "To entertain appeals in such cases would not only interfere with the finality of judgments, but would open the door to abuse, as means of delay, in the execution of judgments."

Iowa. — *Fisher v. Burlington, etc., R. Co.*, 104 Iowa 588.

Missouri. — *State v. Hollenbeck*, 68 Mo. App. 366; *Turner v. Butler*, 66 Mo. App. 380.

Nebraska. — *Citizens' Nat. Bank v. Gregg*, 53 Neb. 760; *Yankton, etc., R. Co. v. State*, 49 Neb. 272.

South Dakota. — *Sorenson v. Donahoe*, 12 S. Dak. 204; *American Banking Co. v. Lynch*, 13 S. Dak. 34.

Tennessee. — *Trout v. Alabama G. S. R. Co.*, 97 Tenn. 364.

Texas. — *Missouri, etc., R. Co. v. Crane*, (Tex. Civ. App. 1895) 32 S. W. Rep. 11; *Unknown Heirs v. Morgan*, 18 Tex. Civ. App. 627.

United States. — *Tyler Min. Co. v. Sweeney*, (C. C. A.) 79 Fed. Rep. 277; *City Bank v. Hunter*, 152 U. S. 512.

Prerequisite. — A party cannot enjoin the enforcement of a fee bill until he has paid or tendered all the legal costs chargeable against him. *Citizens' Nat. Bank v. Gregg*, 53 Neb. 760.

- 247.** See note 1.
248. *b.* TIME OF MOVING FOR RETAXATION — (1) *In General.* — See notes 2, 3.
249. (2) *After Appeal.* — See note 2.
250. *c.* WHAT MOTION SHOULD SHOW. — See note 2.
Notice of Retaxation. — See note 4.
251. *d.* ACTION OF COURT. — See note 1.
2. Upon Appeal — *a.* FROM WHAT APPEAL MAY BE TAKEN. — See note 3.

247. 1. *Ainley v. American Mut. F. Ins. Co.*, 113 Iowa 709 [*citing* 5 ENCYC. OF PL. AND PR. 247]; *Missouri, etc., R. Co. v. Crane*, (Tex. Civ. App. 1895) 32 S. W. Rep. 11; *Unknown Heirs v. Morgan*, 18 Tex. Civ. App. 627.

248. 2. *Chicago City R. Co. v. Burke*, 102 Ill. App. 661 [*citing* 5 ENCYC. OF PL. AND PR. 248]; *Fisher v. Burlington, etc., R. Co.*, 104 Iowa 588, in which case the court said that no hard and fast rule should be adopted, "but each case should be determined upon its own peculiar facts."

3. *Olson v. Lamb*, 61 Neb. 484.

A motion to retax costs at a term after the judgment becomes final cannot be used to review the amount of a referee's fee allowed at an earlier term. *Schawacker v. McLaughlin*, 139 Mo. 333.

Where an objection was made to the jurisdiction of the trial court to hear a motion because the judgment had been rendered at a previous term the court held that, inasmuch as the motion to retax did not seek to affect the judgment, but to correct errors of an officer of the court committed in enforcing the judgment, the motion was proper. *McLennan County v. Graves*, 94 Tex. 635. See also *Berberet v. Berberet*, 136 Mo. 671, holding that costs may be retaxed at a subsequent term, because the subsequent retaxation is not a revision or alteration of the judgment, but is a correcting of a ministerial act of the clerk; but if an allowance calls for judicial action, the court must act before the adjournment of the term at which final judgment was rendered; *Fisher v. Burlington, etc., R. Co.*, 104 Iowa 588, wherein a motion was not filed until the second term after judgment, and the court said: "As the legislature has not seen fit to place a limit upon the time within which such motions shall be

filed, nothing but the doctrine of laches or equitable limitation seems to apply."

In *Illinois* the motion may be made upon notice after the close of the term at which judgment was rendered. *Chicago City R. Co. v. Burke*, 102 Ill. App. 661.

249. 2. See *Chicago City R. Co. v. Burke*, 102 Ill. App. 661, holding that the motion may be made after appeal.

After Affirmance the motion comes too late. *Gulf, etc., R. Co. v. Jagoe*, (Tex. Civ. App. 1897) 40 S. W. Rep. 187.

250. 2. *Williams v. Getz*, 17 App. Cas. (D. C.) 388; *Summerhill v. Darrow*, (Tex. 1901) 62 S. W. Rep. 1054.

The court is not bound to order a retaxation unless for good and sufficient reason. *Thornton v. McLendon*, 99 Ga. 590.

Specification of Items. — *Williams v. Getz*, 17 App. Cas. (D. C.) 388.

4. *Senior v. Anderson*, 130 Cal. 290; *Chicago City R. Co. v. Burke*, 102 Ill. App. 661; *Laughery Turnpike Co. v. McCreary*, 147 Ind. 526.

In *Missouri* the statute does not require notice of such application. Where the term of office of the clerk taxing the disputed costs has not expired and he is still an officer of the court to which the application for retaxation is made, he cannot be heard to assert that he had no notice of the proceeding, since it is he who files the application and enters the judgment thereof. *State v. Hollenbeck*, 68 Mo. App. 366.

251. 1. *Presumption.* — Every intendment is in favor of a proper taxation of costs, in the absence of proof to the contrary. *Chicago City R. Co. v. Burke*, 102 Ill. App. 661.

3. *Nebraska.* — *Yankton, etc., R. Co. v. State*, 49 Neb. 272.

Tennessee. — *Trout v. Alabama G. S. R. Co.*, 97 Tenn. 364.

United States. — *Tyler Min. Co. v. Sweeney*, (C. C. A.) 79 Fed. Rep. 277.

252. See note 1.

253. XIII. PAYMENT AND COLLECTION — 1. From Whom to Be Collected. — See note 3.

254. After Award by Court. — See note 1.

256. 4. Remedies for Collection — b. BY EXECUTION — (1) In General. — See note 3.

261. 5. Payment as Condition — a. OF PROSECUTION OF SECOND SUIT — (1) In General. — See note 1.

252. 1. In California, where the amount of costs allowed is less than three hundred dollars, the action of the trial court in the matter is not reviewable on appeal. *Foley v. California Horseshoe Co.*, 115 Cal. 184.

In New York an order directing a re-taxation is appealable under Code Civ. Pro. N. Y., § 3189. *Rapid Safety Filter Co. v. Wyckoff*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 429.

253. 3. Castle v. Roach, 11 Ohio Dec. 358, citing 5 ENCYC. OF PL. AND PR. 253.

In the First Instance. — See *Adams v. Evans*, 74 Miss. 886.

254. 1. Castle v. Roach, 11 Ohio Dec. 358, citing 5 ENCYC. OF PL. AND PR. 254.

Texas Statute. — Rev. Stat. Tex., art. 2491, provides: "Each party to a suit shall be liable for all costs incurred by him, and in case the costs cannot be collected of the party against whom the same have been adjudged, execution may issue against any party in such suit for the amount of costs incurred by such party, but no more." It is held that this article contemplates that the party to whom costs are due shall first use proper diligence to collect them from the party against whom they are adjudged before they can be demanded of the opposite party who incurred them, but the insolvency of the party against whom costs are adjudged might excuse the failure to make an effort to collect from him. *Beacham v. Wither*, 25 Tex. Civ. App. 575.

256. 3. Priority. — An execution for costs stands upon the same footing as any other execution, and cannot be levied upon property which is embraced in a security deed of older date than the judgment on which the execution was issued unless there has been a judgment or tender of the amount owed to the holder of the security deed in the manner provided by law. *Jordan v. Central City L. & T. Assoc.*, 108 Ga. 495

Interlocutory Costs. — Code Civ. Pro. N. Y., § 779, provides that where costs of a motion directed by an order to be paid are not paid, an execution against the personal property only may be issued by any party or person to whom such costs are made payable by such order. *Bernheimer v. Hartmayer*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 346.

261. 1. Hewitt v. Steele, 136 Mo. 327, citing 5 ENCYC. OF PL. AND PR. 261. See also the following cases;

Alabama. — *Ex p. Street*, 106 Ala. 102.

District of Columbia. — *Williams v. Getz*, 17 App. Cas. (D. C.) 388.

Indiana. — *Hipes v. Griner*, 28 Ind. App. 160.

New York. — *Patchen v. Delaware, etc.*, Canal Co., 62 N. Y. App. Div. 543.

United States. — *Kimble v. Western Union Tel. Co.*, 99 Fed. Rep. 892.

This rule does not rest upon statutory authority, but has been evolved with the growth of English and American jurisprudence. *Schwede v. Hemrich*, 29 Wash. 124.

The nonpayment of costs never impairs the defensive rights of a party. *Farber v. Flauman*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 627.

An order requiring payment of costs of a previous suit does not constitute a final judgment from which an appeal will lie. *Trogdon v. Brinegar*, 26 Ind. App. 441.

Manner of Taking Objection. — The fact that the costs of a former action had not been paid is not a defense, but can be brought to the attention of the court on a motion for an order to stay proceedings. *Patchen v. Delaware, etc.*, Canal Co., 62 N. Y. App. Div. 543.

The stay can be at once terminated by the payment of the costs. *Moore v. Moore*, 44 N. Y. App. Div. 253.

Object of Stay. — The stay mentioned in Code Civ. Pro. N. Y., § 779, is in-

262. See note 1.

As Reason of Rule. — See notes 2, 3.

263. *b.* OF GRANTING RELIEF OR FAVORS. — See note 9.

264. 6. Set-off of Costs. — See note 1.

tended only to prevent an onward movement in the action by the party who owes costs of a motion. *Farber v. Flauman*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 627.

Motion Costs. — On failure to pay motion costs the proceedings will be stayed until payment thereof. *Robinson v. Klein*, (C. Pl. Spec. T.) 31 Abb. N. Cas. (N. Y.) 481.

New Cause of Action. — Both actions must be for substantially the same cause. Where the first action was in tort and the second is on a contract not growing out of or in any wise connected with the tort, a stay will not be granted. *Southern R. Co. v. Raney*, 117 Ala. 270.

Plaintiff in Prison When Action Brought. — After a nonsuit in trespass the court will stay proceedings in a second action between the same parties for the same cause until the costs of the nonsuit are paid, notwithstanding the plaintiff is a prisoner at the time of bringing the second action, and sues *in forma pauperis*. *Williams v. Getz*, 17 App. Cas (D. C.) 388.

Jurisdiction. — The fact that costs of a former action between the same parties and for the same subject-matter have not been paid does not deprive the court of jurisdiction when set in motion by the party resting under the stay. The only effect is to render the proceedings irregular, and when the matter is brought to the attention of the court the party violating the stay will be dealt with as may be proper. *Patchen v. Delaware, etc., Canal Co.*, 62 N. Y. App. Div. 543.

Waiver. — Code Civ. Pro. N. Y., § 779, provides that all proceedings on the part of a party required to pay the costs of a motion, except to review

or vacate the order, are stayed without further direction of the court until the payment thereof, but the adverse party may, at his election, waive the stay, etc. A defendant waives the stay by serving notice of trial, subsequent to the order granting costs, and also by accepting the notice of the trial of the plaintiff. *Reeder v. Lockwood*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 531.

A stay is not waived if the defendant serves an answer to the amended complaint which was served before the stay began to operate. *Robinson v. Klein*, (C. Pl. Spec. T.) 31 Abb. N. Cas. (N. Y.) 481.

262. 1. *Ex p. McNulty*, 117 Ala. 237, citing 5 ENCYC. OF PL. AND PR. 260 [261].

2. *Hewitt v. Steele*, 136 Mo. 327.

Where the slightest evidence is shown to the contrary this presumption will not exist. *Citizens' St. R. Co. v. Shepherd*, (Ind. 1901) 59 N. E. Rep. 349; *Hipes v. Griner*, 28 Ind. App. 160.

3. *Trogdon v. Brinegar*, 26 Ind. App. 441; *Patchen v. Delaware, etc., Canal Co.*, 62 N. Y. App. Div. 543.

263. 9. *Barry v. Winkle*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 171, wherein it was said that if the party accepts the favor he takes it *cum onere* and may be held for the costs on the theory of estoppel.

264. 1. A party has not an absolute right to have costs awarded in his favor set off against costs awarded against him during the progress of litigation. Applications of this character are addressed to the equitable discretion of the court and must be determined in view of all the equities involved. *Matter of Havemeyer*, 27 N. Y. App. Div. 123.

COUNTERFEITING.

267. I. JURISDICTION. — See note 3.

271. IV. PASSING COUNTERFEIT COIN — 1. Indictment Generally — Currency of Coin. — See note 3.

275. VII. PASSING COUNTERFEIT BANKNOTES — 1. Generally. — See note 5.

279. IX. HAVING COUNTERFEIT BANKNOTES IN POSSESSION — 1. Generally. — See note 2.

292. XI. RULES OF GENERAL APPLICATION — 4. Joinder of Counts. — See note 1.

293. 5. Verdict — Degrees of Crime. — See note 4.

267. 3. *Stroube v. State*, 40 Tex. Crim. 581.

271. 3. In *Waller v. Com.*, 97 Ky. 509, it was held that an indictment under Stat. Ky. (1894), § 1181, which provides for the punishment of any person who shall "forge or counterfeit any gold, silver, or other coin which is or hereafter shall be passing as current in this state," was fatally defective in not averring that such coin was in circulation and in failing to describe the coin otherwise than as a ten-dollar gold coin.

275. 5. An indictment for Passing a Confederate Bill does not charge any offense under Rev. Stat. U. S., § 5430, making it a crime to have in possession "any obligation or other security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same." *U. S. v. Barrett*, 111 Fed. Rep. 369.

279. 2. *Excuse for Not Setting Out Notes.* — Under Rev. Stat. U. S., §§ 5431, 5457, an indictment which alleges, as reasons for not setting out a more particular description of the notes and copies thereof, that the notes were not in possession of the grand jurors, and that they have no knowledge or information as to the whereabouts of such notes, or under whose control they are, or that they were returned to the defendant before the finding of the indictment, or destroyed, is sufficient. And an allegation that the notes were United States notes of certain denomination, in connection with allegations of time and place of the

alleged violation of law and of the name of the person upon whom the notes were passed, is a sufficient description of the notes in such case. *U. S. v. Howell*, 64 Fed. Rep. 110.

Varianoe. — An indictment under Rev. Stat. U. S., § 5430, for unlawfully having in possession an obligation and security engraved and printed after the similitude of an obligation and security of the United States, with the intent to sell it, is defective when the obligation described therein is shown by such description to be a bill issued by a bank. *U. S. v. Pitts*, 112 Fed. Rep. 522. See also *U. S. v. Conners*, 111 Fed. Rep. 734.

292. 1. An indictment for unlawfully having in possession counterfeit coins may contain a separate count for every coin of a different denomination found in the possession of the defendant, each count alleging the denomination of the coin to which it refers. *U. S. v. Howell*, 65 Fed. Rep. 402.

293. 4. *Unnecessary Findings.* — An indictment charged the defendant in three counts, in the first with having counterfeit coin in his possession with intent to defraud, in the second with having attempted to pass such coin, and in the third for passing such coin. The verdict read: "The jury finds the defendant guilty in the first count for having in possession counterfeit minor coin. Not guilty as to second and third counts." It was held that all of this verdict except the words "the jury finds the defendant guilty in the first count" was surplusage. *Statler v. U. S.*, 157 U. S. 277.

COUNTIES.

294. 1. ACTIONS AGAINST COUNTIES — 1. Jurisdiction. — See note 1.

295. 2. Remedies for Enforcing Claims. — See notes 1, 2.

294. 1. Indiana. — On a change of venue in a criminal case, the court to which the cause is sent has no jurisdiction to call in the commissioners of such county and adjudicate claims against it for the payment of fees of counsel, appointed by the court of the county from which the change was taken to assist in the trial of the case. *Carroll County v. Pollard*, 17 Ind. App. 470.

Iowa. — In *Polk County v. Sherman*, 99 Iowa 60, it was held that a District Court has no original jurisdiction to correct an error in the assessment of property.

Nebraska. — The District Court has derivative but not original jurisdiction of an action on a claim against a county arising *ex contractu*. *Shepard v. Easterling*, 61 Neb. 882.

New York. — Where a statute authorizes a county to make contracts and to incur indebtedness, it is held that it may be sued in another state. *Van Horn v. Kittitas County*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 333, affirmed 36 N. Y. App. Div. 623.

Raising Question on Appeal. — Where it affirmatively appears that the Circuit Court has no jurisdiction of a case appealed from the board of county commissioners, the question of such jurisdiction may be raised at any stage of the proceedings. *Huntington County v. Beaver*, 156 Ind. 450.

295. 1. Alabama. — *Loonev v. Jackson County*, 105 Ala. 597, wherein it was held that an acceptance of a sum allowed on a claim by the board of commissioners bars an action on the claim presented.

Colorado. — In *Merwin v. Boulder County*, 29 Colo. 169, it was held that the allowance of fees under Sess. Laws Colo. (1891), pp. 213, 214, § 8, providing that commissioners may disallow

fees or costs of district attorneys and others in any criminal case before a justice of the peace, is wholly discretionary and not subject to review.

Idaho. — *Freemont County v. Brandon*, (Idaho 1899) 56 Pac. Rep. 264.

One cannot accept parts of an amount which the board of commissioners may allow and appeal from the action of the board in disallowing other portions thereof. *Clyne v. Bingham County*, (Idaho 1900) 60 Pac. Rep. 76.

Indiana. — In *Myers v. Gibson*, 152 Ind. 500, it was held that after a claim has once been acted upon by a board of commissioners such board has no jurisdiction to act upon the same claim at a subsequent session.

An appeal will not lie from a decision of the board of commissioners denying an application to correct or change an annual settlement of a county treasurer. *Huntington County v. Beaver*, 156 Ind. 450.

The allowance of a claim against a county by its board of commissioners is not conclusive, and a county auditor may question its legality where it is sought to compel him to order the claim to be paid. *State v. Perry*, (Ind. 1902) 65 N. E. Rep. 528.

Missouri. — *Scott County v. Leftwich*, 145 Mo. 26, wherein it was held that the County Court had jurisdiction to examine the county clerk's quarterly reports; that it acted in a ministerial capacity in so doing; and that an appeal would not lie from such action.

Montana. — In *Twohy v. Granite County*, 17 Mont. 461, it was held that where there are several items in a claim a taxpayer may appeal from a part of the allowance.

Nebraska. — *Taylor v. Davey*, 55 Neb. 153; *Trites v. Hitchcock County*, 53 Neb. 79; *Gage County v. Hill*, 52

295. 3. Parties. — See note 3.

296. 4. Declaration or Complaint — *a.* ALLEGATION OF PRESENTMENT OF CLAIM — (1) *Generally.* — See notes 2, 3.

Neb. 444; *State v. Vincent*, 46 Neb. 408; *Sioux County v. Jameson*, 43 Neb. 265.

Where an order disallowing a claim against a county has been reconsidered, such order will not operate as an adjudication of the claim. *Dean v. Saunders County*, 55 Neb. 759.

The approval by the county board of the report of a county officer made in compliance with Comp. Stat. Neb. (1899), c. 28, § 43, is not a judicial order and is not appealable. *Shepard v. Easterling*, 61 Neb. 882.

New Hampshire. — *Plymouth v. Grafton County*, 68 N. H. 361.

New York. — *Foy v. Westchester County*, 168 N. Y. 180; *Staten Island Bank v. New York*, 68 N. Y. App. Div. 231; *Adams v. Wheatfield*, 46 N. Y. App. Div. 466.

Ohio. — *State v. Franklin County*, 5 Ohio Dec. 579; *Stewart v. Logan County*, 1 Ohio Cir. Dec. 404.

Utah. — *Civic Federation v. Salt Lake County*, 22 Utah 6.

295. 2. Arbios *v. San Bernardino County*, 110 Cal. 553; *Henry County v. Gillies*, 138 Ind. 667; *Jackson County v. Nichols*, 12 Ind. App. 315; *Greeley v. Cascade County*, 22 Mont. 580; *Trites v. Hitchcock County*, 53 Neb. 79.

In *Myers v. Gibson*, 152 Ind. 500, it was held that where county commissioners had jurisdiction to act on a claim, on appeal the allowance is vacated and the cause stands for trial *de novo*. But where the commissioners did not have jurisdiction to act on the merits of the claim, on an appeal from the allowance thereof the Circuit Court will not have jurisdiction to render judgment against the county.

In *Sterling v. Cumberland County*, 91 Me. 316, an action by an officer for fees alleged to be due from the county, it was held that the decision of the county commissioners as to whether such fees are allowable or not is conclusive; that no appeal lies therefrom; and that the plaintiff cannot create one by suit to recover his claim.

3. Georgia. — *Conyers v. Bartow County*, 116 Ga. 101.

Indiana. — *Heritage v. Bronnenberg*, 25 Ind. App. 602; *Robbins v. Marshall County*, 24 Ind. App. 341; *De Kalb*

County v. Auburn Foundry, etc., Works, 14 Ind. App. 214.

Nebraska. — *Shepard v. Easterling*, 61 Neb. 882.

New York. — *Erhard v. Kings County*, (Supm. Ct. Spec. T.) 36 N. Y. Supp. 656.

Ohio. — *Summers v. Hamilton County*, 5 Ohio Dec. 553.

Texas. — In *Jeff Davis County v. City Nat. Bank*, 22 Tex. Civ. App. 157, it was held that where a bank sued a parent county in the District Court for interest due on county bonds for which two other counties had been created, such counties would be liable over to the parent county for a *pro rata* of the interest, and that such court had jurisdiction over them to settle the entire controversy in one action.

In *Morath v. Gorham*, 11 Wash. 577, it was held that under Laws Wash. (1893), p. 292 (Ball. Annot. Codes & Stat. Wash. 1897, § 359), providing that "any person may appeal from any decision or order of the board of county commissioners to the Superior Court of the proper county," persons interested in a claim who feel themselves aggrieved by the action of the commissioners in the allowance of a claim may appeal, but that taxpayers generally do not have such right.

296. 2. Kansas. — *Skinner v. Cowley County*, 63 Kan. 557; *Finney County v. Gray County*, 8 Kan. App. 745.

In *Texas* it has been held that in an action of trespass to try title against a county, the complaint need not aver that the claim had been presented to the commissioners' court and disallowed, as required by Rev. Stat. Tex., art. 790. *Bowie County v. Powell*, (Tex. Civ. App. 1901) 66 S. W. Rep. 237.

3. Judgment by Default — *Recital.* — In *Washington County v. Porter*, 128 Ala. 278, where the complaint in an action for services rendered to the county averred that the claim sought to be enforced was itemized, verified, and presented to the county commissioners, and was rejected by them, as required by Civ. Code Ala., § 13, it was held that where judgment by default is rendered on such claim, it need

297. (2) *Itemization and Verification.* — See note 2.

298. b. OTHER ALLEGATIONS. — See note 1.

not recite that proof was made that the claim had been presented as prescribed by statute.

297. 2. *Iowa.* — Where the statement of a claim is properly verified and filed in compliance with the statute, the fact that it includes a claim not allowable will not invalidate the statement. *Epeneter v. Montgomery County*, 98 Iowa 159.

What Sufficient Allegation of Verification. — In an action by a probate judge to recover compensation for recopying a record book in his office, it was held that an averment that the claim was "verified as required by law," or "duly verified," is equivalent to an allegation that it was sworn to. *Washington County v. Porter*, 128 Ala. 278.

298. 1. *Injuries Caused by Defective Bridge.* — In an action for injuries caused by a defective bridge it is unnecessary to name the stream over which the bridge was constructed, and an allegation that the bridge constituted part of the public highway leading into the city sufficiently shows that the bridge was not within the city limits; an allegation that the bridge was one which the appellant county was authorized to construct sufficiently shows that it was the duty of the appellant to maintain it in a reasonably safe condition for public travel; and an allegation that the appellant constructed the bridge sufficiently shows that the bridge was not one over which the township had control. Where it appears that the bridge was over a stream, it is not necessary to allege that it was over a watercourse. *Jackson County v. Nichols*, 139 Ind. 611.

In an action for injuries received from a defective bridge, the fact that additional injuries to those set out in the claim presented to the board of supervisors are alleged in the complaint, and that greater damages are claimed in the complaint than in such claim, does not show a different cause of action from the one presented to the board. *Homan v. Franklin County*, 98 Iowa 692.

Demurrer or Motion to Make More Specific. — In such an action the objection that the complaint did not name the driver of the team behind which the plaintiff was riding at the time of

the injury must be raised by demurrer or by motion to make more specific. *Jackson County v. Nichols*, 139 Ind. 611.

For Public Printing. — In an action against a county for printing election ballots, an averment in the complaint that the claim was presented for payment and that subsequently part of it was paid is not demurrable on the ground that it created a presumption that the payment was made or accepted in full of the claim. *Flagg v. Marion County*, 31 Oregon 18.

For Constructing Bridge. — In an action against a county for labor and material worth more than one hundred dollars and furnished in the construction of a bridge, the petition must allege that the bridge was situated in the county where the contract was made; that the authorities advertised for bids and let the contract to the lowest bidder; and that there was money on hand for such purpose equal to the amount agreed to be paid for such labor and material, as provided in Comp. Stat. Neb. (1899), c. 78, §§ 83, 84. *Tullock v. Webster County*, 46 Neb. 211.

Action for Work Done. — In an action against the board of commissioners of a county for labor and material furnished in making repairs in the court house and jail, the complaint need not aver that the board of commissioners was in session at the time the contracts for such labor and material were made. *DeKalb County v. Auburn Foundry, etc.*, Works, 14 Ind. App. 214.

For Services as Fish and Game Warden. — Stat. Wis. (1898), § 677, providing that "every person * * * having any such claim against any county shall make a statement thereof in writing, setting forth the nature of his claim and the facts upon which it is founded, and if the claim be an account the items thereof separately, the nature of each and the time expended in the performance of any service charged for," is mandatory and must be substantially complied with. An account for services as local fish and game warden, containing numerous items consisting merely of dates and names of persons, without the description of the nature of the services

299. 5. Plea or Answer. — See note 1.

charged for, is not a statement in compliance with the statute and is insufficient as a complaint in the Circuit Court upon appeal for a disallowance of the claim. *Miller v. Crawford County*, 106 Wis. 210.

Medical Services for Insolvent Prisoner. — In an action for medical services rendered to an insolvent prisoner, the complaint must allege that he was in jail at the time and that he was unable to provide such services for himself. *Malone v. Escambia County*, 116 Ala. 214.

Action on Contract. — Under 1 Code Ga., § 343, in an action on a contract made between the plaintiff and the commissioners of roads and revenues of the county, the complaint must aver that the contract was entered on the minutes of said board of commissioners. *Milburn v. Glynn County*, 109 Ga. 473.

Where the petition alleged that the plaintiff was unable to complete the contract on account of the collapse of defective casing furnished by the defendant county, it was held that the allegation that the plaintiff offered to drill a new well without profit to him was not necessary to the cause of action and might be stricken out on motion, and that the allegation that the contract was entered into by the county, in connection with the recital in the contract that the county made it by its duly authorized agent, was sufficient to show the authority under which the agent acted. In such an action a count which alleges that a certain sum is due for extra work caused by and on account of improper casing furnished by the plaintiff states a good cause of action. *McPherson v. San Joaquin County*, (Cal. 1899) 56 Pac. Rep. 802.

For Expense of Officer in Transporting Prisoner. — An action upon an account against a county is not open to general demurrer if one or more of the items of such account are for the expense of the arresting officer in carrying a prisoner to the county where the alleged offense was committed. *Harris County v. Brady*, 115 Ga. 767.

Action to Have Special Fund Applied to Payment of Bonds. — In an action to have a special tax fund applied to the payment of bonds which were given

in settlement of debts incurred by a county, a complaint alleging that the orders were valid and overdue is sufficient without specially averring that the orders were given for necessary expenses of the county or by the consent of the majority of the qualified voters. *McCless v. Meekins*, 117 N. Car. 34.

Injuries Done by Mob. — In *Champaign County v. Church*, 62 Ohio St. 318, it was held that a petition alleging that the plaintiff and his fellow workmen were assaulted by a collection of individuals who had assembled for an unlawful purpose, and who tried to exercise correctional power over the plaintiff and his fellows without any authority of law, and that thereby the plaintiff suffered lynching at the hands of the mob, was not rendered bad by the allegations that the plaintiff was struck by a heavy glass insulator thrown at him by one of the mob and was shot through the leg by leaden bullets fired from a revolver in the hands of some of the mob.

Pleading and Proof. — In an action against a county for services rendered, where the complaint alleged that "the plaintiffs at the request of the coroner" performed the services, and the plaintiff testified that he procured the assistance of three other men and told them that he would "put the bill in to the county" for their services, and as soon as it was allowed they would get their money, it was held that the plaintiff could not recover for the services of the other three. *Shearer v. Hutchinson County*, 10 S. Dak. 9.

Demurrer. — In *Arkansas* a demurrer does not lie to a claim presented to the county for allowance. *Wiegel v. Pulaski County*, 61 Ark. 74.

In *Colorado* an averment that the board adjourned and refused to allow the claims does not render the complaint demurrable. *Rio Grande County v. Bloom*, 14 Colo. App. 187.

299. 1. Action on Contract Made by Judge. — In an action against a county for services rendered at the request of the county judge, an answer denying that the county made the contract for such services raises the issue as to the authority of the county judge to make such contract for the county. *Holtzclaw v. Hamilton County*, 101 Tenn. 338.

300. 6. Method of Enforcing Judgments. — See note 2.

II. ACTIONS BY COUNTIES — 1. Parties. — See note 3.

301. 2. Allegations — Statement of Facts Constituting Cause of Action. — See note 3.

300. 2. Mandamus. — Where judgment has been rendered in favor of a justice of the peace for the balance of salary due to him, mandamus will lie to compel the county auditor to issue a warrant for the payment of the judgment. *State v. Headlee*, 18 Wash. 220.

3. Alabama. — *Jackson County v. Derrick*, 117 Ala. 348.

California. — *Sutter County v. McGriff*, 130 Cal. 124.

Colorado. — *Arapahoe County v. McIntire*, 23 Colo. 137.

Georgia. — *Talbot County v. Mansfield*, 115 Ga. 766; *Jackson v. Dougherty County*, 99 Ga. 185.

Illinois. — *Hardin v. Sangamon County*, 71 Ill. App. 103.

Indiana. — *Lane v. State*, 14 Ind. App. 573.

Iowa. — *Polk County v. Sherman*, 99 Iowa 60.

Kentucky. — *Daviess County v. Daviess Gravel Road Co.*, (Ky. 1901) 63 S. W. Rep. 752; *Com. v. Tilton*, (Ky. 1899) 49 S. W. Rep. 2.

Nebraska. — *Taylor v. Davey*, 55 Neb. 153; *Stoner v. Keith County*, 48 Neb. 279.

North Carolina. — *Montgomery County v. Fry*, 127 N. Car. 258; *Vaughn v. Forsyth County*, 118 N. Car. 636.

Ohio. — *Jones v. Lucas County*, 57 Ohio St. 189.

South Dakota. — *State v. Welbes*, 11 S. Dak. 86; *Custer County v. Albien*, 7 S. Dak. 482.

Texas. — *Day v. Johnson*, (Tex. Civ. App. 1895) 33 S. W. Rep. 676; *Johnson v. Johnson*, (Tex. Civ. App. 1895) 33 S. W. Rep. 682.

Washington. — *State v. Headlee*, 18 Wash. 220.

301. 3. Wrongful Allowance of Claims. — A Complaint in an action by a county to recover money wrongfully allowed to a county officer need not allege specific acts of fraud or deception. *Freemont County v. Brandon*, (Idaho 1899) 56 Pac. Rep. 264.

Answer. — In an action to recover for claims wrongfully allowed to the defendant as auditor of a county, an answer which states that he presented the claims in an itemized and verified

account, that the claims were allowed and the money paid to him in good faith, that the orders of the board allowing such claims were not appealed from, that said orders were full, final, and complete adjudications of all the matters alleged in the complaint, and that the plaintiff is thereby estopped from recovering anything in this action, is demurrable, since the allowance of such claims is not *res judicata* and does not bind the county. *Huntington County v. Heaston*, 144 Ind. 583.

Action Against Auditor for Money Unlawfully Received. — In an action against a county auditor for money unlawfully received by him, the complaint must aver that the claim was disallowed by the commissioners or that the allowance was illegal on the ground of fraud or mistake. *State v. Griggsby*, 8 Ohio Dec. 616.

Demurrer. — Where the sufficiency of the complaint in such an action is not questioned by a motion to make more definite, a demurrer properly presents the question. *State v. Griggsby*, 8 Ohio Dec. 616.

Petition for Injunction. — A complaint by a taxpayer alleging that a certain contract entered into between the county of his residence and another county, for the construction and future operation of a ferry between the two counties, is unlawful and in excess of the power of the board of supervisors, and that said board will proceed and compel the construction of said ferry and will continue to operate it and to pay the cost and the expenses thereof, unless restrained from so doing, is not demurrable. *Johnston v. Sacramento County*, 137 Cal. 204.

Action on Contractor's Bond. — In an action on a contractor's bond for money due to laborers and materialmen for labor and material furnished in the construction of a free gravel road, it was held that the complaint was sufficiently specific as to the necessary items, said items being based on the orders of indebtedness. *Lane v. State*, 14 Ind. App. 573.

Action on Bond of Treasurer. — In an action on the bond of a county treasurer for money unlawfully paid out by

him, an allegation that the money was paid on a warrant for the payment of a claim for services in assisting the recorder and auditor "in the performance of the duties of his office" shows the illegality of the claim, and under the *California* County Government Act, § 114, raises the presumption that the warrants distinctly specify the liability for which they are alleged to have been drawn. *Ventura County v. Clay*,

114 Cal. 242. See also *Carver County v. Bongard*, 82 Minn. 431.

Amendment of Bill. — Where the bill in a suit by a county upon the bond of its former treasurer for the misappropriation of a certain fund is defective because it seeks an accounting of that fund only, and not of all the accounts of the treasurer, it may be amended. *Jackson County v. Derrick*,

117 Ala. 348.

COUNTS, PARAGRAPHS, AND SEPARATE STATEMENTS.

303. I. DEFINITION. — See note 1.

II. PARAGRAPHS UNDER CODE. — See note 2.

304. Several Counts Treated as One. — See note 1.

305. III WHAT REQUIRES SEPARATE COUNTS — 1. Generally.
— See notes 2, 3.

303. 1. Gilmore v. Christ Hospital, (N. J. 1902) 52 Atl. Rep. 241.

Synonymous with Declaration.— Where two counts are in the same declaration they are as distinct as if they were in separate declarations. *Gilmore v. Christ Hospital*, (N. J. 1902) 52 Atl. Rep. 241.

2. Bailey v. Mosher, (C. C. A.) 63 Fed. Rep. 488.

"The term 'paragraph,' as used in code pleading, means an entire or integral statement of a cause of action.

* * * It may embrace one sentence or many sentences; but whether one or many, it constitutes a statement of a single cause of action." *Bailey v. Mosher*, (C. C. A.) 63 Fed. Rep. 488.

In *Connecticut* the Practice Act resembles the English Judicature Act and follows the practice in equity. Each party is to state his case in plain and concise terms and to divide it into short paragraphs. *Botsford v. Wallace*, 72 Conn. 195. See also *Hill v. Fair Haven, etc.*, R. Co., 75 Conn. 177, in which case the court said that one cannot demur to a paragraph in a complaint, or a portion of a paragraph, for "insufficiency," because "ordinarily it is only in those rare cases when a pleading consists of one paragraph, or one essential paragraph, that it can be said of a single paragraph that it is an insufficient statement of a cause of action. * * * Paragraphs are rarely intended to be sufficient in that sense. They are only convenient subdivisions of that larger and more comprehensive statement which the rules of good pleading require to embody the essential allegations of fact which lead to a legal conclusion sufficient for the purpose of the pleader."

In *Georgia* paragraphs are subdivisions of counts, and counts should each set forth a complete cause of action in distinct and orderly paragraphs, numbered consecutively. *Pate v. Allison*, 114 Ga. 651; *Cooper v. Portner Brewing Co.*, 112 Ga. 894.

In *Kentucky* the method of dividing a petition into paragraphs, where only one cause of action is set out, is not required under the code of practice. *Mitchell v. New Farmers' Bank's Trustee*, (Ky. 1901) 60 S. W. Rep. 375.

304. 1. Mitchell v. New Farmers' Bank's Trustee, (Ky. 1901) 60 S. W. Rep. 375.

The statement of facts in separately numbered paragraphs alleged by mistake as separate causes of action does not vitiate the pleading if but a single cause of action or defense is in fact pleaded. *Waite v. Sabel*, 44 N. Y. App. Div. 634.

Where the intent of the pleader and the meaning of the pleading as a whole are apparent, the complaint will be sustained. *Mitchell v. New Farmers' Bank's Trustee*, (Ky. 1901) 60 S. W. Rep. 375.

305. 2. Parmer v. Hartford Dredging Co., 73 Conn. 182; *Sims v. Chicago, etc.*, R. Co., 83 Mo. App. 246; *Gilmore v. Christ Hospital*, (N. J. 1902) 52 Atl. Rep. 241.

3. Cooper v. Portner Brewing Co., 112 Ga. 894; *Gilmore v. Christ Hospital*, (N. J. 1902) 52 Atl. Rep. 241.

In *Connecticut* different and distinct causes of action, if joined in one suit, should be set out in separate counts, and in such case matters of defense appropriate to one of them only are to be separately pleaded. *Botsford v. Wallace*, 72 Conn. 195.

310. 6. Several Grounds. — See note 1.

319. 11. Consistency. — See notes 1, 2.

IV. METHOD OF SEPARATING. — See note 3.

320. V. COMPLETENESS OF EACH COUNT. — See note 1.

310. 1. Gunder v. Tibbits, 153 Ind. 591, *citing* 5 ENCYC. OF PL. AND PR. 309. See also *Boyce v. Odell Commission Co.*, 107 Fed. Rep. 58, in which case the court said: "It is oftentimes a nice and difficult question to determine when a given state of facts may be pleaded in a single paragraph as a single cause of action, and when those facts must be set out in separate paragraphs."

One Continuing Act. — All parts of one continuous wrong, with the damages accruing from each part, constitute but one entire cause of action, which may properly be stated in one count. *Gunder v. Tibbits*, 153 Ind. 591.

319. 1. Harrison v. Magoon, 13 Hawaii 339, *citing* 5 ENCYC. OF PL. AND PR. 319.

2. "It is only good causes of action that can be misjoined." *Flint v. Hubbard*, 16 Colo. App. 464.

A count alleging a failure to erect sufficient barriers to prevent the snow and ice from sliding from a roof, and another count alleging a failure to keep such barriers in repair, are not inconsistent. *Ferris v. Board of Education*, 122 Mich. 315.

3. Under the codes the several causes of action and defenses set out in the pleading should be distinguished by the phrase "for a further cause of action or defense," or something equivalent. *Waite v. Sabel*, 44 N. Y. App. Div. 634.

320. 1. Damages. — The addition to each of several counts of a claim for damages is improper, as the place for the claim for relief is at the foot of the complaint, and the claim there stated, if there are several counts, covers all. *Goodrich v. Stanton*, 71 Conn. 418.

Reference. — It is permissible in common-law pleading to refer to and thereby make a part of one count the whole or a part of the allegation of another count in the same declaration. To be effective, the reference should be definite and certain. *Florida Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1.

Unless one count expressly refers to a preceding count, no defect therein will be aided by the preceding count.

Gilmore v. Christ Hospital, (N. J. 1902) 52 Atl. Rep. 241.

Each count is as distinct as if in separate declarations or complaints, and must, independently of the others, contain all necessary averments, or the latter count must expressly refer to the former. *Bryant v. Southern R. Co.*, (Ala. 1903) 34 So. Rep. 562.

While the averment of facts contained in independent counts of a declaration may not be taken in aid the one of the other, yet if the pleader, by appropriate averment in one count, adopts as a part of such count facts stated in the other, such facts so adopted may be taken as stated in the former, without formal repetition; and even though the latter count be insufficient in statement of a cause of action, if the former, so aided, states a cause of action, a demurrer thereto for want of a cause of action should be overruled. *Hutson v. King*, 95 Ga. 271. See also *Corbey v. Rogers*, 152 Ind. 169, holding that facts averred in one paragraph of a pleading cannot be adopted and made a part of another paragraph by reference. And see *Cooper v. Portner Brewing Co.*, 112 Ga. 894, holding that it is not permissible for a plaintiff to make paragraphs of the first count a part of the second count by mere reference thereto.

The rules of pleading require that each count shall disclose upon its face a distinct right of action, and a statement that the right of action accrued "on the day aforesaid," the reference being to a day set out in a preceding count when a number of days are referred to therein, is insufficient. *Opdycke v. Easton, etc., R. Co.*, (N. J. 1902) 52 Atl. Rep. 243.

Idaho. — When several causes of action are united under the provisions of Rev. Stat. Idaho (1887), § 4169 (Code Civ. Pro. Idaho 1901, § 3205), "it is not necessary to rewrite in each count after the first all common allegations, but it is sufficient if apt and express reference is made in each subsequent count to the preliminary allegations stated in the first, thereby making them a part thereof." *Aulbach v. Dahler*, (Idaho 1896) 43 Pac. Rep. 322.

321. VI. SEVERAL COUNTS FOR ONE CAUSE OF ACTION — 1.
Under Codes — *a.* GENERALLY. — See note 1.

324. *b.* EXPRESS AND IMPLIED CONTRACTS. — See note 1.

325. *d.* DESCRIPTION OF TORT WITH DOUBLE ASPECT. —
See note 2.

327. *f.* AUTHORITIES DENYING RIGHT TO USE SEVERAL COUNTS FOR SINGLE CAUSE OF ACTION. — See notes 1, 2.

321. 1. *Harrison v. Magoon*, 13 Hawaii 339 [citing 5 ENCYC. OF PL. AND PR. 321]; *Estrella Vineyard Co. v. Butler*, 125 Cal. 232; *Rucker v. Omaha, etc., Smelting, etc., Co.*, (Colo. App. 1903) 72 Pac. Rep. 682; *Lynn Safe Deposit, etc., Co. v. Andrews*, 180 Mass. 527; *Rinard v. Omaha, etc., R. Co.*, 164 Mo. 270; *Compton v. Ashley*, (Tex. Civ. App. 1894) 28 S. W. Rep. 223; *Great Western Coal Co. v. Chicago G. W. R. Co.*, (C. C. A.) 98 Fed. Rep. 274. See also *Hill v. Hill*, 51 S. Car. 134.

The plaintiff may state different counts in a cause of action for the purpose of varying the form of the statement so as to meet any possible state of the proof. *Brockett v. Fair Haven, etc., R. Co.*, 73 Conn. 428; *Hess v. Gansz*, 90 Mo. App. 439.

There is a distinction between stating a single cause of action in different ways in separate counts, and so dividing it as to make it the basis of three distinct causes of action and three recoveries. *Hess v. Gansz*, 90 Mo. App. 439. See also *Rinard v. Omaha, etc., R. Co.*, 164 Mo. 270, in which case the court said: "It is as true to-day as it ever was that repugnancy in pleading is not permissible. But to render a pleading bad the repugnancy must be such that proof of one state of facts pleaded as a basis for a recovery will necessarily disprove another state of facts pleaded as such a basis. A plaintiff may plead a single cause of action in as many different counts as he chooses, to meet any possible state of the proofs, and this will not make his counts repugnant."

Construed to Make Consistent. — See *American Nat. Bank v. National Wall-Paper Co.*, (C. C. A.) 77 Fed. Rep. 85.

Verdict. — If any one of the counts in a petition so framed is good it will support a general verdict, *Rinard v. Omaha, etc., R. Co.*, 164 Mo. 270; but recovery can be had only on one count, *Loftus v. King*, 23 Tex. Civ. App. 36.

Double Aspect. — In *Texas* a petition

may be framed with a double aspect. *Compton v. Ashley*, (Tex. Civ. App. 1894) 28 S. W. Rep. 223.

324. 1. *Estrella Vineyard Co. v. Butler*, 125 Cal. 232; *Hill v. Hill*, 51 S. Car. 134, wherein two alleged causes of action were for the same debt, in one cause being evidenced by a note simply; in the other by the note, the promise to pay implied from payments, and written acknowledgments by letters; *Loftus v. King*, 23 Tex. Civ. App. 36.

325. 2. Negligence. — It is proper to aver in one count that an injury was received by being hurled to the ground in jumping from a car, and in another count that the injury was received by being hurled to the ground when just ready to jump. *Brockett v. Fair Haven, etc., R. Co.*, 73 Conn. 428.

327. 1. *Palmer v. Hartford Dredging Co.*, 73 Conn. 182; *Alsop v. Central Trust Co.*, 100 Ky. 375.

Where a single transaction resulting in the indorsement of two notes was made the subject of six counts, each setting it out in a slightly different way with the aim of giving it a different legal aspect, it was held that it was the duty of the plaintiff to narrate the facts according to the truth and leave it to the court to draw the inferences, and that such narration should be confined to a single count, unless the transaction was one from which two separate and distinct causes of action arose. *Goodrich v. Stanton*, 71 Conn. 418.

In *McLaughlin v. Engelhardt*, (N. Y. City Ct. Gen. T.) 62 N. Y. Supp. 428, the court said: "It is quite the correct practice now, in the tendency to simplification of allegation and proof that our laws encourage and due administration enjoins, to see to it that repetition of charges or counts for the same cause of action or the same demand be not permitted in the pleading."

2. Alternative Pleading. — *Compton v. Ashley*, (Tex. Civ. App. 1894) 28 S.

330. Remedy for Violation of Rule — Election of Count. — See note 1.

334. VII. ONE COUNT FOR SEVERAL CAUSES OF ACTION — 1. At Common Law. — See note 2.

335. 2. Under Codes — Introductory. — See note 1.

Motion to Elect. — See note 3.

Demurrer. — See note 4.

336. Motion to Separately State and Number. — See note 1.

W. Rep. 223, citing *Floyd v. Patterson*, 72 Tex. 202.

In *Kentucky*, "pleading in the alternative is permissible under subsection 4, section 113, of the Code; but in such case each alternative pleaded should be a complete and sufficient cause of action or ground of defense." *Cumberland Valley Bank v. Slusher*, 102 Ky. 415.

In *Connecticut* "several causes of action may be stated in a single count when such causes of action are not separate and distinct from each other; that is, separable from each other 'by some distinct line of demarcation.'" *Maisenbacker v. Concordia Soc.*, 71 Conn. 369.

Texas. — Rule No. 4, governing the practice in the District Courts, provides that the plaintiff, in his petition, "may state all of his facts, so as to present together different combinations of facts amounting to a cause or causes of action, or he may state the cause or causes of action in several different counts, each within itself presenting a combination of facts specifically amounting to a single cause of action which, when so drawn, shall be numbered, so that an issue may be formed on each one by the answer." *Compton v. Ashley*, (Tex. Civ. App. 1894) 28 S. W. Rep. 223.

330. 1. *Alsop v. Central Trust Co.*, 100 Ky. 375.

If there is only one cause of action stated, although alternative relief is prayed the motion will be denied. *Pryor v. Warford*, (Ky. 1900) 54 S. W. Rep. 838.

Time of Motion to Elect. — If the issues have been joined on the merits, a motion to elect comes too late. *Beale v. Barnett*, (Ky. 1901) 64 S. W. Rep. 838; *Kenton Ins. Co. v. Osborne*, (Ky. 1899) 51 S. W. Rep. 306; *Diamond Coal Co. v. Carter Dry-Goods Co.*, (Ky. 1899) 49 S. W. Rep. 438; *Vernon v. Union L. Ins. Co.*, 58 Neb. 494; *Kahn v. Rosenheim*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 192.

334. 2. *Sleeper v. World's Fair*

Banquet Hall Co., 166 Ill. 57, citing 5 ENCYC. OF PL. AND PR. 334, and holding that a declaration which unites two causes of action in one count is liable to demurrer.

335. 1. **Separately Stating Defenses.** — Code Civ. Pro. N. Y., § 507, provides that "each defense or counterclaim must be separately stated and numbered." *Zacharias v. French*, (C. Pl. Spec. T.) 10 Misc. (N. Y.) 202.

3. *Provident Trust Co. v. Coron*, 5 Kan. App. 431.

A motion to elect should be filed before entering upon trial. *Wilson v. St. Louis, etc.*, R. Co., 67 Mo. App. 443.

4. *Wilson v. St. Louis, etc.*, R. Co., 67 Mo. App. 443.

A demurrer is proper only when two causes of action are of such character that they cannot legally be joined in one action. *Wilson v. St. Louis, etc.*, R. Co., 67 Mo. App. 443.

336. 1. *Provident Trust Co. v. Coron*, 5 Kan. App. 431; *Egan v. Butterworth*, 66 N. Y. App. Div. 480; *Westheimer v. Musliner*, 46 N. Y. App. Div. 96; *Barnes v. McGuire*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 438; *Daly v. Wolaneck*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 162.

When it is fairly doubtful whether the complaint states more than one cause of action, and the plaintiff intends to state but one, a motion to compel the plaintiff to separate and number the causes of action should not be granted. *Pope v. Kelly*, 30 N. Y. App. Div. 253. See also *Pittsburgh, etc.*, R. Co. *v. Beck*, 152 Ind. 421, holding that where a single cause of action is stated, a motion to separate the complaint into paragraphs will be overruled.

Even if there is an erroneous ruling against a motion to separate a complaint into paragraphs such ruling will not authorize a reversal unless it appears that the appellant has been deprived of some substantial right. *Pittsburgh, etc.*, R. Co. *v. Beck*, 152 Ind. 421.

336. Waiver. — See note 2.

339. VIII. PROCEDURE WHERE THERE ARE SEVERAL COUNTS—

2. At Common Law — Demurrer. — See note 3.

In *Pierce v. Walton*, 20 Ind. App. 66, it was held that the overruling of a motion to separate is not available error. See also *Farmers', etc., Nat. Bank v. Smith*, (C. C. A.) 77 Fed. Rep. 129, wherein the court said: "When this provision of the code [of Nebraska] is disregarded, and the facts constituting a cause of action are stated in a single count, it may well be concluded that the pleader intended to rely upon a single ground of recovery, and in such cases he should be confined to the cause of action which, upon a fair construction of the complaint, he appears to have selected."

Matter of Right. — See *Provident Trust Co. v. Coron*, 5 Kan. App. 431.

Notice of Motion. — "When a party gives notice of a motion to make a complaint definite and certain, the notice should specify in what particu-

lars it should be corrected." *Long v. Hunter*, 48 S. Car. 179, citing 5 ENCYC. OF PL. AND PR. 336.

336. 2. The plaintiff waives all objection save that the petition fails to state a cause of action or that the court has no jurisdiction. *Wilson v. St. Louis, etc., R. Co.*, 67 Mo. App. 443.

339. 3. *Knapp v. Ross*, 181 Ill. 392. A plaintiff cannot join in one action distinct claims against several defendants. *Gilmore v. Christ Hospital*, (N. J. 1902) 52 Atl. Rep. 241.

Where one count sets forth a cause of action against two defendants, and another count alleges a cause of action against one of the defendants alone, there is a misjoinder, and a general demurrer to the whole declaration will be sustained. *Gilmore v. Christ Hospital*, (N. J. 1902) 52 Atl. Rep. 241; *Dunn v. Pennsylvania R. Co.*, 67 N. J. L. 377.

COVENANT.

350. III. WHEN ACTION WILL NOT LIE — In General. — See note 2.

Privity. — See note 4.

351. Between Partners. — See note 1.

352. IV. WHO MAY SUE — 1. Covenantee Generally. — See note 4.

353. 2. Severally or Jointly — In General. — See note 1.

354. 3. Personal Representatives — Covenants Relating to Realty. — See note 1.

355. Covenants Relating to Personality. — See note 1.

4. Heirs and Devisees — Heirs. — See note 3.

350. 2. Covenant will not lie where the defendant has not engaged to perform by deed. *Walker v. Kesner*, 86 Ill. App. 244.

4. *Hardy v. Pecot*, 104 La. 136; *Barkley v. Steers*, 47 La. Ann. 951; *Mygatt v. Coe*, 147 N. Y. 456.

Necessity to Carry Covenant to Subsequent Purchasers. — In *Wallace v. Perelles*, 109 Wis. 316, it was held that, neither title nor possession being shown in the grantor at the time of his conveyance, and there being no proof that the grantee took possession, the covenants in the grantor's deed were personal to his grantee, and that there was no such privity of estate as would carry the covenants to subsequent purchasers.

351. 1. Action Will Lie if Articles Are under Seal. — While one partner cannot sue another at law in an action on account, in the absence of an account stated, he may do so in covenant, if the articles of partnership are under seal and any covenant or agreement in them has been violated. *Gusdorff v. Schleisner*, 85 Md. 360.

352. 4. *Webster v. Fleming*, 73 Ill. App. 234.

353. 1. *Bridgewater v. Ocean City R. Co.*, 62 N. J. Eq. 276.

354. 1. *Prestwood v. McGowin*, 128 Ala. 267, citing 5 ENCYC. OF PL. AND PR. 354.

Action by Beneficiary. — Where the covenant is with one person for the benefit of another, or to pay to another,

which is the same thing, the action for a breach must be brought in the name of the covenantee, or, if he is dead, by his legal representative. The beneficiary, however, may use his own name or the name of the representative for the purpose. *Brann v. Maine Ben. L. Assoc.*, 92 Me. 341.

Action Survives to Personal Representative. — Under the *Rhode Island* statutes an action of covenant survives in the name of a personal representative whose duty it is to prosecute or defend such action to final judgment. *Sprague v. Greene*, 20 R. I. 153.

355. 1. *McConaughy v. Bennett*, 50 W. Va. 172.

Where the Covenant Relates to Personality a covenant of warranty is personal to the purchaser, and he alone may sue his vendor on the warranty. *Asher Lumber Co. v. Cornett*, (Ky, 1900) 58 S. W. Rep. 438.

Rent. — Although rent savors of the realty, any warranty or insurance of rent is a purely personal contract and does not run with the land, and an action therefor, after the death of the covenantee, should be brought in the name of his personal representative, and not of his heirs. *Walsh v. Packard*, 165 Mass. 189.

2. All Coplaintiffs Must Be Entitled to Recover or None Can Recover. — Where two of the original grantees in a deed and the heirs of the other deceased grantees bring an action for a breach of the covenants of warranty, the heirs

355. 5. Assignees or Remote Grantees. — See note 5.**356.** See note 1.

having no right to maintain the action, the principle applies that when several parties sue jointly as plaintiffs, all must be entitled to recover or none can; and if any one of them is incompetent to sue all must fail, though the evidence may sustain the action as to one or more of them. *Prestwood v. McGowin*, 128 Ala. 267.

355. 5. Covenants in Deeds Running with the Land. — Covenants in a deed duly executed pursuant to the form of deeds prescribed by the *Indiana* statute run with the land, and a grantee may sue a remote grantor for a breach of such covenants. *Beasley v. Phillips*, 20 Ind. App. 182.

First Grantee Failing to Sue, His Deed Carries Right of Action on Covenant. — In *Langenberg v. Chas. H. Heer Dry Goods Co.*, 74 Mo. App. 12, the court said: "The existence of a prior lease of the land for three years, when defendant's deed was made containing a covenant of seizin of an indefeasible estate, was a breach of that covenant for which action might have been maintained and full damages recovered by the first grantee. As he, however, did not sue, his deed to plaintiff carried the covenant, and plaintiff became entitled to sue thereon and recover to the extent he was damaged by the outstanding lease."

Last Vendee May Sue Either Warranting Grantor, but Not Both. — In *Ravenal v. Ingram*, 131 N. Car. 549, the court said: "Where one conveys with general warranty, another without warranty, another with warranty, and still another without warranty, and the last vendee is evicted by title paramount to the warranting grantor's, he may sue either of the warranting grantors, but not both of them."

When Intermediate Warrantor May Recover. — The right of action for a breach of warranty cannot exist against a prior warrantor in both an intermediate warrantor and the last warrantee at one and the same time, and an intermediate warrantor will not be permitted to recover against the prior warrantor until he has satisfied or procured a release from the person to whom he had conveyed, and who had a right of action on the warranty. *Taylor v. Lane*, 18 Tex. Civ. App. 545.

356. 1. McConaughy v. Bennett, 50 W. Va. 172.

When Right of Action Does Not Pass to Assignee. — Where one conveyed property with covenant that the premises were "free from incumbrances," when in fact there were certain outstanding incumbrances which were at the time a subsisting lien on the property conveyed, and the grantee therein conveyed to another expressly subject to the existing incumbrances, and the last grantee conveyed, with covenant against incumbrances, to the plaintiff, who paid off the incumbrances and sued the executors of the original covenantor for a breach of the covenants against them, it was held that, the incumbrances being in existence, the covenants were violated immediately upon the execution of the first deed, and the claim of the grantee thereunder for damages for the breach being a chose in action was not assignable so as to pass a right of action to the plaintiff against the executors of the original covenantors. *Geiszler v. De Graaf*, 44 N. Y. App. Div. 178.

In *Security Bank v. Holmes*, 65 Minn. 531, the defendants executed and delivered a mortgage containing the usual covenants, including one against incumbrances, which mortgage was assigned to the plaintiff and the sum was afterwards foreclosed by action, the plaintiff becoming the purchaser. At the time this mortgage was executed the premises therein described were encumbered by a prior mortgage which the plaintiff paid and discharged. In an action by the plaintiff on covenant to recover the amount so paid, it was held that the plaintiff had a right of action by virtue of his ownership and foreclosure of the mortgage, and was entitled to the benefits of the covenants therein, which run with the land.

Purchaser on Foreclosure Takes as Assignee. — Covenants created by the statutory words "grant, bargain, and sell," in a trust deed containing them, are as operative as they would be in a conveyance in fee simple *inter partes*, and a purchaser at a foreclosure sale, as assignee of such covenants under a trustee's deed, is entitled to sue for their breach. *Blanchard v. Haseltine*, 79 Mo. App. 248.

357. 6. Beneficiaries — Third Persons. — See note 2.

358. See note 2.

V. WHO MAY BE SUED — 1. Covenantors Generally — Privy of Contract. — See note 5.

361. 4. Husband and Wife. — See note 2.

5. Personal Representatives and Heirs. — See note 3.

6. Assignees. — See note 4.

357. 2. Baldwin v. Emery, 89 Me. 496.

358. 2. Scott v. Farmers, etc., Nat. Bank, (Tex. Civ. App. 1902) 66 S. W. Rep. 485.

5. Mygatt v. Coe, 147 N. Y. 456; Wallace v. Pereles, 109 Wis. 316.

When Sublessee Bound by Covenant in Original Lease. — In *St. Joseph, etc., R. Co. v. St. Louis, etc., R. Co.*, 135 Mo. 173, it was said: "If the sublease so effectually passes the whole term that it must be held to be an assignment, then privity of estate is established and the sublessee becomes bound by the covenants of the original lease, irrespective of his intention."

Lessees and Purchaser under Mortgage.

— There is no privity of contract between the lessees of real property and a purchaser who derived his title from a sale on foreclosure of a mortgage, executed prior to the lease, the purchaser taking title as of the date of the mortgage. As no privity of contract existed between the mortgagee and the lessee, none as between the lessee and the purchaser resulted from the purchase and the deed, thereupon made, as would in any event support an action by either against the other upon the covenants of the lease. *Sprague Nat. Bank v. Erie R. Co.*, 22 N. Y. App. Div. 526.

361. 2. Chaison v. Beauchamp, 12 Tex. Civ. App. 109.

Joint Deed of Husband and Wife. — Where a deed was jointly executed by a husband and wife, describing and conveying as one tract one hundred and twenty-nine acres, fifty acres belonging to the husband and seventy-nine acres to the wife, and the purchaser, knowing that the tracts were separate, paid to each of them the price for their respective shares, the joint deed having been procured at his instance and request, in an action for a breach of warranty by reason of the plaintiff's being compelled to pay off a mortgage on the fifty acres belonging to the husband, it was held that the

court below erred in overruling a motion for a new trial on the part of the wife after a judgment against her for the breach. *Sorrells v. Sorrells*, 105 Ga. 36.

Indiana. — The general disability of married women to contract has been removed by statute in Indiana, so that ability is the rule and disability is the exception, and married women are made liable upon their covenants of warranty in conveyances of their separate estates. *Dickey v. Kalfsbeck*, 20 Ind. App. 290.

3. Rohrbaugh v. Hamblin, 57 Kan. 393.

When Action Lies Against Heirs and devisees. — As the general covenant to warrant and defend the title runs with the land in all cases, it follows that the heirs and devisees of the covenantor are bound for a breach of such covenant made during the lifetime of the ancestors from whom their estate is derived; but before either the heirs or devisees can be bound thereby it must appear that their ancestors' estate was settled and closed before the claim accrued to the covenantee. Where a petition alleges such to be the case, it states a sufficient cause of action for a breach of covenant. *McClure v. Dee*, 115 Iowa 546.

4. Tenant in Possession. — A covenant by a railroad company to construct and maintain fences, in consideration of a grant of right of way through land, is a covenant running with the land, and is in the interest of the possessory title to the land. A tenant in possession at the time the covenant was made, though having only a leasehold interest in the land, as assignee of this title and interest is entitled to bring an action to recover damages for destruction of his crops by reason of a breach of the covenant, in the event of the railroad company failing to maintain fences. *Lake Erie, etc., R. Co. v. Power*, 15 Ind. App. 179. See also *Lake Erie, etc., R. Co. v. Griffin*, 25 Ind. App. 138.

362. VI. DECLARATION — 1. Venue. — See note 1.

364. 3. Body — a. INDUCEMENT — Profert. — See note 1.

365. c. PROMISE. — See note 3.

367. d. AVERMENTS — (1) Generally. — See note 3.

369. e. BREACH — (1) Generally. — See notes 3, 4.

362. 1. Chaison v. Beauchamp, 12 Tex. Civ. App. 109.

364. 1. Georgia. — In Chicago Bldg., etc., Co. v. Talbot Creamery, etc., Co., 106 Ga. 84, it was said: "While at common law profert was required only in cases where the party claimed or justified under a deed, and was not necessary where the suit or defense was founded upon an instrument not under seal, still the rule in this state requires that profert should be made of any note or other instrument which is the foundation of the action, whether the same be under seal or not."

Illinois. — Under the Illinois Practice Act it is not necessary in any case to make profert, therefore it is not necessary to aver any reason or excuse for not making it, and the rule that "where a profert or excuse for the want of it is necessary, if the plaintiff profess to produce the deed when he is not prepared to do so, the defendant is entitled to oyer, and if he plead *non est factum*, the plaintiff will be nonsuited on the trial," does not obtain. *Fleet v. Hertz*, 98 Ill. App. 564.

Failure to Make Profert. — Failure to make profert can be objected to only by special demurrer. *New York Trap Rock Co. v. Brown*, 61 N. J. L. 536.

When Right to Crave Oyer Applies. — As a general rule the right to crave oyer of papers mentioned in a pleading applies only to deeds and letters of probate and administration, and that right applies to a deed only when the party pleading relies upon the direct and intrinsic operation thereof. *Grubbs v. National L. Ins. Co.*, 94 Va. 569.

Deed Is Part of Record on Oyer Craved. — The meaning of profert is that the party has the writing in court and is ready to give oyer of it to his opponent. When oyer is demanded and granted, then the matter therein set out becomes a part of the record, and the party has the option to demur or plead according to the nature of the fact disclosed. Without oyer the writing proffered is not a part of the record. *Insurance Co. v. Thornton*, 97 Tenn. 1. See also *Western Springs v. Collins*, (C. C. A.) 98 Fed. Rep. 933.

If profert is made of any document of which it is not necessary, it will be treated as mere surplusage and will not entitle the defendant to oyer. *Atherton Mach. Co. v. Atwood-Morrison Co.*, (C. C. A.) 102 Fed. Rep. 949.

365. 3. Contents of Deed Relating to Covenant Must Be Alleged. — In *Gano v. Green*, 116 Ga. 22, it was held that "a petition in an action to recover damages for a breach of warranty alleged to be contained in a deed is open to special demurrer if it does not set forth, at least in substance, a sufficiency of the contents of such deed to show the covenant of warranty the breach of which is complained of; and where such a demurrer to such a petition is filed, and the defect is not cured by amendment, it is not erroneous to dismiss the petition."

Irrelevant Allegations. — In *West Coast Mfg., etc., Co. v. West Coast Imp. Co.*, 25 Wash. 627, it was held that it was not error in the court, in an action for breach of warranty in a deed, to strike out of the complaint, on the defendant's motion, as an irrelevant and immaterial allegation, the words "and claimed to own and held itself out as the owner of all the lands to deep water," when the matter stricken out referred to a claim made by the defendant in the year preceding the execution of the deed. There being no ambiguity in the language of the deed, the intention of the parties must be gathered from the deed itself.

367. 3. Where it appears from the declaration in covenant that the defendant did not enter into any covenant whatever with the plaintiff, the declaration is bad. *Walker v. Kesner*, 86 Ill. App. 244.

369. 3. Sufficiency of Averment. — In an action for a covenant of seizin, the breach is properly assigned by negating the words of the covenant. *Evans v. Fulton*, 134 Mo. 653.

4. When Deed Is Filed, Statement of Substance Is Sufficient. — In an action for breach of covenant of general warranty in a deed, it is immaterial whether the allegation of the covenant as expressed in the deed is set out #

370. See notes 1, 2.

372. (3) *Covenant of Warranty and for Quiet Enjoyment — Covenant of Warranty.* — See note 1.

hac verba in the petition, or as allowed and made effective by the statute. In either case, where the deed itself, containing the covenant sued on, is filed and referred to, a statement of the substance is sufficient. *Brady v. Peck*, 99 Ky. 42.

370. 1. Application of Rule. — Where a petition in an action for damages for a breach of covenant against incumbrances, as well as general warranty, alleges that at the date of the covenant there was a right of dower consummated in a third person, but not admeasured, it alleges sufficient facts to show that the covenant against incumbrances was broken as soon as made, and entitles the plaintiff to recover nominal damages without showing that he discharged the incumbrances by payment or otherwise, and to sustain a demurrer thereto is error. *Weyer v. Sager*, 12 Ohio Cir. Dec. 193.

3. Defective Statement of Good Cause of Action. — In an action for a breach of the covenants of warranty, an allegation that there "was and is a breach of defendant's contract of warranty aforesaid," states a good cause of action, but is defective in that it does not allege wherein the breach consisted, as by a special allegation of ouster, etc. A defective statement of a good cause of action, while subject to demurrer, may be cured by amendment, but a statement of a defective cause of action cannot be cured by amendment and may be dismissed on motion in the Supreme Court, even when not taken advantage of in the court below, or the court may dismiss the action *ex mero motu*. *Mizzell v. Ruffin*, 118 N. Car. 69.

Secundum Allegata et Probata. — In *Harlan v. Stratton*, 120 Ala. 145, there was held to be a fatal variance between the allegations in a complaint and the proof where, in an action for damages for a breach of the covenant of warranty in a deed, implied in the statutory words "grant, bargain, and sell," the plaintiff assigned as a breach that a paramount title, to the hostile assertion of which he had to yield, existed in a railroad company, and the only proof offered was that the railroad company had an easement — a right of way — upon the specified lots.

372. 1. Must Allege and Prove Eviction or Surrender. — In an action for a breach of the covenants of warranty, the plaintiffs must allege and prove an actual eviction or a surrender to a paramount title which was outstanding at the date of the covenant sued upon. *Merrill v. Suing*, (Neb. 1902) 92 N. W. Rep. 618, citing 5 ENCYC. OF PL. AND PR. 371. See also *Mickler v. Reddick*, 38 Fla. 341; *Boulden v. Wood*, (Md. 1903) 53 Atl. Rep. 911; *Mumford v. Keet*, 65 Mo. App. 502; *Sears v. Broady*, (Neb. 1902) 92 N. W. Rep. 214; *Troxell v. Stevens*, 57 Neb. 329; *Hamp-ton v. Webster*, 56 Neb. 628; *Troxell v. Johnson*, 52 Neb. 46; *Boyd v. Leith*, (Tex. Civ. App. 1899) 50 S. W. Rep. 618; *Koepke v. Winterfield*, (Wis. 1902) 92 N. W. Rep. 437.

Quieting Title by Purchase. — In *Georgia Bank v. O'Neal*, 101 Ga. 673, a petition in an action for breach of warranty which alleged that the plaintiff, by reason of a suit in ejectment brought against him and in order to quiet his title, was compelled to buy up an outstanding "paramount title" to prevent being evicted from the premises conveyed to him by the defendant, was held to be sufficient as against a general demurrer.

An allegation in a petition that at the time the property in question was conveyed to the plaintiff a third party named in the petition held a paramount title thereto, under which the plaintiff was evicted, is not sustained by proof that prior to the date of the defendant's deed the defendant had conveyed the same property to a person other than the party named, unless the proof goes further and shows that such holder of the paramount title holds the property under a conveyance from the last-named grantee of the defendant. *Sheppard v. Reese*, 114 Ga. 411.

Allegation of Particular Eviction Must Be Supported by Proof. — In an action on a breach of covenants of warranty in a deed, where the eviction or ouster by paramount title is not pleaded in general terms, but a particular kind of eviction is alleged, and an issue joined thereon, the evidence must support the allegation. *Walker v. Kirshner*, 2 Kan. App. 371.

Tennessee. — Where a complaint

373. *Covenant for Quiet Enjoyment.* — See note 3.

374. (4) *Covenant of Seizin.* — See note 1.

Eviction Unnecessary. — See note 2.

(5) *Covenant Against Incumbrances.* — See note 3.

charged that third parties were in adverse possession of property, and that the covenants of warranty were broken, not because said third parties mentioned had a better title, but that they were claiming under a title "apparently better" than that conveyed to the complainant, it was held that it neither alleged an eviction nor showed a breach of the covenants of warranty. *Pigeon River Lumber, etc., Co. v. Mims*, (Tenn. Ch. 1897) 48 S. W. Rep. 385.

Special Warranty. — In an action for breach of covenant of special warranty to defend the title to land conveyed against the claim or claims of all persons claiming by, through, or under the covenantor, an allegation in the complaint that a party has recovered a judgment for the land against the plaintiff, without alleging an ouster or a disturbance of the plaintiff's possession equivalent to an ouster, and that the alleged recovery against him was obtained upon a title derived from the defendant and grantor, is vitally defective. This last defect may be taken advantage of at any time, even in the Supreme Court. *Ravenal v. Ingram*, 131 N. Car. 549.

Oregon. — A complaint is sufficient if the existence of the elder title is made to appear, and it is alleged generally that the complainant has been evicted by virtue of such title. The eviction by a paramount title may be set forth in the complaint as an ultimate fact, without alleging the manner in which it was accomplished. *Jennings v. Kiernan*, 35 Oregon 349.

Allegation of Notice to Covenantor. — In a suit for damages for a breach of a covenant of title by an eviction on a paramount title, in order to bind the covenantor by the judgment of eviction it is essential that the complaint should allege that the covenantor had notice of the proceedings in which the judgment was obtained. *Cullity v. Dorffel*, 18 Wash. 122.

Constructive Eviction Sufficient. — *Prestwood v. McGowin*, 128 Ala. 267; *Beasley v. Phillips*, 20 Ind. App. 182; *Wagner v. Finnegan*, 65 Minn. 115; *Leet v. Gratz*, 92 Mo. App. 422;

Egan v. Martin, 71 Mo. App. 60; *West Coast Mfg., etc., Co. v. West Coast Imp. Co.*, 25 Wash. 627; *Harr v. Shaffer*, (W. Va. 1903) 43 S. E. Rep. 89; *McConaughy v. Bennett*, 50 W. Va. 172.

373. 3. Counts and Assignments of Breaches. — In declaring on the covenants for quiet enjoyment and warranty of title, the complaint, to be in proper form, should contain separate counts and assignments of each of the breaches for which recovery is sought. *Prestwood v. McGowin*, 128 Ala. 267.

A petition which neither expressly nor impliedly alleges an actual eviction or a surrender to a valid outstanding title, nor a compulsory purchase of the paramount title to protect title, wholly fails to state a cause of action. *Mumford v. Keet*, 65 Mo. App. 502.

374. 1. Title in Another under Recorded Tax Deeds. — In an action for breach of a covenant of seizin, a declaration which alleges that the defendant never had the actual or constructive possession of, nor any title or interest in, the land, but that other parties named had the title in fee and a lawful right to the property under recorded tax deeds, states a cause of action, and the fact that tax deeds do not always divest the title of the original owner is without significance, in view of the other requisite allegations. *Koepke v. Winterfield*, (Wis. 1902) 92 N. W. Rep. 437. See also *Daisy Realty Co. v. Brown*, (Ky. 1896) 35 S. W. Rep. 637.

2. Action May Be Instituted Before Eviction. — A grantee is not bound to wait for an eviction before he can maintain his action for a breach of the covenants of seizin, for the covenants of seizin, if broken at all, are broken as soon as the deed is executed, and an action may be brought at once, without waiting for a disturbance of possession. *Bolinger v. Brake*, 4 Kan. App. 180.

3. Action by Husband of Deceased Grantee. — A husband of a deceased wife, who was the original grantee, cannot maintain an action for a breach of a covenant against incumbrance unless he was a party to the conveyance

376. VII. DEMURRER — In General. — See note 3.

377. Grounds for Demurrer. — See note 4.

378. VIII. PLEA — 2. Plea of *Non Est Factum* — Scope of Plea. — See note 1.

to his wife, notwithstanding he may have subsequently joined with her in a conveyance of the same land by warranty deed; and a petition setting up a claim for damages for a breach of covenants against incumbrances which fails to allege the fact that he was such original covenantee, or that the covenants had been assigned to him, states no cause of action and a demurrer thereto should be sustained. *Ladd v. Montgomery*, 83 Mo. App. 355, holding also that unless it appears from the petition that the wife removed the incumbrance during her lifetime, or that it was discharged out of the assets of her estate after her death, it fails to show any cause of action in the heirs at law of the wife.

Breach by Reason of Unpaid Taxes. — In an action for a breach of covenant against incumbrances, a complaint which alleges that at the time of the delivery of the deed there were unpaid taxes upon the property, together with the penalty and interest thereon for nonpayment, discloses an immediate breach of the covenant and presents a cause of action. *Brenen v. Kelly*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 46.

When Allegation as to Assessments Held Good on Demurrer. — Where the complaint sued to recover an assessment which was a lien on the property conveyed at the time of the conveyance, and alleged that the defendant covenanted that the property was free from incumbrances, except "taxes," and that the said assessment was not contemplated by the parties to the deed, "or in the meaning of the word comprehended by the word 'taxes' as used in said covenant," it was held that as the term "taxes" is a debatable word when used with reference to local assessments, the allegation as to the intent of the parties was an allegation of fact, and a demurrer thereto should be overruled. *Sullivan v. Hamilton*, 13 N. Y. App. Div. 140.

Assessments for Street Gradings. — In an action for a breach of a covenant against incumbrances growing out of the assessment by a city of the first class of certain costs for street grad-

ings against the plaintiff as an abutting property owner, which assessments the plaintiff was compelled to pay, a complaint is good as against a general demurrer, although it fails to allege that the city was a municipal corporation and had authority to grade its streets and assess the costs thereof against the abutting property owners, as the courts are required to take judicial cognizance of the incorporation of municipalities of the first class, and of their charters and of all amendments thereto. *Green v. Tidball*, 26 Wash. 338.

376. 3. When Instrument Sued on Is Not Part of Declaration. — When the declaration is in due form for covenant, and the instrument sued on is not expressly made a part of the declaration, the fact that a copy attached to the declaration appears to be not under seal presents no ground for demurrer for that reason, as the copy is technically no part of the declaration. *Metzger v. Canadian, etc., Credit System Co.*, 59 N. J. L. 340.

377. 4. Failure to Show Lien Has Ripened Into Paramount Title. — An allegation in a petition for the breach of covenants of warranty which sets out that a certain mortgage executed by the grantor prior to his conveyance to the plaintiff is an outstanding title to the premises, paramount and superior to that of the plaintiff, is merely a conclusion of the pleader. As a mortgage does not convey a legal title to the premises, but is only a lien thereon, a petition which fails to show that such lien has ripened into a paramount title by foreclosure, sale, and confirmation of sale, and a deed executed to the purchaser, does not state facts sufficient to constitute a cause of action. *Merrill v. Suing*, (Neb. 1902) 92 N. W. Rep. 618.

378. 1. Sufficient as Against Complaint for Breach of Covenant in Deed. — A plea of *non est factum* duly sworn to is a sufficient answer to a complaint assigning solely a breach of the covenant alleged to have been contained in a deed. *Gadsden, etc., R. Co. v. Gadsden Land, etc., Co.*, 128 Ala. 510.

379. *Verification.* — See note 1.

3. *Special Pleas.* — See notes 2, 3.

380. **4.** *Plea of Performance or Tender Thereof — Plea of Performance.* — See note 1.

385. **12.** *Demurrer to Plea.* — See note 2.

386. **IX. REPLICATION AND REJOINDER** — *Replication.* — See note 3.

379. **1.** *Fleet v. Hertz*, 98 Ill. App. 564.

2. *Proviso or Exception Must Be Specially Plead.* — If the covenant contains a proviso or exception not in the body of the covenant itself, but in a separate clause of the contract, in order to avail himself thereof in an action for a breach of the covenant the party seeking to avoid it must specially plead such proviso or exception. *Consolidated Coal Co. v. Mexico Fire Brick Co.*, 66 Mo. App. 296.

3. *Insufficient Traverse.* — Where, in an answer to an action for a breach of covenant of warranty of title to a tract of land, the defendant did not attack the genuineness of the deed, merely denying that he sold the land to the plaintiff and that the latter paid to him any part of the purchase money, but admitting that the plaintiff paid the purchase money to a third party, the vendor of the defendant, it was held that, the defendant having executed and delivered to the plaintiff the deed with the covenant of general warranty sued on, it must be presumed that the payment to the defendant's vendor was by his consent and direction, and a demurrer to the answer was properly sustained. *Brady v. Peck*, 99 Ky. 42.

380. **1.** *Arnold v. Cole*, 42 W. Va. 663, citing 5 ENCYC. OF PL. AND PR. 380.

Averment of Performance of Conditions Precedent. — A lessee cannot recover damages upon a breach of covenant to renew his lease for a second term unless he avers and proves performance on his part at the time and in the manner stipulated, or gives a valid excuse for his nonperformance of all the things

he had covenanted to do during the first term. *Grubb v. Burford*, 98 Va. 553.

Time, Place, and Manner of Performance. — The plea of performance must show specially the time, place, and manner of performing each condition. *Norfolk, etc., R. Co. v. Suffolk Lumber Co.*, 92 Va. 413, in which case, however, it was said that this rule may "admit of relaxation in certain classes of cases; as, for instance, where the subject comprehends a great multiplicity of particulars, as in the case of a sheriff's bond for the performance of all of his multifarious duties."

385. **2.** *Demurrer Relates Back to First Defective Pleading.* — A demurrer searches the whole record and relates back to the first defective pleading, and where a complaint counts upon a covenant made by the defendant and fails to show that it was made upon consideration, or that it was under seal, or that it was made for the benefit of the plaintiff, and does not bring him in privity with the covenantor, unless such defects in the complaint are aided by the answer the complaint itself is bad, and a demurrer to the answer will be ineffectual. *Holmes v. Northern Pac. R. Co.*, 65 N. Y. App. Div. 49.

386. **3.** *New Matter Amounting to Departure from Allegations of Petition.* — Where a reply to the answer of the defendant contains new matter which amounts to a departure from the cause of action set forth in the petition, it should be eliminated therefrom by a motion to strike out or by a demurrer. *Merrill v. Suing*, (Neb. 1902) 92 N. W. Rep. 618.

CREDITORS' BILLS AND FRAUDULENT CONVEYANCES.

- 391.** 1. **DEFINITION** — Creditors' Bills. — See note 1.
392. II. **CLASSIFICATION OF CREDITORS' BILLS** — 1.
Aside Fraudulent Conveyances. — See note 1.
395. 4. **Suits by Creditors of Corporations.** — See note
also WINDING UP CORPORATIONS.
397. 5. **General Creditors' Bills.** — See note 1.
III. EQUITY JURISDICTION — 1. In General. —
2, 3.

Abolition of Distinction Between Law and Equity. —

- 398.** 2. **Suits to Set Aside Fraudulent Conveyances.**
GENERAL. — See note 1.

391. 1. See *lauch v. de Socarras*, 56 N. J. Eq. 524, wherein the court discusses generally the various classes of creditors' bills; *Miller v. Melone*, 11 Okla. 241.

Proceeding in Rem. — *Houghton v. Axelsson*, 64 Kan. 274, *quoting* 5 ENCYC. OF PL. AND PR. 391.

392. 1. *Wollenberg v. Minard*, 37 Oregon 621; *Anderson v. Provident L. & T. Co.*, 25 Wash. 20, in each of which cases the court *cited* 5 ENCYC. OF PL. AND PR. 392.

395. 2. See *Henderson v. Hall*, 134 Ala. 455; *Metcalf v. Arnold*, 110 Ala. 180, 132 Ala. 74; *Hall v. Henderson*, 126 Ala. 449; *Taber v. Royal Ins. Co.*, 124 Ala. 681; *Anderson v. Bullock County Bank*, 122 Ala. 275; *Koechl v. Leibinger, etc., Brewing Co.*, 26 N. Y. App. Div. 573; *Craig v. California Vineyard Co.*, 30 Oregon 43; *American Handle Co. v. Standard Handle Co.*, (Tenn. Ch. 1900) 59 S. W. Rep. 709; *Haskin Wood Vulcanizing Co. v. Cleveland Ship Bldg. Co.*, 94 Va. 439; *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16; *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 110 Fed. Rep. 491; *Bickford v. McComb*, 88 Fed. Rep. 428; *D. A. Thompsons Co. v. Catawba Mills*, 82 Fed. Rep. 780; *Childs v. N. B. Carlstein Co.*, 76 Fed. Rep. 86.

In Alabama a court of chancery will not take charge of and administer the

assets of an insolvent corporation in the suit of its creditors, in preference of some recognized principle of jurisdiction. Thus, the independence of a corporation or that it is about to remove its assets from the state does not entitle it to the aid of a court in equity. *Dimmick Lumber Co. v. Alabama*, 385.

397. 1. When Bill Against Creditors' Bills is filed against a corporation to set aside a fraudulent conveyance and apply the proceeds of the sale of the property to the payment of the debts of the corporation, the bill is not a bill in equity, and does not seek to wind up the affairs of the corporation as an insolvent corporation, and in no sense a general bill. *Parks v. Saw Co.*, 104 T.

2. See *Goddard v. Fisher*, 9 Col. App. 196.

3. See *Selz v. Hocknell*, 62 Neb. 101; *F. Nat. Bank v. Mosher*, 63

4. *Bomar v. Means*, 53

398. 1. *California*. — *Co. v. Helbing*, 134 C. Angeles First Nat. Ban 123 Cal. 360.

Colorado. — *Leupert v. Colo. App.* 404.

401. Grounds for Assuming Jurisdiction. — See note 1.

402. Remedy by Sale of Property under Execution. — See note 2.

403. Personal Property. — See note 1.

404. Liens and Incumbrances. — See note 1.

407. *d.* SUITS TO REACH PROPERTY FRAUDULENTLY PURCHASED IN NAME OF VOLUNTEER. — See note 1.

District of Columbia. — Gilbert v. Washington Beneficial Endowment Assoc., 10 App. Cas. (D. C.) 316.

Georgia. — See Ernest v. Merritt, 107 Ga. 61; Hobbs v. Greenfield, 103 Ga. 1.

Indiana. — Hoffman v. Henderson, 145 Ind. 613.

Indian Territory. — Daugherty v. Bogy, 3 Indian Ter. 197; Springfield Grocery Co. v. Thomas, 3 Indian Ter. 330.

Iowa. — Groves v. Steel, (Iowa 1902) 89 N. W. Rep. 1107; Hirsch v. Israel, 106 Iowa 498; Gamet v. Simmons, 103 Iowa 163; Brundage v. Cheneworth, 101 Iowa 256; Iseminger v. Criswell, 98 Iowa 382; Carbiener v. Montgomery, 97 Iowa 659; Ware v. Delahaye, 95 Iowa 667.

Kansas. — Jones v. Johnson, 7 Kan. App. 616.

Massachusetts. — Equitable jurisdiction to set aside fraudulent conveyances was established in Massachusetts by Stat. 1877, c. 178. Weeks v. Currier, 172 Mass. 53.

Nebraska. — Anthes v. Schroeder, (Neb. 1902) 92 N. W. Rep. 196; Sheldon v. Parker, (Neb. 1902) 92 N. W. Rep. 923; Monroe v. Reid, 46 Neb. 316, wherein it was held that an action to set aside a fraudulent conveyance and to reach and appropriate moneys or property of the judgment debtor claimed to have been concealed, is equitable in its nature and triable by the court without the intervention of a jury.

New Mexico. — Albuquerque First Nat. Bank v. McClellan, 9 N. Mex. 636.

North Dakota. — Daisy Roller Mills v. Ward, 6 N. Dak. 317.

Oregon. — Wollenberg v. Minard, 37 Oregon 621; Fleischer v. McMinnville Bank, 36 Oregon 553; Wyatt v. Wyatt, 31 Oregon 531; Fisher v. Kelly, 30 Oregon 1; Craig v. California Vineyard Co., 30 Oregon 43; Bennett v. Minott, 28 Oregon 339.

South Carolina. — Edmunds T. Brown Co. v. Allen, 56 S. Car. 237.

Texas. — Tucker v. Pennington, (Tex. Civ. App. 1898) 45 S. W. Rep.

313; McGregor v. White, 15 Tex. Civ. App. 299.

Virginia. — Crowder v. Garber, 97 Va. 565.

West Virginia. — Greer v. Mitchell, 42 W. Va. 494.

Wisconsin. — Kickbusch v. Corwith, 108 Wis. 634.

401. 1. *Inadequacy of Remedy at Law.* — Early Times Distillery Co. v. Zeiger, 9 N. Mex. 31; Level Land Co. No. 3 v. Sivyver, 112 Wis. 442.

In Aid of Judgment Lien. — Compare Stanton v. Catron, 8 N. Mex. 355.

402. 2. *Alabama.* — Freeman v. Stewart, 119 Ala. 158.

Wisconsin. — If the debtor has property subject to the judgment lien, and sufficient to satisfy it, equity has no jurisdiction of a suit to set aside a fraudulent conveyance. Level Land Co. No. 3 v. Sivyver, 112 Wis. 442.

Statutes. — Anderson v. Provident L. & T. Co., 25 Wash. 20, citing 5 ENCYC. OF PL. AND PR. 402.

403. 1. Cox v. Wall, 99 Fed. Rep. 546 [citing 5 ENCYC. OF PL. AND PR. 403]; Ruggles v. Cannedy, 127 Cal. 293; O'Brien v. Stambach, 101 Iowa 40; Webb v. Staves, 1 N. Y. App. Div. 145.

404. 1. *Chattel Mortgages.* — A judgment creditor may invoke the aid of a court of equity to establish the priority of his lien over chattel mortgages which, as against an execution, are fraudulent and void. Robinson v. Hawley, 45 N. Y. App. Div. 287.

407. 1. *Arkansas.* — Slayden-Kirksey Woolen Mills v. Anderson, 66 Ark. 419.

Colorado. — Compare Fox v. Lipe, 14 Colo. App. 258.

District of Columbia. — Turner v. Gottwals, 15 App. Cas. (D. C.) 43; Smith v. Cook, 10 App. Cas. (D. C.) 487.

New York. — Mandeville v. Campbell, 45 N. Y. App. Div. 512.

North Carolina. — Webb v. Atkinson, 124 N. Car. 447.

Oregon. — Silver v. Lee, 38 Oregon 508.

South Dakota. — Minneapolis Thresh-

411. 3. Suits to Subject Property Not Reachable I— (a) **In Absence of Statute — In United States.** — See note I.**417. (b) Statutes Conferring Jurisdiction.** — See note I.**429. 4. Suits by Creditors of Decedents — b. FR**
CONVEYANCES BY DECEDENTS. — See note I.**430.** See note I.**5. Ouster of Jurisdiction by Special Statutory**— **a. ATTACHMENT AND GARNISHMENT.** — See note I.

ing Mach. Co. v. Hanrahan, 9 S. Dak. 520.

Virginia. — See Noyes v. Carter, (Va. 1895) 23 S. E. Rep. 1.

411. 1. Alabama. — A court of chancery had jurisdiction originally, and has now under the statute, to subject to a judgment whereon legal remedies had been exhausted the interest of a debtor in property, the legal title to which was held in trust for him. *Burke v. Morris*, 121 Ala. 126.

Nebraska. — *Millard v. Parsell*, 57 Neb. 178, wherein it was held that when the legal estate of a judgment debtor has been exhausted, a creditors' bill will lie to reach land in which his interest is equitable only and which either cannot be reached on execution, or cannot be sold to advantage because of the clouded condition of the title.

417. 1. Geist v. St. Louis, 156 Mo. 643, quoting 5 ENCYC. OF PL. AND PR. 415-417.

Alabama. — See *Henderson v. Hall*, 134 Ala. 455.

Maine. — Under Rev. Stat. Me., c. 77, § 6, par. X., providing that a creditors' bill may be filed to reach property which cannot be taken on execution, such an action is not the proper procedure to determine and enforce the rights of a pledgor and a pledgee. *Shaw v. Monson Maine Slate Co.*, 96 Me. 41.

Wisconsin. — Stat. Wis. 1898, § 3029; *Crocker v. Huntzicker*, 113 Wis. 181.

429. 1. Alabama. — *Freeman v. Pullen*, 119 Ala. 235, wherein it was said that Civ. Code Ala. 1896, § 331, which prohibits the commencement of suits against executors and administrators, as such, until six months after the grant of letters, does not apply to suits by creditors to reach and subject property fraudulently conveyed by the decedent in his lifetime, as such conveyances are valid against the grantor, and the property in no sense can become assets of the estate; *Merchants' Nat. Bank v. McGee*, 108 Ala. 304.

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New York. — *Montgomery v. Helland*, 55 N. Y. App. Div. 64; *Harvey v. McDonnell*, 111 N. Y. 13, holding that the need not allege that the debtor refused to sue.

Transfer by Incompetent Person before Death. — Under Laws of N. Y. c. 314, § 2, re-enacted as Personal Property Law of 1897, c. 417, § 7, and providing that "a person who fraudulently takes, or in any manner impairs the personal property of another person" is liable to the owner of the value of such property and damages caused by such act, a creditor may maintain an action against an executrix to set aside a transfer made by a deceased person within a year of his death when he was incompetent to make the same. *See* *Montgomery v. Helland*, 55 N. Y. App. Div. 64; *Harvey v. McDonnell*, 111 N. Y. 13; *Rosselle v. Klein*, 42 N. Y. 316; *National Bank of Commerce v. Thurber*, (Supm. Ct. Spec. T.) 13, holding that the need not allege that the debtor refused to sue.

430. 1. Compare Webb v. McGee, 124 N. Car. 447.

3. Alabama. — In *Guyton v. Guyton*, 132 Ala. 66, the court said: "objection to a bill to subject fraudulently conveyed property to the creditor complete remedy at law, by garnishment, otherwise, to that end."

See *Henderson v. Hall*, 134 Ala. 455, holding that a bill in equity by judgment creditors of a decedent to reach unpaid stock subscription is not demurrable upon the ground that under Civ. Code Ala. 1886, § 331, in force, such creditors have no remedy at law by garnishment.

Oregon. — In *Sabin v. Sabin*, 487, it was held that a bill in equity to uncover assets of a decedent did not supersede the remedy at law in fraud of creditors, and

433. Election of Remedies. — See note 1.

b. SUPPLEMENTARY PROCEEDINGS. — See note 2.

434. [6. Effect of Subsequent Bankruptcy Proceedings. — The equitable lien created by the filing of the bill and the service of process in a creditor's action is not displaced by the subsequent bankruptcy of the judgment debtor, nor is the court thereby divested of its jurisdiction to proceed to a final decree. See note 1*a*.]

435. IV. JURISDICTION OF PARTICULAR COURTS — 1. In General. — See note 1.

Justices of Peace. — See note 2.

2. United States Courts. — See note 3.

436. 3. Jurisdictional Amount. — See note 2. See also AMOUNT IN CONTROVERSY.

437. Aggregate of Amounts Claimed by Several Creditors. — See note 4.

accounting. See also *Matlock v. Babb* 31 Oregon 516.

United States. — *Childs v. N. B. Carlstein Co.*, 76 Fed. Rep. 86, wherein it was held that inasmuch as the Michigan statutes, in relation to garnishment, furnished a plain, adequate, and complete remedy at law, the remedy by a creditors' bill was prohibited.

433. 1. *Kansas.* — In *Taylor v. Lander*, 61 Kan. 588, it was held that where land had been attached and an order for the sale thereof made, the attachment creditor could not maintain an equitable action to set aside a subsequent conveyance thereof as fraudulent, as the sale under execution provided an adequate remedy at law.

In *Nebraska* a creditors' bill may be based upon a lien obtained by attachment or garnishment proceedings. *Citizens' State Bank v. Porter*, (Neb. 1903) 93 N. W. Rep. 391; *Hargreaves v. Tennis*, 63 Neb. 356.

2. *Nebraska.* — In *Monroe v. Reid*, 46 Neb. 316, it was held that the right of an equitable action to set aside a fraudulent conveyance existed prior to, and is not taken away by, the enactment of the statute providing for the proceedings in aid of execution.

New York. — The provisions of the code relating to proceedings supplementary to execution furnish a substitute for a creditors' bill as formerly used, and the service of the order under those provisions takes the place of the commencement of the suit under the old system, and gives the judgment creditor a prior lien upon the equitable assets of the debtor. *Reynolds v. Aetna L. Ins. Co.*, 160 N.

Y. 635, citing *Lynch v. Johnson*, 48 N. Y. 27.

434. 1*a.* *National Bank of Republic v. Hobbs*, 118 Fed. Rep. 626; *Iselin v. Goldstein*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 489.

435. 1. *Jurisdiction to Annul Foreign Transfers.* — A court of chancery of one state has no jurisdiction to entertain a bill to set aside as fraudulent a decree of a court of another state directing the sale of land to pay the debts of a decedent. *Eames v. Manley*, 121 Mich. 300.

2. *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487.

3. See *Hudson v. Wood*, 119 Fed. Rep. 764.

A suit by a Trustee in Bankruptcy, in the nature of a creditors' bill, must be brought in the courts of the state wherein he was appointed, if the defendants are residents thereof, *Sheldon v. Parker*, (Neb. 1902) 92 N. W. Rep. 923, unless the defendants consent that the action be prosecuted in a federal court, *McIntyre v. Malone*, (Neb. 1902) 91 N. W. Rep. 246.

436. 2. *Amount in Excess of Jurisdiction.* — In *Cleveland v. Peoples' Nat. Bank*, (Tex. Civ. App. 1899) 49 S. W. Rep. 523, it was held that where both the property conveyed and the debts attempted to be secured thereby exceeded one thousand dollars, the County Court had no jurisdiction.

437. 4. *United States.* — In a creditors' bill brought in a federal court, it is sufficient if the judgment of one of the creditors exceeds the jurisdictional limit, and the other creditors holding liens of the same general character,

438. V. VENUE — In General. — See note 2.

Suit Affecting Title to Real Estate. — See note 3.

439. VI. WHAT PROPERTY REACHABLE — 1. In
See note 1.

though insufficient in amount, may unite or intervene. *Bidwell v. Huff*, 103 Fed. Rep. 362.

Aggregate Amount of Claims as Affecting Right to Appeal. — In *Marx v. Meyer*, 50 La. Ann. 1229, it was held that where the judgment sought by the complainants was in excess of the minimum jurisdictional limit of the Appellate Court, the fact that no individual claim of any one complainant reached such limit did not bar complainants from taking an appeal.

438. 2. Georgia Statute. — Under the Constitution and Civ. Code Ga., § 4950, providing that equity cases should be tried in the county where a defendant resides against whom substantial relief is prayed, if such requirement is satisfied as to one defendant, it is immaterial that another defendant resides in another county. *Kruger v. Walker*, 111 Ga. 383.

Kentucky Statute. — Civ. Code Ky. (1895), § 70, authorizes an action upon the return of "no property found," pursuant to Civ. Code Ky. (1895), § 439, either in the county in which the judgment is rendered or in the county in which the defendant resides or is summoned. *Martin v. Byrd*, (Ky. 1897) 42 S. W. Rep. 1112. See also *Chinn v. Curtis*, (Ky. 1903) 71 S. W. Rep. 923; *Nashville, etc., R. Co. v. Mattingly*, 101 Ky. 219.

3. Woodbury v. Nevada Southern R. Co., 120 Cal. 463. See also *Lanahan v. Caffrey*, 40 N. Y. App. Div. 124.

Property in Another State. — Where the land alleged to have been fraudulently conveyed is situated in another state and is not, therefore, subject to the lien of the complainant's judgment, the court has no power to make any decree which will subject it to such lien or apply it to the payment of the judgment. *Gray v. Folwell*, 57 N. J. Eq. 446.

In the Federal Courts a creditors' bill may be filed by an alien plaintiff in the district of the *situs* of the property, although the defendants may be residents of another district. *De Hierapolis v. Lawrence*, 99 Fed. Rep. 321.

439. 1. German Nat. Bank v. Hastings First Nat. Bank, 55 Neb. 86.

Property of a Corporation sold to

another corporation upon of mortgages cannot be creditor of the former judgment creditor's acti *v. Ann Arbor R. Co.*, Div. 336.

Individual Property of separate and individual each member of a partnership subjected by suit against to the payment of a partnership and any disposition of liable for such debt, if creditor, will be set aside and the property condemned of equity. *Steiner Lan King*, 118 Ala. 546.

Land Dedicated to Public Where land is platted plots and is dedicated as a public use, it cannot be reached by a creditor's bill; and the fact that of the legal title to a portion receives a portion of the proceeds from the sale thereof render the unsold lots subject to legal or equitable lien. *First Nat. Bank v. Hastings*, 844.

Separate Property of a *Adler, etc., Clothing Co.*, 55 Neb. 266, it was held wife permits her husband to take title of her property and obtain credit, she will be liable for the property as against the enforcement of a debt, which was influenced, by the husband's ownership of the property, allow him to contract.

Improvements Made by Husband's Land. — *Marmon v. Ind.* 445; *Jackson v. Ind.* App. 1902) 63 N. E. Rep. 100.

Improvements Made by Wife's Land. — In *Trefe nam*, 90 Me. 376, it was held a husband expends money upon his wife's property, the enforcement of such property thereof may be reached by a creditor's bill.

In Maddox v. Summer 483, the court held that the wife cannot be sold to the husband's creditors, appears that the husband may

442. *Seats in Stock Exchanges.* — See note 1.

443. *Corporate Stock.* — See note 2.

444. *Policies of Insurance.* — See note 1.

445. *2. Choses in Action.* — See note 1.

ments thereon with his own or their common funds with intent to defraud his creditors, and that the wife, knowing of such intent, participated in the fraud.

The Dower Right of a wife in the real estate of her husband cannot be reached in a suit to set aside a conveyance alleged to be fraudulent as to his creditors. *Isgrigg v. Pauley*, 148 Ind. 436.

Money in Custodia Legis. — In *Anheuser-Busch Brewing Assoc. v. Hier*, 52 Neb. 424, the court said that funds held by the clerk of the court, in his official capacity, could not be reached by a creditors' bill, and asserted that the statement to the contrary, in *Weaver v. Cressman*, 21 Neb. 675, was mere *obiter*.

In *Wade v. Ringo*, 62 Mo. App. 414, it was held that moneys in the hands of a receiver, appointed pending litigation between partners, may be taken to satisfy a decree based upon a creditor's bill, if such decree runs against all the parties having an interest in such moneys.

In *U. S. v. Eisenbeis*, 88 Fed. Rep. 4, it was held that money paid into court by the federal government for distribution to those interested in condemnation proceedings could not be reached by a creditors' bill. See further *Mitchell v. Evans*, 18 App. Cas. (D. C.) 254.

Homestead and Exemptions. — Property which would be exempt from execution if retained, cannot be set aside by the creditors as fraudulently conveyed. *Isgrigg v. Pauley*, 148 Ind. 436. See also *Marmon v. White*, 151 Ind. 445.

Effect of Fraudulent Conveyances. — In support of the doctrine that the conveyance of a homestead by a debtor cannot be attacked as fraudulent by his creditors, see the following cases: *State Ins. Co. v. Prestage*, 116 Iowa 466; *Gwaltney v. Searcy*, (Tex. Civ. App. 1902) 68 S. W. Rep. 304; *Doyle v. Wamego First Nat. Bank*, (Tex. Civ. App. 1899) 50 S. W. Rep. 480.

442. 1. See *Sprogg v. Dichman*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 409.

443. 2. See *Gilbert v. Washington Beneficial Endowment Assoc.*, 10 App. Cas. (D. C.) 316; *Gray v. Folwell*, 57 N. J. Eq. 446.

444. 1. *Compare Hendrie, etc., Mfg. Co. v. Platt*, 13 Colo. App. 15, wherein it was held that a creditor cannot enforce the payment of his debt out of the proceeds of insurance on the life of his deceased debtor, except to the extent of the premiums paid by such debtor subsequent to his becoming indebted to the plaintiff and during his insolvency, although the policies were issued on the distributive plan payable in twenty years and the deceased died before the expiration of the twenty years.

Fraudulent Assignment of Policies of Insurance. — Where the only consideration for the assignment of an insurance policy was the moral obligation of a wife to pay her husband's note, the assignment will not prevent a creditor of the assignor from reaching such policy by a creditors' bill. *Fideliv, etc., Co. v. Thompson*, 128 Cal. 506.

Insurance Premiums. — In *Adler, etc., Clothing Co. v. Hellman*, 55 Neb. 266, it was held that, as a general rule, premiums paid for life insurance in favor of wife and children, or either, cannot be recovered by creditors, as made in fraud of their rights, although the debts existed at the time of such payments.

See also *Hendrie, etc., Mfg. Co. v. Platt*, 13 Colo. App. 15, holding that where a husband was indebted to his wife for more than the premiums paid by him for life-insurance policies in her favor, creditors of the husband could not reach the amount of such premiums after his death, even though he was insolvent at the time they were paid and the debts had already been created.

Fire Insurance. — In *Forrester v. Gill*, 11 Colo. App. 410, it was held that while creditors may reach property conveyed, they cannot reach the insurance on such property when it has been destroyed by fire, even though the debtor paid the premiums thereon.

445. 1. **An Actionable Demand** against a third party in favor of the

448. 3. Equitable Assets — a. IN GENERAL. — S**450. Instances of Equitable Interests. — See note 3.****451. See notes 1, 2, 3.**

debtor may be enforced by the latter's judgment creditors. *German Nat. Bank v. Hastings First Nat. Bank*, 59 Neb. 7.

Rights of Action for Torts. — Compare *Anglin v. Conley*, (Ky. 1903) 71 S. W. Rep. 926, wherein the court approved the doctrine that "one who had a claim against another, growing out of assault and battery, had the right to have a fraudulent conveyance set aside, although made before the judgment was rendered in his favor."

And in *German Nat. Bank v. Hastings First Nat. Bank*, 55 Neb. 86, it was held that a creditors' bill will reach a debtor's cause of action for conversion.

Rights of Action in Indebitatus Assumpsit. — In *Meriwether v. Bell*, (Ky. 1900) 58 S. W. Rep. 987, it was held that Civ. Code Ky., § 439, which authorizes a proceeding in equity on return of "no property," was intended to enable a creditor to subject to the payment of his debt "any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled," and that the words "chose in action" and "all other property to which the defendant is entitled," are broad enough to include all claims on which an action of *indebitatus assumpsit* would lie at common law.

Unpaid Rents may be seized and subjected to the payment of the claims of judgment creditors. *Daugherty v. Bogy*, 3 Indian Ter. 197.

Moneys Due from a Municipal Corporation cannot be reached by a creditor's bill. *Morgan v. Rust*, 100 Ga. 346; *Addyston Pipe, etc., Co. v. Chicago*, 170 Ill. 580.

A Verdict in favor of the debtor is not reachable by a creditors' bill until after judgment has been entered thereon. *Bennett v. Sweet*, 171 Mass. 600.

Annuity for Life. — A stated amount to be paid annually for life, to their mother, by the grantees in a deed, is a fixed and certain liability which may be reached by her judgment creditors. *Ellis v. Ellis*, 104 Ky. 121.

448. 1. See *Watson v. Bonfils*, (C. C. A.) 116 Fed. Rep. 157.

Interests of Contingent

— In *Howbert v. Caw*, 649, it was held that a remainder could not be set aside in payment of the debts of a remainderman.

Lien of Partner on F sale of his interest in the effects of a partner in the absence of fraud, is a lien on the partnership thereafter the creditors cannot avail themselves of the satisfaction of their debt on partnership assets. *Sel. Ind.* 422.

The Good Will of a Busi reached by a creditors' bill. *Drucklieb*, 84 Fed. Rep. 912. **450. 3. Muir v. Ho**

Where a Devisee Has Right of Possession, with interest meanwhile, the effect both debtor and creditor on the sale until reduced to possession. *Monahan*, 17 Wash. 148.

Contingent Interest. — May, 9 App. Cas. (D. C.) said that if a debtor has an interest in land devised under certain contingencies, and will, there seems to be no reason why the same, what should not be sold, if for the satisfaction of an unpaid debt.

451. 1. Muir v. Ho Rep. 912.

2. Freeman v. Stewart Kickbusch v. Corwith, 1

3. Marshall v. Hall, 4

In Alabama, when a creditor substantially all his property to be executed for the payment of a prior debt by force or priority of payment one or more creditors, a will impress upon the property to be executed for the payment of all the creditors. Such a sale is not cognizable and enforceable in court of law, and in no law nor a court of equity for fraudulent motives of consideration. *Morrow v. Ala.* 330.

And if the property so

452. See note 2.

454. *b. EXPRESS TRUSTS* — (1) *In General.* — See note 1.

(2) *Trusts Created by Third Persons under Statutes.* —

See note 2.

456. (3) *Spendthrift Trusts.* — See note 1.

457. 4. *Property Fraudulently Conveyed and Its Avails.* — See note 3.

been levied upon under writs of attachment, at the instance of certain creditors, a court of equity may, nevertheless, entertain a bill to enforce the trust, and may, in the meantime, enjoin the attachment suits at law. *Gay v. Strickland*, 112 Ala. 567.

Assets of Insolvent Partnership. — The assets of an insolvent copartnership, dissolved by the death of one of its members, are not held in trust by the surviving partner of the firm, for the payment of copartnership debts, so that they may be reached by a creditors' bill. *Fairbanks v. Welshans*, 55 Neb. 362.

459. 2. See *Mandeville v. Campbell*, 45 N. Y. App. Div. 512.

454. 1. See *Huntington v. Jones*, 72 Conn. 45.

Assigned Interest in Trust Fund. — In *Montgomery v. Boyd*, 78 N. Y. App. Div. 64, it was held that the assigned interest of a debtor in a trust fund created by him can be reached by his creditors, when the assignment thereof was made with intent to hinder, delay, and defeat his creditors.

Trusts Created by Debtor. — In *De Hierapolis v. Lawrence*, 115 Fed. Rep. 761, 99 Fed. Rep. 321, it was held that an annuity reserved from the property of the debtor, which had been placed in trust by him, could be reached by a judgment creditors' bill, although such annuity had been assigned. See also *Los Angeles First Nat. Bank v. Maxwell*, 123 Cal. 360; *Coleman, etc., Co. v. Rice*, 115 Ga. 510; *Racek v. North Bend First Nat. Bank*, 62 Neb. 659.

2. California. — In *Seymour v. McAvoy*, 121 Cal. 438, it was held that the income of a trust fund created by will cannot be appropriated to the payment of the claims of the beneficiary's creditors, where the effect of such appropriation would be to defeat the trust.

New York. — A judgment creditor's action can be maintained under 2 Rev. Stat. N. Y. 173, 174, §§ 38, 39, superseded by Code Civ. Pro. N. Y., §§ 1871-1879, to reach the income of a trust fund only when the same was created

by the debtor. *Keeney v. Morse*, 71 N. Y. App. Div. 104.

Where the trust fund was created by a third person for the benefit of the debtor, a creditor may recover, under 1 Rev. Stat. N. Y. 729, § 57, re-enacted as part of the Real Property Law (Laws N. Y. 1896, c. 547, § 78), the surplus of the income thereof over and above that necessary for the education and support of the beneficiary. *Wetmore v. Wetmore*, 149 N. Y. 520; *Keeney v. Morse*, 71 N. Y. App. Div. 104; *Brown v. Barker*, 68 N. Y. App. Div. 592; *Dittmar v. Gould*, 60 N. Y. App. Div. 94.

456. 1. *Hutchinson v. Maxwell*, 100 Va. 169.

457. 3. See *Muskegon Valley Furniture Co. v. Phillips*, 113 Ala. 314.

Liability of Fraudulent Grantee Who Transfers Property. — A fraudulent grantee who wrongfully places the property beyond the reach of his transferor's creditors may be held liable for its proceeds or its value. *Metcalf v. Arnold*, 132 Ala. 74; *Weingarten v. Marcus*, 121 Ala. 187; *Birmingham Shoe Co. v. Torrey*, 121 Ala. 89.

And he may be charged with interest on the value of the property. *Hargreaves v. Tennis*, 63 Neb. 356.

In *Bigby v. Warnock*, 115 Ga. 385, it was held that where the property was transferred to an innocent third party as security for a loan to the fraudulent grantee, the latter was personally liable to a judgment creditor of her grantor for the amount of the loan or for an amount thereof sufficient to satisfy the judgment.

Property Exchanged for Corporate Stock.

— A fraudulent grantee who transfers the property received in exchange for corporate stock is liable for the value of such property, and not merely for the shares of stock taken in exchange. *Varnum v. Behn*, 63 N. Y. App. Div. 570, *affirmed* 171 N. Y. 658.

Payments by Grantee for Benefit of Property. — In *Cooper v. Friedman*, 23 Tex. Civ. App. 585, it was held that a fraudulent grantee cannot recover

460. 6. After-acquired Property. — See note 2.

VII. EXHAUSTION OF ORDINARY LEGAL RE

In General. — See note 3.

461. See note 1.

462. *United States Courts.* — See note 1.

463. 2. Demands Primarily Enforceable in Equity. —

464. *Enforcement of Trusts.* — See note 1.

465. 3. Blending of Law and Equity in One Ju

See note 1.

466. 4. Necessity to Recover Judgment at Law —
ERAL. — See note 1.

from the creditor, or charge the property with taxes, insurance, or interest on a mortgage debt paid by him.

In *Daisy Roller Mills v. Ward*, 6 N. Dak. 317, it was held that the payment by the fraudulent grantee of valid existing incumbrances on the property did not entitle him to hold the same as security for the amounts so paid.

460. 2. *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16; *Manhattan Trust Co. v. Seattle, etc., Co.*, 19 Wash. 493.

3. See *Huntington v. Jones*, 72 Conn. 45; *Silver v. Lee*, 38 Oregon 508.

461. 1. *District of Columbia.* — *Droop v. Ridenour*, 9 App. Cas. (D. C.) 95.

Illinois. — *Nordlinger v. Ostatag*, 66 Ill. App. 661. Compare *Andrews v. Donnerstag*, 70 Ill. App. 236, affirmed 171 Ill. 329.

Iowa. — *Cassady v. Grimmelman*, 108 Iowa 695; *Hill v. Denney*, 106 Iowa 726; *Banning v. Purinton*, 105 Iowa 642.

Nebraska. — *Missouri, etc., Trust Co. v. Richardson*, 57 Neb. 617.

In *Thompson v. La Rue*, 59 Neb. 614, it was held not essential to the maintenance of an equitable action against judgment debtors that legal remedies be first exhausted against an indorser on the instrument merged into the judgment, where such indorser was not a party to the original action.

New Mexico. — See *Early Times Distillery Co. v. Zeiger*, 9 N. Mex. 31.

Oregon. — *Fleischner v. McMinnville Bank*, 36 Oregon 553.

Pennsylvania. — *People's Nat. Bank v. Kern*, 193 Pa. St. 59.

Wisconsin. — *Ellis v. Southwestern Land Co.*, 108 Wis. 313.

Exhaustion of Remedy by Supplementary Proceedings. — A creditors' bill may be

maintained without first the statutory proceeding tary to the execution.

tier, 113 Cal. 429; *Chamling House v. Turner-Fra Co.*, (Neb. 1902) 92 N. W. Meyer Boot, etc., Co. Co., 11 S. Dak. 620.

462. 1. See *Bidwell Fed. Rep.* 362; *U. S. v. Fed. Rep.* 4; *Childs v. N Co.*, 76 Fed. Rep. 86; *G Fed. Rep.* 327.

463. 3. See *Kruger Ga.* 383.

In a Suit by a Trustee to set aside fraudulent co the bankrupt, it is imma complainant has an ade at law, equity being th remedy. *Cox v. Wall*, 546.

Nor need the credito trustee represents, ha their legal remedies. *Parker*, (Neb. 1902) 92 N.

464. 1. *Early Times v. Zeiger*, 9 N. Mex. 31.

465. 1. *Iowa.* — The jurisdiction of a court of be invoked by a cred remedies at law have b does not prevail in all i is in harmony with the thority. *Banning v. Iowa* 642, citing 5 ENCY Pr. 465.

466. 1. *Connecticut.* necessary that a judgr rendered before a cre brought. The judgme dered in the very action equitable relief is asked v. Jones, 72 Conn. 45.

District of Columbia. *Washington Beneficial Assoc.*, 10 App. Cas. (D.

- 466.** Right to Trial by Jury. — See note 2.
467. Subrogation of Party Paying Judgment. — See note 2.
469. *b.* SUITS TO SET ASIDE FRAUDULENT CONVEYANCES
 — (1) *In General.* — See note 1.

In *Droop v. Ridenour*, 9 App. Cas. (D. C.) 95, the defendant in an action at law absconded, and the plaintiff thereupon filed a creditors' bill. Pending the latter proceedings the debtor returned and entered an appearance in the action at law, and it was held that he was entitled to a stay of the creditor's action until the determination of the suit at law.

Illinois. — *Austin v. Bruner*, 169 Ill. 178; *Detroit Copper, etc.*, *Rolling Mills v. Ledwidge*, 162 Ill. 305; *Hughes v. Link Belt Machinery Co.*, 95 Ill. App. 323, *affirmed* 195 Ill. 413; *Cotes v. Bennett*, 84 Ill. App. 33, *affirmed* 183 Ill. 82; *Austin v. Bruner*, 65 Ill. App. 301.

Iowa. — *Smith v. Sioux City Nursery, etc.*, Co., 109 Iowa 51; *Hunt v. Johnston*, 105 Iowa 311.

Kansas. — *State Bank v. Chatten*, 59 Kan. 303.

Missouri. — *McCoy v. Connecticut F. Ins. Co.*, 87 Mo. App. 73; *Burnham v. Smith*, 82 Mo. App. 35; *Wilkinson v. Goodin*, 71 Mo. App. 394.

Nebraska. — *Moore v. Omaha L. Assoc.*, 62 Neb. 497. See also *Fairbanks v. Welshans*, 55 Neb. 362, holding that creditors are not given such a lien by law upon the assets of a copartnership, whether it be solvent or insolvent, as will render unnecessary the reduction of their claims to judgment before maintaining a creditors' bill.

New York. — *Dittmar v. Gould*, 60 N. Y. App. Div. 94, holding that before a judgment creditor's action can be maintained to recover the surplus of the income of a trust fund created by a third party for the benefit of the debtor, it is absolutely necessary that a judgment at law be recovered against the beneficiary and an execution returned unsatisfied, although the debtor or beneficiary be outside of the jurisdiction of the court; *Cornell v. Savage*, 49 N. Y. App. Div. 429.

Wisconsin. — *Ellis v. Southwestern Land Co.*, 108 Wis. 313; *Krouskop v. Krouskop*, 95 Wis. 296.

Where the Answer Admits the plaintiff's claim, the requirement that there must be an acknowledged debt as a preliminary to bringing the action is

fulfilled. *D. A. Tompkins Co. v. Catawba Mills*, 82 Fed. Rep. 780.

Mechanics' Lien. — The perfection of a statutory mechanics' lien upon real property will give the lienor a standing in a court of equity for the purpose of setting aside a fraudulent mortgage upon the premises. *Mahoney v. McWalters*, 3 N. Y. App. Div. 248.

466. 2. See *Early Times Distillery Co. v. Zeiger*, 9 N. Mex. 31; *Hudson v. Wood*, 119 Fed. Rep. 764.

In *New York*, in an action brought to set aside as fraudulent the transfer by a debtor before his death of an interest in a trust fund, the foreign executors of such debtor, who are properly made parties to the action, are entitled to a trial by jury as to the existence of an indebtedness from the testator to the plaintiff. *Montgomery v. Boyd*, 78 N. Y. App. Div. 64.

467. 2. *Gunn v. Orndorff*, (Ky. 1902) 67 S. W. Rep. 372.

Necessity for Payment of Judgment. — A surety who has not paid a judgment against him cannot maintain a suit in equity to set aside as fraudulent a conveyance made by his principal. *Ellis v. Southwestern Land Co.*, 108 Wis. 313.

469. 1. Colorado. — In *Livingston v. Swofford Bros. Dry Goods Co.*, 12 Colo. App. 320, it was held that mere contract creditors could maintain a creditors' bill where it was shown that a judgment and execution in favor of the plaintiffs would have been fruitless and a useless and unnecessary expense.

Iowa. — *Hill v. Denney*, 106 Iowa 726; *Ware v. Delahaye*, 95 Iowa 667.

Nebraska. — *Fairbanks v. Welshans*, 55 Neb. 362, *quoting* 5 ENCYC. OF PL. AND PR. 468.

New Jersey. — See *Bird v. Magowan*, (N. J. 1898) 43 Atl. Rep. 278.

New Mexico. — *Early Times Distillery Co. v. Zeiger*, 9 N. Mex. 31.

North Dakota. — See *Ingwaldson v. Skrivseth*, 7 N. Dak. 388.

Oregon. — *Fisher v. Kelly*, 30 Oregon 1.

Texas. — *Herring-Hall-Marvin Co. v. Kroeger*, 23 Tex. Civ. App. 672, wherein it was held that creditors may bring suit to subject property fraudu-

472. Why Judgment Is Necessary. — See note 1.

473. See note 2.

(2) *As Prerequisite to Obtaining Injunction.*—

475. (3) *Suits to Reach Property Fraudulently Conveyed to Name of Volunteer.* — See note 1.

(4) *Statutes Authorizing Suits by Creditors.* — See note 2.

lently conveyed by the debtor, to the payment of their debts, without having first acquired a lien thereon, provided the property conveyed or transferred can be reached by garnishment or attachment.

Wisconsin. — *Ellis v. Southwestern Land Co.*, 108 Wis. 313; *French Lumbering Co. v. Theriault*, 107 Wis. 627; *Weber v. Weber*, 90 Wis. 467.

Limitations of Rule—Where Judgment Is Impossible. — Where it is impossible for the creditors to obtain a judgment at law, they may sue to set aside a fraudulent conveyance without obtaining such judgment. *Mueller v. Bruss*, 112 Wis. 406. See also *infra*, VII. 9. *Insolvency of Debtor as Excuse for Not Exhausting Legal Remedies.*

472. 1. *French Lumbering Co. v. Theriault*, 107 Wis. 627.

New York. — In *Whitney v. Davis*, 148 N. Y. 258, it was said that the principle of equitable intervention to annul or set aside transfers of a debtor's property, for being fraudulent as to his creditors, demands for its application an adjudication of the fact of the debt and that it shall appear that an execution upon the judgment is incapable of levy because of a fraudulent transfer by the judgment debtor.

473. 2. See *Frankfort Deposit Bank v. Caffee*, (Ala. 1902) 33 So. Rep. 152, in which the court said: "The rule seems to be settled with us, in a suit to set aside a fraudulent conveyance, whether it be constructively fraudulent and therefore voidable as against past due debts, or actually fraudulent, and voidable as to future as well as to past obligations, that the existence of a debt, for the payment of which, except for the conveyance, the property transferred could be made liable to creditors, must appear."

3. *Hill v. Denney*, 106 Iowa 726; *Ellis v. L. Hays Saddlery, etc., Co.*, 65 Kan. 174.

475. 1. *Hill v. Denney*, 106 Iowa 726.

2. *Alabama.* — Civ. Code Ala. 1886, §

3544, has been re-enacted Ala. 1896, § 818.

A judgment creditor is "a creditor without a lien." Civ. Code Ala. 1896, § 818; *Steele*, 109 Ala. 563.

The existence of an ad hoc remedy at law in a particular case is not the creditor of his remedy at law. *Birmingham v. Torrey*, 121 Ala. 89; *V. Marcus*, 121 Ala. 187.

A bill filed under this code has none of the features of discovery. *Rice v. Steele*, 109 Ala. 563.

In *Freeman v. Pullen*, the court, construing this statute, said: "Whatever may have been the decisions, we regard the fact that this statute authorizes a contract creditor, without a bill to discover or subject the debtor's property to the payment of his debt any property has been fraudulently conveyed by the debtor, without first exhausting legal remedies to a return of the bill, whether the debtor be liable or not." See also *Metcalf v. Arrington*, 74, 110 Ala. 180.

Conveyance Need Not Be Void to Pass Title. — This statute defines the remedies to cases where property has been alienated by a debtor so perfect in form as to pass the legal title, but in equity terms the jurisdiction is to fraudulent attempts to convey. *Little v. Sterne*, 109 Ala. 563.

Setting Aside Writ of Habeas Corpus. — Under this section the creditor may file a bill to set aside a writ of habeas corpus levied upon the debtor. *Collier v. Schwartz Shoe Co.*, 109 Ala. 563; *Comer v. Heidelberg*, 109 Ala. 563.

But in such a case the averment of fraud on the part of the common debtor or of collusion between the attaching creditors and the debtor is not required, but the mere allegation that the fraud existed for the attachment.

477. United States Courts. — See note 6.

c. SUITS TO SUBJECT PROPERTY NOT REACHABLE BY EXECUTION — (1) *In General.* — See note 7.

479. (2) Under Statutes. — See note 1.

d. SUITS BY CREDITORS OF DECEDENTS — (1) *Administration Suits Generally.* — See note 2.

sufficient. Builders, etc., Supply Co. v. Montgomery First Nat. Bank, 123 Ala. 203; Plaster v. Throne-Franklin Shoe Co., 123 Ala. 360.

And a bill which contains the proper allegations as to fraud and collusion need not aver the nonexistence of grounds for the attachment. Henderson v. J. B. Brown Co., 125 Ala. 566. See also Butler v. Feeder, 130 Ala. 604; Putney v. Wolberg, 127 Ala. 124; Steiner v. Atlanta Woodenware Co., 127 Ala. 261.

Arkansas. — Euclid Ave. Nat. Bank v. Judkins, 66 Ark. 486; Davis v. Arkansas F. Ins. Co., 63 Ark. 412.

Kentucky. — Act March 16, 1896, c. 7 (Acts 1896, p. 10), changed the law then in force, providing that a creditor could not bring an action to set aside a fraudulent conveyance without procuring an attachment or having a return of *nulla bona*. Under said act "any party who may be aggrieved thereby" may file a petition in equity to set aside a fraudulent transfer or conveyance. Johnson v. Bonfield, (Ky. 1897) 40 S. W. Rep. 697. See also Locheim v. Eversole, (Ky. 1902) 70 S. W. Rep. 661; O'Kane v. Vinnege, (Ky. 1900) 55 S. W. Rep. 711; Dishman v. Davidson, (Ky. 1897) 39 S. W. Rep. 515.

Mississippi. — See Jones v. Jones, 79 Miss. 261, holding that chancery courts cannot take cognizance of a suit seeking to have the damages of the complainant arising out of a tort ascertained and to have set aside a conveyance alleged to have been fraudulently made for the purpose of defeating the complainant's claim.

Tennessee. — See Shapira v. Paletz, (Tenn. Ch. 1900) 59 S. W. Rep. 774; Bickford v. McComb, 88 Fed. Rep. 428.

West Virginia. — Code W. Va., c. 139, § 7, as it was before the enactment of Act of 1891, c. 95, authorized a suit by a judgment creditor to subject the lands of his debtor to the judgment lien, without the issue and return of an execution against the debtor's personalty. By the Act of 1891, the rule was changed, and the issue and return of

an execution unsatisfied was made a condition precedent to the right to subject land to a judgment lien; but this act was not retroactive, and did not apply to suits already begun. Burns v. Hays, 44 W. Va. 503. See also Hoffman v. Fleming, 43 W. Va. 762.

Wisconsin. — Laws Wis. 1901, c. 207, confers the right of enforcement of their claims, as against fraudulent conveyances followed by a general assignment, upon and in favor of contract creditors, and no prior judgment upon the claims, nor resort to legal remedies, is demanded to establish their interest. *In re H. G. Andrae Co.*, 117 Fed. Rep. 561.

477. 6. Harrison v. Farmers' L. & T. Co., (C. C. A.) 94 Fed. Rep. 728; D. A. Tompkins Co. v. Catawba Mills, 82 Fed. Rep. 780. See also Childs v. N. B. Carlstein Co., 76 Fed. Rep. 86.

7. Michigan. — Jenks v. Horton, 114 Mich. 48.

Oklahoma. — Miller v. Melone, 11 Okla. 241.

Wisconsin. — Hughes v. Hunner, 91 Wis. 116.

Award in Lieu of Judgment. — In a suit to reach equitable assets, a party in whose favor an award has been made in proceedings under an agreement to arbitrate may maintain a creditors' bill without first reducing the demand to judgment. The award, regularly made and apparently unimpeachable, is as conclusive of the demand, in respect of both its validity and its amount, as the judgment of a court of competent jurisdiction would be. Sanborn v. Maxwell, 18 App. Cas. (D. C.) 245.

479. 1. Turrentine v. Koopman, 124 Ala. 211, holding that a bill by judgment creditors to subject to the satisfaction of their judgment an equity of redemption in lands owned by their debtor will not lie, when it does not appear that legal remedies have been exhausted.

2. In New Jersey the general jurisdiction of the court of chancery for enforcing payment of the debts of a decedent is based upon the general

481. (2) *Fraudulent Conveyances by Decedents.* —

484. *e. SUITS BY CREDITORS OF PARTNERSHIP.* — See note 1.

485. *5. Requisites and Sufficiency of Judgment.* — See note 2.

487. *Docketing Judgment.* — See note 1.

Regularity of Judgment. — See note 2.

administration of the estate, and when the jurisdiction is invoked, not for this purpose, but for the collection of one complainant's claim only, it is not to be exercised in the absence of facts showing that the ordinary procedure at law for the collection of debts and the settlement of estates of decedents is not applicable or should be superseded. A bill in equity by a mere creditor at large to enforce payment of his claim will not lie against the legatees or devisees until the claim has been established by law or admitted by the executors. *Loehnerberg v. Loehnerberg*, 63 N. J. Eq. 496.

481. 1. In Iowa, where an administrator brings an action against the grantee of the decedent to set aside a conveyance as in fraud of the decedent's creditors, it is not necessary, in support of such an action, that the creditors should have reduced their claims to judgment. *Mallow v. Walker*, 115 Iowa 238.

New Jersey. — See *Adoue v. Spencer*, 59 N. J. Eq. 231; *Rutherford v. Alyea*, 54 N. J. Eq. 411.

New York. — The Personal Property Law (Laws N. Y. 1897, c. 417, § 7) provides that a creditor of a deceased insolvent debtor, having a claim against the estate of such debtor exceeding the amount of one hundred dollars, may, without obtaining judgment upon such claim, for the benefit of himself and other creditors interested in such estate, maintain an action to set aside a conveyance or transfer of personal property made in fraud of creditors; and the claim of such creditor, if disputed, may be established in such action. *Montgomery v. Boyd*, 78 N. Y. App. Div. 64.

The fact that a creditor has placed his claim in judgment will not preclude him from maintaining an action under this statute. *Rosselle v. Klein*, 42 N. Y. App. Div. 316. See also *National Bank v. Thurber*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 13; *Nill v. Phelps*, (Supm. Ct. Spec. T.) 20 Misc.

(N. Y.) 488; *Lilienthal (C. C. A.)* 92 Fed. Rep. 7; *Wisconsin.* — See *Allen Wis.* 226.

484. 1. *Fairbanks v. Neb.* 362, *quoting* 5 ENCY PR. 482.

485. 2. *Judgment by* In order to establish legally of a plaintiff as a creditor maintain an action to set aside as fraudulent, the mere judgment by the defendant after the execution of said judgment is not sufficient without something tending to prove the indebtedness of the defendant. *Docen*, 50 N. Y. App. 1.

Judgment for Costs of For Action. — Where a defendant creditors' action against him for costs of such judgment is subsequent to his wife's judgment of such action, and judgment is subsequently against him for costs of such judgment, such judgment is basis for the maintenance of another judgment creditor to set aside such transfer. *Smith*, (Supm. Ct. Spec. T.) 564.

487. 1. *New York.* — judgment has been docketed in the county of the debtor's residence, and an execution has been satisfied, it is not necessary to docketed in another county that a judgment creditor's action be maintained to set aside such judgment of real property in county. *Lanahan v. Caff*, App. Div. 124.

2. *Wooten v. Steele*, 18 Central Nat. Bank v. (Mich. 488; *Maddox v. St. Tex.* 483; *Thomson v. C.* Rep. 327. Compare *Stevenson*, 68 Ill. App. 549; *Lamb*, 101 Ky. 727; *Sch* (Minn. 1903) 93 N. W. Rep.

When the Judgment Merely, and not absolutely

- 487.** *Service of Process.* — See note 3.
- 489.** *Dormancy of Judgment.* — See note 1.
b. DECREES IN EQUITY. — See note 2.
Decree for Alimony. — See note 3.
- 491.** *c. FOREIGN JUDGMENTS AND JUDGMENTS OF UNITED STATES COURTS* — (1) *Foreign Judgments.* — See note 1.
- 492.** *United States Courts.* — See note 1.
 (2) *Judgments Rendered by United States Courts.* — See note 2.
- 493.** *6. Issuance of Execution and Return of Nulla Bona* — *a. GENERALLY.* — See note 1.
- 495.** *Alias Executions.* — See note 1.
- 497.** *b. SUITS TO SET ASIDE FRAUDULENT CONVEYANCES* — (1) *In General* — *In One Line of Decisions.* — See note 1.

sufficient foundation for a bill in aid of execution. *Griffin v. McGavin*, 117 Mich. 372.

487. *3. Service upon One of Two Partners*, when followed by the return unsatisfied of executions against the firm, is sufficient to authorize the bringing of a subsequent creditors' action to set aside a general assignment by both partners. *King v. Baer*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 308.

489. *1.* See *Miller v. Melone*, 11 Okla. 241, holding that where the statutory period has run between the date of the last execution issued on the judgment, and the time of suing out another execution thereon, such judgment becomes dormant, and a creditor's bill cannot be maintained.

2. *Clement v. Oceana Circuit Judge*, 119 Mich. 605, citing 5 ENCYC. OF PL. AND PR. 489, and holding that a deficiency decree against mortgagors may be made the basis of a creditors' bill.

3. *Wetmore v. Wetmore*, 149 N. Y. 520, holding that a wife who has been awarded alimony under a judgment of divorce is such a judgment creditor of her husband as will entitle her to maintain an action in equity to subject the surplus of a testamentary trust fund created for the benefit of her husband, over and above what is necessary for his suitable support and maintenance, to the payment of the alimony both accrued and to accrue.

491. *1.* See *Lilienthal v. Drucklieb*, 80 Fed. Rep. 562.

492. *1.* See *Barnett v. East Tennessee, etc., R. Co.*, (Tenn. Ch. 1898) 48 S. W. Rep. 819; *Bidwell v. Huff*, 103 Fed. Rep. 362; *Alkire Grocery Co. v. Richesin*, 91 Fed. Rep. 70.

2. Judgment of Different District. — A federal court will not entertain a creditors' bill based upon a judgment entered by a federal court of another district. *Union Trust Co. v. Bokor*, 89 Fed. Rep. 6.

493. *1. Bill in Aid of Execution.* — In *Michigan* a bill in aid of execution need not show an execution returned unsatisfied. *Wilson v. Addison*, 127 Mich. 680; *Hodge v. Gray*, 110 Mich. 654.

Bill to Enforce Judgment Lien. — In *West Virginia*, a bill to enforce a judgment lien must state that a writ of fieri facias has been returned "No property found," or that no execution has issued within two years from the date of the judgment. This is not required as to judgments of date before the act of March 13, 1891. *Dunfee v. Childs*, 45 W. Va. 155.

495. *1. When Supplemental Bill Shows After-acquired Property.* — In *Newlove v. Pennock*, 123 Mich. 260, it was held that where the original bill showed the return of an execution unsatisfied, and a supplemental bill was filed from which it appeared that the defendant had since acquired property against which an execution might be issued and which prayed for a discovery, the court had jurisdiction to entertain the latter bill, although no subsequent execution had been issued and although the complainant had a complete remedy at law.

497. *1. District of Columbia.* — *Droop v. Ridenour*, 9 App. Cas. (D. C.) 95.

Michigan. — *Grenell v. Ferry*, 110 Mich. 262, holding that the filing of a supplemental bill, setting forth the issue of an alias execution after suit

501. Other Authorities. — See note 1.

503. Under Statutes. — See note 1.

(2) *Fraudulent Conveyances of Personal*

See note 2.

504. See note 1.

brought and its return unsatisfied, gives no jurisdiction to the court.

Minnesota. — *Spooner v. Travelers Ins. Co.*, 76 Minn. 316, citing 5 ENCYC. OF PL. AND PR. 498.

Nebraska. — In *Howard v. Raymers*, (Neb. 1902) 89 N. W. Rep. 1004, it was held that where an execution has been levied upon a fraudulently alienated piece of real estate, an execution creditor is entitled to proceed at once to set aside the fraudulent conveyance and enforce the lien of execution. See also *Plattsmouth First Nat. Bank v. Gibson*, 60 Neb. 767.

New York. — *Baker v. Potts*, 73 N. Y. App. Div. 29 [citing *Adsit v. Butler*, 87 N. Y. 585], holding that the rule that the judgment creditor must make a *bona fide* endeavor to collect his judgment against all the judgment debtors before filing a creditors' bill, obtains only when the judgment debtors are all liable in an equal degree, and not when one is merely a surety.

In *Schwarzschild, etc., Co. v. Mathews*, 39 N. Y. App. Div. 477, it was held that a judgment creditor may bring an action in equity to remove alleged fraudulent obstructions to a levy under an outstanding execution issued upon a judgment in favor of the plaintiff against the judgment debtor; and the rights of the plaintiff in such an outstanding execution are not defeated by his inability to bring his case to trial within the statutory time for returning the execution. See also *Home Bank v. Brewster*, 15 N. Y. App. Div. 338.

Wisconsin. — *Mueller v. Bruss*, 112 Wis. 406, holding that where it is impossible for the creditors to obtain a judgment against the debtor, they are excused from the requirement as to execution and return; *Ellis v. Southwestern Land Co.*, 108 Wis. 313; *French Lumbering Co. v. Theriault*, 107 Wis. 627; *Krouskop v. Krouskop*, 95 Wis. 296 [the two cases last cited following *Gilbert v. Stockman*, 81 Wis. 602]; *Weber v. Weber*, 90 Wis. 467.

United States Courts. — See *Schofield v. Ute Coal, etc., Co.*, (C. C. A.) 92 Fed. Rep. 269, for a general discussion

as to the classes of cases where the levy and return of an execution is not indispensable to the maintenance of a creditors' action. See *Brown v. John V. Farwell*, 764 Rep. 764.

501. 1. **Georgia.** — *Laurens Co. v. Steinhardt*, (C. C. A.) 614 Rep. 614.

Kansas. — *Metzger v. Kansas*, Kan. App. 374.

Louisiana. — See *Dabert v. 104 La. 781*.

New Jersey. — See *T. Brecht*, 56 N. J. Eq. 499.

Oregon. — *Matlock v. Oregon*, 516, holding that a creditor may file a bill as soon as he has obtained a specific lien upon the property of the debtor; the lien be obtained by judgment, or the issuing of a writ of execution. See also *Fleischner v. Fleishner*, 36 Oregon 553.

Wisconsin. — *Level Land Co. v. Sivyver*, 112 Wis. 442, where it was said that the holder of a judgment which is not yet a lien, in order to set aside fraudulent conveyances, the lien may attach, must get a writ of execution and show the issue and the return of an execution; but a specific lien, by judgment or otherwise, may maintain suit to set aside fraudulent or invalid obstructions in the way of its enforcement without such preliminary.

503. 1. **Alabama.** — *Union Ala.* (1896), § 818, a judgment without a return of nullity of execution, may be subject to the payment of the debt any property which has been fraudulently transferred to be fraudulently conveyed to the debtor. *Henderson v. Bank*, 123 Ala. 547; *Wood v. Bank*, 109 Ala. 563; *McClarin v. Bank*, 109 Ala. 571.

2. See *Hall v. Nash*, 554.

504. 1. See *O'Brien v. Iowa*, 40, in which case the point is not decided that numerous authorities there must be a return of

506. *c.* SUITS TO SUBJECT PROPERTY NOT REACHABLE BY EXECUTION. — See note 3.

509. *d.* SUITS BY CREDITORS OF DECEDENTS — (1) *Administration Suits Generally.* — See note 2.

510. (2) *Suits to Set Aside Fraudulent Conveyances.* — See note 1.

511. 7. *Requisites and Sufficiency of Execution* — Presumption as to Regularity of Execution. — See note 2.

519. 9. *Insolvency of Debtor as Excuse for Not Exhausting Legal Remedies* — *a.* RECOVERY OF JUDGMENT. — See note 1.

520. See note 1.

521. *b.* ISSUANCE OF EXECUTION AND RETURN OF NULLA BONA. — See note 1.

506. 3. *District of Columbia.* — *Droop v. Ridenour*, 9 App. Cas. (D. C.) 95, wherein the object of the bill was to procure a decree for the payment of the alleged debt out of an equitable interest of the debtor in certain real estate.

Michigan. — *Jenks v. Horton*, 114 Mich. 48.

New York. — *Dittmar v. Gould*, 60 N. Y. App. Div. 94, holding that in an action to reach the income of a trust fund created either by the debtor or by a third person for the benefit of the debtor, a judgment at law must have been recovered against the beneficiary and an execution returned unsatisfied, although the beneficiary be outside of the jurisdiction of the court.

Oregon. — *Matlock v. Babb*, 31 Ore. 516.

South Dakota. — *Brown v. Edmonds*, 9 S. Dak. 273; *Minneapolis Threshing Mach. Co. v. Hanrahan*, 9 S. Dak. 520.

509. 2. In *West Virginia* a general creditor of a deceased person cannot sustain a bill in equity on a purely legal demand, unless he shows that he has exhausted his legal remedy, or that such remedy, for some good cause, would be inadequate or unavailing. *Hale v. White*, 47 W. Va. 700.

510. 1. In *Alabama* it is not necessary that the complainant in an equitable action to set aside a fraudulent conveyance should aver and prove that there are no other assets of the estate besides the property so conveyed. *McClarlin v. Anderson*, 109 Ala. 571.

511. 2. *Stiefel v. Berlin*, 28 N. Y. App. Div. 103, wherein it was held that where a receiver was appointed in proceedings supplementary to execution and his receivership was subse-

quently extended to another judgment, the defendants, in a judgment creditors' action brought by said receiver, could not raise the objection that a proper execution had not been issued upon the second judgment, and that, therefore, the receivership was improperly extended.

519. 1. *Illinois.* — *Austin v. Bruner*, 169 Ill. 178. Compare *Huenig v. Buckley*, 87 Ill. App. 648.

The Filing of a Claim Before an Assignee for the benefit of creditors will not relieve the creditor from the necessity of reducing his claim to judgment before bringing a creditor's action. *Austin v. Bruner*, 169 Ill. 178; *McCoy v. Connecticut F. Ins. Co.*, 87 Mo. App. 73; but in *Plume, etc., Mfg. Co. v. Baldwin*, 87 Fed. Rep. 785, it was held that the allowance of a claim in insolvency proceedings is a sufficient substitute for a judgment of a court of law.

520. 1. *Florida.* — See *Clafin v. Ambrose*, 37 Fla. 78.

Indian Territory. — *Springfield Grocery Co. v. Thomas*, 3 Indian Ter. 330.

Missouri. — *Burnham v. Smith*, 82 Mo. App. 35; *Carp v. Chipley*, 73 Mo. App. 23; *Webb v. Midway Lumber Co.*, 68 Mo. App. 546.

South Carolina. — See *Exp. Kenmore Shoe Co.*, 50 S. Car. 140.

Bankruptcy of Debtor. — Where the fraudulent conveyance is made pending bankruptcy proceedings in behalf of the debtor, no judgment can be obtained against the debtor for debts covered by such proceedings, and hence none is required as a condition to the right to set aside such conveyance. *Mueller v. Bruss*, 112 Wis. 406.

521. 1. *District of Columbia.* — *Droop v. Ridenour*, 9 App. Cas. (D. C.) 95.

523. 10. Nonresidence of Debtor as Excuse for Not Legal Remedies. — See note 2.

525. 11. Suits by Attaching Creditors. — See note

531. VIII. DUTY OF CREDITOR TO FIRST RESORT TO LATERAL SECURITIES. — See note 1.

IX. PARTIES — 1. Complainant — *a.* IN GENERAL. — See note 2.

Iowa. — *O'Brien v. Stambach*, 101 Iowa 40.

Nebraska. — *Selz v. Hocknell*, 63 Neb. 503.

Oregon. — *Fleischner v. McMinnville Bank*, 36 Oregon 553, citing 5 ENCYC. OF PL. AND PR. 521.

Bankruptcy of Debtor. — Since no judgment can be obtained against a bankrupt pending the bankruptcy proceedings, on any debt covered by such proceedings, if the bankrupt fraudulently transfers property pending such proceedings, his creditors may sue to set aside the conveyance without first having an execution issued and returned. *Mueller v. Bruss*, 112 Wis. 406.

523. 2. District of Columbia. — In *Supplee Hardware Co. v. Driggs*, 13 App. Cas. (D. C.) 272, it was held that if one of two joint debtors is insolvent and the other removes from the District, leaving no assets but an equitable interest in certain real estate in the District, a creditors' bill may be maintained without the creditor having recovered a judgment. *Distinguishing Hess v. Horton*, 2 App. Cas. (D. C.) 81. See also *Droop v. Ridenour*, 9 App. Cas. (D. C.) 95.

New York. — In *Patchen v. Rofkar*, 12 N. Y. App. Div. 475, and 52 N. Y. App. Div. 367, holding that where one who has made an assignment for the benefit of his creditors leaves the state and renders it impossible for his creditor to secure a personal judgment against him within the state, a creditor may, since he has no remedy at law which he can pursue or exhaust, maintain an action in equity against the assignee to set aside the general assignment and to reach the assigned property for the payment of his claim.

525. 1. In New York the rule is well settled that, until after the recovery of judgment and the issuing of execution, no equitable action can be maintained by an attaching creditor to set aside fraudulent transfers or to reach equitable assets. But a court of equity is not without jurisdiction to

interpose in aid of an attachment even where no specific property is gained, and to grant the relief demanded, if special circumstances exist which require such interposition. *Whitney v. N. Y.*, 256, in which case a fraudulent transfer of real estate between nonresidents of the state prevented the levy of a writ against the judgment debtor; the court held that this fact constituted a special circumstance authorizing the maintenance of an equitable action to set aside such transfer pending the rendering of judgment in the debt action; and it was held that the only authority for the maintenance of such an action is that conferring upon the attaching sheriff in the case of a defendant served without the publication, when, under Pro. N. Y., § 655, subdivision 1, the defendant has not appeared (otherwise than specially) made default."

Oregon. — *Bennett v. Mitchell*, 339.

Appointment of Receiver. — A creditor whose claim is not entitled to a judgment is not entitled to appoint a receiver of assets alleged to have been converted by a debtor to defraud his creditors. *Denney*, 106 Iowa 726.

531. 1. O'Brien v. Stambach. — *Iowa* 40, citing 5 ENCYC. OF PL. AND PR. 530, and holding that a creditor is not required to go out of the state to enforce their claims against the judgment debtor before bringing an action against some of his grantees to subject real estate in the state and county judgments were obtained. *Travelers Ins. Co.*, 76 Minn. 5 ENCYC. OF PL. AND PR. 521.

2. Suits to Set Aside Fraudulent Transfers. — *An Assignee claiming under an assignment executed after the execution of a judgment is not bound by the fraudulent conveyance by the debtor.*

533. Assignee of Judgment. — See note 1.

534. *b.* WHEN BILL MUST BE FILED IN BEHALF OF ALL CREDITORS — (1) *Suits Inter Vivos.* — See note 1.

maintain a creditors' bill to set aside such conveyance. *Kaufman v. Burchinell*, 15 Colo. App. 520.

An Administrator may maintain an action to set aside a conveyance made by his intestate in fraud of the latter's creditors. *Mallow v. Walker*, 115 Iowa 238; *Webb v. Atkinson*, 124 N. Car. 447.

Bill by Bank Against Accommodation Indorser. — A bank which has reduced to judgment an indorsed note discounted by it is such a creditor of the accommodation indorser as will entitle it to maintain an action to set aside a transfer of property by such indorser, although the transfer was made when the liability of the indorser was only contingent. *Citizens' Nat. Bank v. Fonda*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 114.

Bill by Beneficiary of Trust. — An action may be brought to require a wife to account for property conveyed to her by her husband with an alleged intent to defraud the beneficiaries of the estate of which he was one of the executors and trustees. *Ebbitt v. Dunham*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 232.

A Wife Suing for Divorce and Alimony may maintain an action to set aside a conveyance made by her husband to defeat her rights. *Hall v. Harrington*, 7 Colo. App. 474; *Harrington v. Johnson*, 7 Colo. App. 483.

A Subsequent Mortgagee of a fraudulent grantor cannot attack the conveyance on the basis of being a creditor for the debt forming the consideration of the mortgage. *Boice v. Conover*, 54 N. J. Eq. 531.

Bill by Landlord. — Where there is an existing continuing liability on the part of a tenant to pay rent secured by a lease, this condition constitutes the landlord a creditor who has a standing to attack a conveyance by the tenant of her property as fraudulent. *O'Brien v. Whigam*, 9 N. Y. App. Div. 113.

A Receiver in Proceedings Supplemental to Execution represents the judgment creditor to the extent necessary to bring actions in the nature of a creditors' bill to set aside fraudulent transfers. *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178; *Reynolds v. Aetna L. Ins. Co.*, 160 N. Y. 635; *Ward v. Petrie*, 157 N. Y. 301,

A Trustee in Bankruptcy may maintain an action either in a federal or in a state court to set aside fraudulent conveyances by the bankrupt. *Schmitt v. Dahl*, (Minn. 1903) 93 N. W. Rep. 665; *Norcross v. Nathan*, 99 Fed. Rep. 414; *Cox v. Wall*, 99 Fed. Rep. 546; *Lehman v. Crosby*, 99 Fed. Rep. 542. See also *Mueller v. Bruss*, 112 Wis. 406, wherein it was held that a trustee in bankruptcy may sue to set aside a fraudulent conveyance by the bankrupt, provided he has not sufficient assets in his hands to satisfy the claims of the creditors; *Sheldon v. Parker*, (Neb. 1902) 92 N. W. Rep. 923, wherein it was held that an assignee in bankruptcy may proceed to recover the interest of the bankrupt in property conveyed by him to defraud his creditors, whether the creditor was in a position to attack the transfer or not.

Claimant in Tort. — A person having a claim for damages arising from a tort is a creditor of the tortfeasor, and may maintain a creditors' bill to set aside a fraudulent conveyance executed by such tortfeasor. *Gunn v. Hardy*, 130 Ala. 642; *Carbniener v. Montgomery*, 97 Iowa 659; *McInnis v. Wiscassett Mills*, 78 Miss. 52.

533. 1. See *Wimpfheimer v. Perrine*, 61 N. J. Eq. 126.

534. 1. *Seymour v. McAvoy*, 121 Cal. 438. Compare *Maddox v. Lanier*, 107 Ga. 291, wherein it was held that "one or more creditors, representing one-third in amount of the unsecured debt" of an insolvent trader, are necessary parties in the proceeding instituted against him under the provisions of Civ. Code Ga., § 2716.

Property Held in Trust. — In a suit by judgment creditors to subject property held in trust, the trustees of the several deeds of trust and all the creditors therein named should be made parties. *Carnahan v. Ashworth*, (Va. 1898) 31 S. E. Rep. 65.

In West Virginia. — Though a suit is brought by one judgment creditor only, to enforce the lien of his judgment, and though it does not make other judgment creditors parties, and though it is not in terms a suit for the benefit of the plaintiff and other judgment creditors, yet the court may make it a suit for all lienors by ordering an

535. See note 1.

(2) *Suits by Creditors of Decedents.* — See n

536. See note 1.

537. *c.* JOINDER OF CREDITORS. — See note 1.

538. See notes 1, 4.

account of all liens to be taken, or on a reference to convene lienors any may prove their liens. Upon such order to convene lienors the suit becomes one for the benefit of all presenting liens, though no mention of such liens be made in the bill. *Dunfee v. Childs*, 45 W. Va. 155.

United States. — In *Childs v. N. B. Carlstein Co.*, 76 Fed. Rep. 86, it was held that a creditors' bill should be brought for the benefit of the complainant and all other creditors similarly situated who may come in and become parties to the cause and present their rights.

It Is Optional with the Complainant. — *Anderson v. Mossy Creek Woolen Mills Co.*, 100 Va. 420.

A Receiver Appointed in Supplementary Proceedings may maintain a judgment creditors' action in behalf of the creditors whom he represents, to set aside a fraudulent conveyance without joining other creditors. *Stiefel v. Berlin*, 28 N. Y. App. Div. 103.

538. 1. See *Dobbins v. Coles*, (N. J. 1898) 45 Atl. Rep. 442; *D. A. Tompkins Co. v. Catawba Mills*, 82 Fed. Rep. 780.

2. *Spencer v. Goodlett*, 104 Tenn. 648; *Allen v. McRae*, 91 Wis. 226.

536. 1. **Creditors or Personal Representatives as Party Complainant.** — In *California*, where the grantee in an alleged fraudulent conveyance executed by a decedent is the decedent's executor, the creditors of the decedent may themselves sue to set the conveyance aside, such a condition of affairs not being a statutory cause for the removal of the executor, and the creditors being therefore without remedy unless allowed to sue in their own names. *Emmons v. Barton*, 109 Cal. 663.

537. 1. *Ferst v. Powers*, 64 S. Car. 221, citing 5 ENCYC. OF PL. AND PR. 536-538. See also *Armstrong v. Dunn*, 143 Ind. 433; *Marx v. Meyer*, 50 La. Ann. 1229; *Morehouse v. Kissam*, 58 N. J. Eq. 364.

Simple Contract and Judgment Creditors may join in a bill to reach property fraudulently conveyed or attempted to

be conveyed by their cot Brookes v. Lowenstein, Steiner Land, etc., Co. Ala. 546; *Steiner v. Pat* 357.

All Need Not Recover, that unless all the com recover none can has not a creditors' bill filed by creditors of a common derson v. J. B. Brown 566.

538. 1. **Objection for 1** An objection that a bill creditors to subject the interests of the debtor is fil of "all creditors" inste lien creditors" is not well only lien creditors were become parties to the son v. Maxwell, 100 Va. 18

Enforcing Contribution. general creditors' bill filed the complainant and other desiring to come in and the costs, an order may be court directing such credited their claims and the to share in the proceeds to contribute towards the thereof, even though so creditors were originally fendant. *Chick v. North* Co., 118 Fed. Rep. 933.

4. Joinder of Attaching Kansas. — In an action creditors to subject land ment debtor, the title to the name of his wife, to of their judgments, a c has obtained an attach has not reduced his claim is a proper party plaintiff *Simon*, 57 Kan. 385.

Abandonment of Suit by P the original bill in a sui Stat. Ky. (1894), § 1910, preferential acts, inures t of all of the creditors, any of the right, before the dis suit, to come in and pr judgment, notwithstanding that the original plainti doned the suit. *Slusher* son, 101 Ky. 594.

539. Suits to Reach Equitable Interests. — See note 1.

2. Defendant — *a.* IN GENERAL. — See note 2.

540. See note 1.

539. 1. Where Some of the Plaintiffs Have Not Exhausted Their Remedies at Law, and the others have an interest only in the surplus of the fund sought to be reached after the payment of claims of the former, there is a misjoinder. *Hughes v. Hunner*, 91 Wis. 116.

2. *Davis v. Chase*, (Ind. 1902) 64 N. E. Rep. 88; *Smiser v. Stevens-Wolford Co.*, (Ky. 1898) 45 S. W. Rep. 357; *Benson v. Snyder*, 42 W. Va. 223.

Cestui Que Trust of a resulting trust in land must be made formal parties to a creditors' bill to subject such land to the payment of the trustee's debts, notwithstanding Code W. Va. 1891, c. 139, p. 883, providing for the convention of lienholders by publication. *Marshall v. Hall*, 42 W. Va. 641.

In a suit to set aside a Collusive Attachment, the sheriff who levied the attachment, if he has possession of the property sought to be reached, is a necessary party defendant. *Plaster v. Throne-Franklin Shoe Co.*, 123 Ala. 360.

Enforcing Liability of Stockholders. — *The Corporation and Its Stockholders Are Necessary Parties* in a creditors' suit to enforce the individual liability of the stockholders. *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.*, (C. C. A.) 87 Fed. Rep. 252.

Where the Corporation Is Foreign to the district of the federal court in which the action is brought, it cannot be joined as a party, and the bill must be dismissed. *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.*, (C. C. A.) 87 Fed. Rep. 252.

Receiver of Rents and Profits. — In a suit by judgment creditors to set aside a conveyance of real estate as fraudulent, in which no accounting for rents and profits is asked, it is not necessary to bring in as a party defendant a receiver of the rents and profits of such real estate, appointed long after the conveyance was made and in an action to which none of the plaintiffs in the creditors' suit were parties. *Daisy Roller Mills v. Ward*, 6 N. Dak. 317.

Convention of Lienholders — *West Virginia Statute.* — Specific lienors, such as vendors holding liens by executory contract, reservation in a deed, attach-

ment, mortgage, or legacies charged by will, must be made formal parties. If not made such parties, they are not bound by a convention of lienors by publication of notice to lienholders under Code W. Va., c. 139, § 7. *Benson v. Snyder*, 42 W. Va. 223.

A Trustee who holds the legal title to an estate bequeathed to him for the benefit of another is a necessary party defendant to a suit by creditors of the beneficiary to reach the latter's interest in such estate. *Bryan v. May*, 9 App. Cas. (D. C.) 383.

Assignees of Equitable Interests. — Where a principal conveys to his surety his equitable interest in an estate to indemnify the latter against loss, it is not necessary to make the surety a party to a creditors' bill praying for a sale of such equitable interest subject to the rights of the surety. *Bryan v. May*, 9 App. Cas. (D. C.) 383.

Codevisees. — In a suit to reach the interest of a devisee in the devised estate, the other devisees are not necessary parties if their interests are to certain and separate interests or parts in the property devised, and in the rents and revenues that may be collected for distribution as provided in the will. *Bryan v. May*, 9 App. Cas. (D. C.) 383.

Owners of Legal Estate. — It is unnecessary to join the owners of the legal title to land with the owners of the equitable interest therein, in a suit to subject the equitable interest to the payment of a debt. *Russell v. Burke*, 180 Mass. 543.

Persons to Whom Money Has Been Lent by the judgment debtor with intent to hinder, delay, and defraud his creditors are proper, if not necessary, parties to a bill for a discovery and to reach the money lent. *Guyton v. Terrell*, 132 Ala. 66.

Minors. — When it is sought by means of a creditors' bill to impress a lien upon a trust fund in which minors are interested, guardians *ad litem* may be appointed and are proper parties defendant. *Binns v. La Forge*, 191 Ill. 598.

540. 1. Bill in Aid of Execution. — In *Michigan*, where a bill in aid of execution seeks to set aside a fraudulent incumbrance upon the property of one

542. See note 1.

b. SUITS TO SET ASIDE FRAUDULENT CON

— Debtor. — See note 2.

543. Fraudulent Grantee. — See note 1.

After Fraudulent Grantee Has Conveyed to Others. —

544. See note 1.

of the judgment debtors, the other judgment debtors are not interested and need not be made parties. *Hodge v. Gray*, 110 Mich. 654.

542. 1. A Bankrupt is not a necessary party to a suit by his trustee in bankruptcy to avoid a fraudulent transfer. *Cox v. Wall*, 99 Fed. Rep. 546.

2. Traders' Deposit Bank v. Hoffman, 99 Ky. 240; *Wilson v. Spear*, 68 Vt. 145.

Limitation of Rule. — Where a conveyance attacked as fraudulent is absolute, and transfers an indefeasible title to the grantor's entire interest in the property conveyed, the grantor is not an indispensable party. *Homestead Min. Co. v. Reynolds*, (Colo. 1902) 70 Pac. Rep. 422; *Amsterdam First Nat. Bank v. Shuler*, 153 N. Y. 163; *Bennett v. Minott*, 28 Oregon 339.

In Suits to Set Aside Assignments for Benefit of Creditors — Assignor Necessary Party. — In a creditors' suit to set aside a general assignment by a debtor of his property for the benefit of creditors, the court will not proceed to judgment in the absence of the debtor as a party defendant, unless on account of death or other circumstance his joinder is wholly impracticable. *Amsterdam First Nat. Bank v. Shuler*, 153 N. Y. 163.

Assignee Proper Party. — An assignee for the benefit of creditors, who has a personal interest adverse to the rights of creditors in the lands alleged to have been fraudulently conveyed, is a proper party defendant. *Rankin v. Gardner*, (N. J. 1896) 34 Atl. Rep. 935.

Tenants in Common of the land, an interest in which has been conveyed by the debtor, are not necessary parties, as they are without interest in the suit. *Watts v. Burgess*, 126 Ala. 170. See also *Burke v. Morris*, 121 Ala. 126, wherein it was held that the heirs and representatives of one who owned land jointly with a debtor need not be made parties to a suit by creditors of the latter to subject his interest in the land to his debts.

543. 1. Smith-Dimmick Lumber

Co. v. Teague, 119 Ala. 3; *Williams*, 61 Ark. 189; *Deposit Bank v. Hoffman*. *Terhune v. Sibbald*, 55 N. Sprogg v. Dichman, (Sup. T.) 28 Misc. (N. Y.) 409.

Persons in the Possession of Where a suit is brought to set aside a deed executed under a fraudulent confession of judgment, the session of the land is an indispensable party. *Sloan v. Hunter*, 385; *Simon v. Sabb*, 56 S. C. See also *Sheppard v. Green*, 165.

Heirs of a deceased necessary parties to a suit to set aside the conveyance as fraudulent. *Eisman*, (Ky. 1900) 56 S. C. 410; *Sloan v. Hunter*, 56 S. C. 385; *Simon v. Sabb*, 56 S. C. 385; *Sheppard v. Green*, 48 S. C. 165.

Lien Creditors of a Fraudulent Conveyance are necessary parties defendant in a suit to set aside the conveyance as fraudulent. *Crim. v. Price*, 374.

Defense by Grantee. — The grantee of a fraudulent conveyance must have an opportunity to dispute the debt. He may plead any defense, not only personal, which the grantor could have made. *Franklin Bank v. Caffee*, (Ala. 1902) 152.

3. Skillen v. Endelman (Spec. T.) 39 Misc. (N. Y.) 410; *ENCYC. OF PL. AND PR.* 542; *Spear*, 68 Vt. 145.

544. 1. Cook v. Lake (App. Div. 92 [citing 5 ENCYC. OF PL. AND PR. 543, 544]; *Skillen v. Endelman*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 410.

Purchasers Pendente Lite. *Sprouse*, 46 W. Va. 225.

When Subsequent Grantee Necessary Parties. — Where the creditor is a judgment creditor's action, only that the first grantees account to the plaintiff for the value of the property conveyed, a

544. All Participants in Fraud. — See note 2.

545. Mortgagees. — See note 1.

546. Joinder of Two or More Grantees. — See notes 1, 2.

548. c. SUITS TO SUBJECT PROPERTY NOT REACHABLE BY EXECUTION. — See note 3.

551. d. SUITS BY CREDITORS OF DECEDENTS — (1) *Personal Representatives* — *Fraudulent Conveyances by Decedents*. — See notes 1, 2.

552. (2) *Heirs and devisees*. — See note 1.

seek to set aside the conveyances as to the second grantees, the latter are not necessary parties. *Arnot v. Birch*, 29 N. Y. App. Div. 356.

544. 2. All Participants Necessary Parties. — *Kruger v. Walker*, 111 Ga. 383; *Marx v. Meyer*, 50 La. Ann. 1229. *Contra*, *Morrison v. Blue Star Nav. Co.*, 26 Wash. 541.

Partner of Fraudulent Grantor. — In a suit by a partnership creditor to set aside a conveyance made by a member of the partnership of property in which the partnership has no interest, the other partners are not necessary parties. *Freeman v. Pullen*, 119 Ala. 235; *Brooks v. Lowenstein*, 124 Ala. 158.

Creditors Accepting Preferential Mortgage. — In a petition to set aside a chattel mortgage as being a fraudulent preference of creditors, all the creditors who have accepted the mortgage should be made parties, even though as to some of them the mortgage is admitted to be valid. *Cleveland v. People's Nat. Bank*, (Tex. Civ. App. 1899) 49 S. W. Rep. 523.

Abstractors of Title. — A lawyer who has been employed to examine the title to real estate is not a proper party to be joined as defendant to a bill to set aside the conveyance of said real estate as fraudulent. *Davis v. Harper*, 14 App. Cas. (D. C.) 463.

545. 1. Freeman v. Stewart, 119 Ala. 158.

Where there Are Prior Liens on the property executed by parties other than the fraudulent debtor, if the creditor deems it necessary to set aside such liens or to reduce the amount thereof in order to get at the property fraudulently conveyed, the prior lienors and the persons owing the money secured by such liens may be made parties defendant to a suit to set aside the fraudulent conveyance. *Level Land Co. No. 3 v. Sivyver*, 112 Wis. 442.

546. 1. Norcross v. Nathan, 99 Fed. Rep. 414, *citing* 5 ENCYC. OF PL. AND PR. 546.

2. Wilson v. Addison, 127 Mich. 680; *Dixon v. Coleman*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 64.

548. 3. See Dobbins v. Coles, (N. J. 1898) 45 Atl. Rep. 442.

An Insurance Company is a necessary party defendant when the bill seeks to reach insurance moneys in its hands as equitable assets. *Burne v. O'Shaughnessy*, (N. J. 1897) 38 Atl. Rep. 963.

551. 1. Foreign Executors — *Necessary Parties*. — In *Montgomery v. Boyd*, 78 N. Y. App. Div. 64, it was held that in an action to set aside as fraudulent an assignment of the debtor's interest in a trust fund, the debtor's foreign executors were necessary parties.

Where there Is a Resident Executor in a creditor's action seeking a discovery as to an assignment made by the decedent and praying that the same be declared void, the court may obtain jurisdiction as against the resident executor, and a foreign executor need not be made a party. *Plume, etc., Mfg. Co. v. Baldwin*, 87 Fed. Rep. 785.

2. Alabama. — *Merchants' Nat. Bank v. McGee*, 108 Ala. 304 [*citing* *McClarín v. Anderson*, 104 Ala. 201]; *McClarín v. Anderson*, 109 Ala. 571.

552. 1. Spencer v. Goodlett, 104 Tenn. 648, wherein it was held that it is usual and customary to make heirs and devisees parties defendant to a general creditors' bill for the sale of a decedent's land for the payment of debts; but where devisees are seeking to hold the executor liable for mismanagement, they may be joined as parties plaintiff with the creditors who are seeking the sale of the realty descending to such heirs or devisees.

Action for Insurance Money. — Where policies payable to the estate of the

- 552. Fraudulent Conveyances by Decedents.** — See note 1
3. Intervention. — See note 2.
General Creditors' Bill. — See note 3.

insured are assigned by him to his wife and minor children, in a suit brought after his death to impress a lien on the proceeds of such policy for the benefit of creditors of his estate his minor children are necessary parties, and a curator cannot be substituted for them. *Judson v. Walker*, 155 Mo. 166.

Fraudulent Grantees of the Heirs, and all parties who participated in the fraud, are proper parties to a suit by the creditors of the decedent to subject his property to his debts. *Adkins v. Loucks*, 107 Wis. 587.

553. 1. Freeman v. Pullen, 119 Ala. 235.

2. Intervention by Consent of Complainant. — When a bill is filed by a judgment creditor for the benefit of himself alone to establish the lien of his judgment as against a fraudulent conveyance, other judgment creditors are not entitled to intervene and be made parties complainant against the objection of the defendant, although the complainant may have consented thereto. *Lauch v. Socarras*, 56 N. J. Eq. 524.

Intervention by Complainant. — Where the complainant recovers another judgment subsequent to the filing of his bill, and seeks by petition to be allowed to come in and receive the benefit of the decree in respect of his latter judgment, such petition cannot be allowed against the objection of the defendant. *National State Bank v. McCormick*, (N. J. 1899) 44 Atl. Rep. 706.

Where Debtors Are Insolvent. — When it appears in a creditors' suit that the debtors are insolvent, all creditors should be allowed to come in by intervening petitions. *Carp v. Chipley*, 73 Mo. App. 22.

After the Original Suit Has Been Dismissed, although the formal order of dismissal has not been entered, other creditors have no right to intervene, although they contend that as to them the dismissal was fraudulent. *Keehn v. Keehn*, 115 Iowa 467.

Intervention by Receiver. — By filing an affidavit of receivership a receiver cannot come into court and take the proceeds of a sale of property of the defendant in a creditors' bill, when such bill does not describe the securi-

ties the sale of which are sought to be taken by *Thomas v. Van Meter*, 16

3. Taber v. Royal Ins. 681, citing 5 ENCYC. OF 553. See also *Campau v. ing Club*, (Mich. 1902) 99 49; *Fleischner v. McMir* 36 Oregon 553; *Lilienthal* 84 Fed. Rep. 918.

Creditors of Insolvent C Falls v. Anglo-Teutonia Assoc., 105 Tenn. 18 [cit OF PL. AND PR. 554]; *Me* Bank v. McDonald, 63 Ne

Process Essential to Mak Parties. — The mere filing to intervene and an ca under it, there being no s cess upon any of the pa compel the parties to take petitioner on appeal or way. *Gilbert v. Washing* Endowment Assoc., 10 A C.) 316.

Intervening Petitions are to conform to all the te applicable to pleading as principal parties. When of court, other parties in entitled to notice and an to defend, but the petiti name them as defendants, no formal prayer for pro can *Pig Iron Storage W* German, 126 Ala. 194.

Jurisdiction Conferred by — A creditor whose claim reduced to judgment can a creditors' bill for the di the assets of a corporation such a creditor files such a l who has reduced his claim and has had an exec and returned *nulla bona* In such case the interve plaintiffs and all the othe come defendants. *Mer* Bank v. McDonald, 63 Ne

After Satisfaction of Claim. — Where the claim plainant, in an open bill f ors who shall join in the s to contribute to expense satisfied, and notice has b an application to dismiss t creditors who recover ju

- 554.** 4. Death of Parties — *a.* COMPLAINANT. — See note 1.
555. *b.* DEBTOR. — See notes 1, 2.
556. 5. Complainant's Control over Suit. — See note 1.
X. BILL OR COMPLAINT — 1. In General. — See note 2.
557. Description of Indebtedness. — See note 2.

for the hearing of such publication cannot be admitted as complainants. *Schlagenhauf v. Craven*, 61 N. J. Eq. 232.

Intervention by Defendants. — Where a creditor who has been made a defendant to a general creditors' bill intervenes as a complainant, and the original complainants not only do not object but accept his assistance in the prosecution of the suit, his status as a complainant cannot thereafter be attacked by the original complainants. *Goldberg v. Cohen*, 119 N. Car. 68.

554. 1. Death of Officer of Plaintiff Corporation. — In *Manhard Hardware Co. v. Rothschild*, 121 Mich. 657, it was held that the death of a corporation trustee who signed and swore to a bill on behalf of his corporation did not affect the status of the suit.

555. 1. Beith v. Porter, 119 Mich. 365.

Contra. — *Reynolds v. Aetna L. Ins. Co.*, 160 N. Y. 635; *Amsterdam First Nat. Bank v. Shuler*, 153 N. Y. 163, both cases affirming the rule laid down in *Brown v. Nichols*, 42 N. Y. 26.

2. In New York an action to set aside a preferential assignment is not abated by the death of the assignor, and the personal representatives of the assignor must be brought in as parties to the action. *Amsterdam First Nat. Bank v. Shuler*, 153 N. Y. 163.

556. 1. After Appointment of Receiver. — See *Johnson v. Miller*, (C. C. A.) 96 Fed. Rep. 271.

Effect of Cross-petition by Lienholder. — Where a suit to set aside a fraudulent conveyance is brought in the county where the complainant's judgment was obtained pursuant to Civ. Code Ky., § 70, and makes a lienholder a party defendant, the answer and cross-petition of such lienholder having been filed, the plaintiff cannot dismiss the original action properly brought in that county, so as to deprive the cross-petitioner of the right to prosecute the lien thus set up to judgment in that forum. *Chinn v. Curtis*, (Ky. 1903) 71 S. W. Rep. 923.

2. Ernest v. Merritt, 107 Ga. 61;

American Nat. etc., Co. v. Mayo, 97 Va. 182.

Allegations Which Have Been Held Sufficient. — Allegations which set out that a conveyance was a sham, without consideration, and made with the intention of defrauding complainant and other creditors, and that the grantee holds the realty conveyed in trust for the grantor, sets out a *prima facie* case for equitable relief. *Andrews v. Donnerstag*, 171 Ill. 329. See also *Kilham v. Western Bank, etc., Co.*, (Colo. 1902) 70 Pac. Rep. 409; *Fox v. Lipe*, 14 Colo. App. 258.

Verification. — When the averments in a bill are positive the verification must be so. When they are upon information and belief the verification should embrace both the facts that the affiant has been informed and that he believes them to be true, either in terms or by affirming positively that the facts alleged in the bill are true as therein stated. *Burgess v. Martin*, 111 Ala. 656. See also *McKissack v. Voorhees*, 119 Ala. 101; *Smith-Dimmick Lumber Co. v. Teague*, 119 Ala. 385; *Guyton v. Terrell*, 132 Ala. 66.

557. 2. Necessity to Allege Lien. — In *Wyman v. Jensen*, 26 Mont. 227, it was held that in an action to set aside a conveyance of property as in fraud of creditors the complaint must set out that at the time the property was conveyed complainant had a lien thereon.

Failure to Allege that Debt Is Due — Objection Waived. — Where the defendant makes no objection to a complaint which does not aver that the indebtedness upon which it is based was due and payable, he cannot raise the question on appeal. *Bennett v. Minott*, 28 Oregon 339.

Merger of Claims. — Where a pre-existing debt is simply merged in an indebtedness contracted subsequent to an alleged fraudulent conveyance, and notes are executed by the debtor for the whole amount, no liability is thereby created different from that created by the original debt. The conveyance being fraudulent as to the existing indebtedness is likewise fraud-

558. See note 1.

2. Invitation to Other Creditors. — See note 1.

560. 3. Multifariousness. — See note 1.

561. Vacation of Fraudulent Conveyances and Subjection Reachable by Execution. — See note 1.

ulent in respect to that contracted subsequently. *Trezevant v. Terrell*, 96 Tenn. 528.

558. 1. Compare *Anderson v. Lindberg*, 64 Minn. 476.

4. Morrison v. Blue Star Nav. Co., 26 Wash. 541, citing 5 ENCYC. OF PL. AND PR. 558. See also *Dunlap v. Rauch*, 24 Wash. 620.

Where No Receiver Is Appointed. — Where no receiver has been appointed or requested, it is not necessary to allege that the suit is brought on behalf of all creditors who desire to join and contribute to the expense. *Nebraska Nat. Bank v. Hollowall*, 63 Neb. 309.

560. 1. Norcross v. Nathan, 99 Fed. Rep. 414, citing 5 ENCYC. OF PL. AND PR. 560. See also the following cases: *Guyton v. Terrell*, 132 Ala. 66; *Henderson v. Farley Nat. Bank*, 123 Ala. 547; *Burke v. Morris*, 121 Ala. 126; *Gassenheimer v. Kellogg*, 121 Ala. 109; *Steiner Land, etc., Co. v. King*, 118 Ala. 546; *Hulbert v. Detroit Cycle Co.*, 107 Mich. 81. See also *Henderson v. Hall*, 134 Ala. 455; *Conley v. Buck*, 100 Ga. 187; *Rutherford v. Alyea*, 54 N. J. Eq. 411; *Hudson v. Wood*, 119 Fed. Rep. 764; *De Hierapolis v. Lawrence*, 115 Fed. Rep. 761; *Bidwell v. Huff*, 103 Fed. Rep. 362.

Transfer of Real and Personal Property.

— The fact that the conveyances sought to be set aside were of real and personal property, respectively, and were separated in point of time by several years, is immaterial. *Burne v. O'Shaughnessy*, (N. J. 1897) 38 Atl. Rep. 963.

Misjoinder. — A bill stating no right of action, equitable or legal, in favor of the complainant, against certain of the defendants, is multifarious by reason of misjoinder of parties. *Cowgill, etc., Milling Co. v. L. M. Nicholson Co.*, (Miss. 1899) 24 So. Rep. 880; *Wilkinson v. Goodin*, 71 Mo. App. 394.

Several Conveyances to One Person. —

A bill seeking to set aside a number of different conveyances made by the judgment debtor to a single grantee is not multifarious. *Wimberly v. Montgomery Fertilizer Co.*, 132 Ala. 107.

Bill for Discovery and

New Jersey Lumber Co. v. N. J. Eq. 330, the court

can be no dispute that to discovery and relief chancery in behalf of creditor may be joined, relief against persons to whom debtor may have made or fraudulent transfers, property or things in action.

* * * Such parties made parties defendant will not be multifarious requiring into separate transactions.

Attacking Prior Liens. — A bill to set aside a conveyance of debtor's land is not multifarious because it makes the holder of such liens parties defendant, and the money secured therefrom.

Level Land v. Sivyver, 112 Wis. 442.

Claim Adjudicated in One bill is not multifarious where in litigation embraced by one suit a rights of the defendant is decided and the convenience is secured. *Haskin Wood Co. v. Cleveland Ship-Eng'g Co.*, 94 Va. 439.

Surplus Allegations of mere fact that a bill states plus narrative purporting fraud will not make it multifarious. *Jordan v. Liggan*, 95 Va. 100.

561. 1. Hail v. Heisterkamp, 111 Ala. 449. See also *Krug v. Hail*, 111 Ga. 383.

Inconsistent Allegations. attacking the validity of a bill for fraud and also seeking to set aside a general assignment of assets is inconsistent and repugnant. *Brooks v. Lowenstein*, 111 Mo. App. 394.

Beddow v. Sheppard, 111 Mo. App. 394. See also *Taylor v. Dwyer*, 91.

Bill Filed for Double Purpose. — A bill perfectly regular to file for the double purpose of aiding

562. 4. Exhaustion of Ordinary Legal Remedies — *a.* IN GENERAL. — See note 1.

b. JUDGMENT. — See note 2.

564. *d.* RETURN. — See note 4.

and to reach property not open to execution. *Wilson v. Addison*, 127 Mich. 680.

562. 1. *Fairbanks v. Welshans*, 55 Neb. 362; *Stanton v. Catron*, 8 N. Mex. 355; *Miller v. Melone*, 11 Okla. 241. See *Droop v. Ridenour*, 9 App. Cas. (D. C.) 95.

In *South Carolina*. — A complaint to set aside the conveyance of property as fraudulent must allege that complainants have not been guilty of laches in bringing their action. *Charleston Bank v. Dowling*, 52 S. Car. 345.

In *Hargreaves v. Tennis*, 63 Neb. 356, it was held that a creditor who has obtained a lien upon a stock of goods may maintain a suit in equity to set aside a transfer of such goods, without showing specific facts, making the remedy by an action at law unsatisfactory or inadequate.

2. *Kedey v. Petty*, 153 Ind. 179; *McCoy v. Connecticut F. Ins. Co.*, 87 Mo. App. 73; *Wilkinson v. Goodin*, 71 Mo. App. 394; *Moore v. Omaha L. Assoc.*, 62 Neb. 497; *Fisher v. Kelly*, 30 Oregon 1. But compare *Huntington v. Jones*, 72 Conn. 45.

In *Kilham v. Western Bank, etc., Co.*, (Colo. 1902) 70 Pac. Rep. 409, it was held that in an action on a judgment it is unnecessary to allege jurisdictional facts necessary to the rendition of the judgment.

Docketing Judgment. — The complaint in a suit brought on a creditors' bill should not only state the recovery of a judgment, but should allege that such judgment was docketed in accordance with Code Civ. Pro. Mont., § 1197. *Wyman v. Jensen*, 26 Mont. 227.

Ownership of Judgment. — The plaintiff must allege that he was at the time the action was brought the owner of the judgment upon which the suit is based. *Whiteside v. Hoskins*, 20 Mont. 361.

564. 4. *Hutchinson v. Maxwell*, 100 Va. 169.

Exception to the Rule. — Although it is the general rule that an execution under judgment must be issued and returned *nulla bona* before a creditors'

suit will lie, it is an exception to the rule that where the purpose of the bill is merely to set aside some fraudulent conveyance out of the way of his execution, the bill may be filed without such return as soon as judgment is recovered. *Comstock-Castle Stove Co. v. Baldwin*, 169 Ill. 636.

Presumption on the Return of Execution. — Where a complaint avers the return of an execution unsatisfied, but does not state the reason, it will not be presumed that the execution was returned *nulla bona*. *Lammert v. Stockings*, 27 Ind. App. 619.

"Wholly Unsatisfied." — It is not necessary to maintenance of a creditors' bill to set aside a fraudulent conveyance to allege that the execution was returned wholly unsatisfied. *Neubert v. Massman*, 37 Fla. 91; *French v. Commercial Nat. Bank*, 97 Ill. App. 533, affirmed 199 Ill. 213; *Lane v. Union Nat. Bank*, 75 Ill. App. 299; *Andrews v. Donnerstag*, 171 Ill. 329, affirming 70 Ill. App. 236. See also *Edwards, etc., Brokerage Co. v. Rosenheim*, 74 Mo. App. 621; *Ryan v. Spieth*, 18 Mont. 45; *Sheppard v. Green*, 48 S. Car. 165; *Hutchinson v. Maxwell*, 100 Va. 169.

In the case of *Wyatt v. Wyatt*, 31 Oregon 531, it was held sufficient to allege the issuance of an execution, and its return *nulla bona*, without averring that the defendant had no property out of which the judgment could have been satisfied.

Under Kansas Statute. — In an action by a judgment creditor in the nature of a creditors' bill, under Gen. Stat. Kan. (1897), c. 95, § 501, it is necessary that the petition contain an allegation that the judgment debtor has not personal or real property subject to levy upon execution. *Moyer v. Riggs*, 8 Kan. App. 234.

Solvency Not Inconsistent with the Terms Nulla Bona. — Where a complaint by creditors alleged the return of an execution *nulla bona*, it is not rendered bad by alleging facts which show that the defendant had assets largely in excess of his debts. *Goddard v. Fishel-Schlichten Importing Co.*, 9 Colo. App. 306.

565. 5. Insolvency of Debtor. — See note 1.

In Suits to Set Aside Fraudulent Conveyances. — See

566. See note 2.**567. As Excuse for Not Exhausting Legal Remedies.** — See Essential Averments. — See note 3.

565. 1. Burlington Protestant Hospital Assoc. v. Gerlinger, 111 Iowa 293; Fryberger v. Berven, (Minn. 1903) 92 N. W. Rep. 1125; Whiteside v. Hoskins, 20 Mont. 361; Madison First Nat. Bank v. Tompkins, (Neb. 1902) 91 N. W. Rep. 551; Bates v. Drake, 28 Wash. 447.

Bill in Aid of Execution. — In Michigan a bill in aid of execution need not allege the insolvency of any of the defendants. Hodge v. Gray, 110 Mich. 654.

Insolvency of Cestui Que Trust. — In an action to subject real estate, the title to which is held in trust, to the payment of a judgment against a *cestui que trust*, the complaint need not allege whether the *cestui que trust* was insolvent or indebted to the judgment creditor when the trust was created. Burke v. Tewksbury, (Neb. 1902) 92 N. W. Rep. 726.

2. Land Worth More than Exemption. — In an action to set aside a fraudulent conveyance, it is not necessary to allege that the land conveyed was worth more than the amount allowed by law as exempt from execution. State v. Parsons, 147 Ind. 579.

Implied Allegations of Insolvency. — The allegation that the defendant is insolvent at the time the bill is filed to set aside a fraudulent conveyance, may be omitted if the general allegations of the complaint state facts from which it can be ascertained that the defendant is insolvent. Reed v. Loney, 22 Wash. 433. See also Dufrene v. Anderson, (Neb. 1903) 93 N. W. Rep. 139.

Insufficiency of Other Assets Must Be Alleged. — In a suit to set aside a conveyance of land made by the complainant's debtor, the complaint must allege the insufficiency of the debtor's other assets, subject to the complainant's lien to satisfy it. Level Land Co. No. 3 v. Sivyver, 112 Wis. 442.

See the case of Riddick v. Parr, 111 Iowa 733, in which it was held that when a judgment is against joint defendants, and the suit in equity based on such judgment is brought to set aside a conveyance, it must be alleged

that both the judgment and the debtor are insolvent.

Alabama Statute. — Civ. Code, § 818, extends the jurisdiction of equity to all classes of fraudulent conveyances which offend creditors, whether with or without lien, or with or without remedy, notwithstanding there are remedies to recover the debt, though the debtor may have property sufficient to pay his debt. It is unnecessary, therefore, to aver that the debtor is insolvent. Rice v. Eiseman, 122 Ala. 122; also Metcalf v. Arnold, 122 Ala. 132; Henderson v. Farley, 122 Ala. 547; Beall v. Lehman, 110 Ala. 446; McClarin v. McClarin, 109 Ala. 571.

Arkansas Statute. — Under Act of March 31, 1887 (Sand. & Ark. 1894, § 3034), it is alleged the insolvency of judgment debtors. Euc Bank v. Judkins, 66 Ark. 109.

566. 2. Banning v. Banning. — Iowa 642 [citing 5 Encyc. Pr. 566]; Dufrene v. Anderson, 1903) 93 N. W. Rep. 139. v. Lipe, 14 Colo. App. 28; Metcalf v. Arnold, 132 Ala. 132. That a bill attacking a trust partner to another of his firm property need not aver that a partnership was insolvent.

567. 2. Albright v. T. Co., 8 N. Mex. 422.

3. Alleging Insolvency. For the degree of certainty which is required in the allegation of insolvency of the debtor in the following cases: Co. v. Hazard, 122 Ala. 218; Stuckwisch v. H. App. 1902) 64 N. E. Rep. 19; v. Saylor, (Ind. App. 1902) Rep. 881; Vansickle v. Sh. 413; State v. Parsons, 112 Wis. 442; Pierce v. Hower, 142 Ind. 122; Stockings, 27 Ind. 122; Stanton v. Catron, 8 N. W. Rep. 15; Howard v. Devo, 15 Wash. 447.

An Averment in a Cross Complaint. — At the time of its filing the

568. See note 1.

6. Prayer. — See note 2.

569. 7. Allegations Peculiar to Various Classes of Bills — a. SUITS TO SET ASIDE FRAUDULENT CONVEYANCES — (1) Relation of Debtor and Creditor. — See note 1.

(2) *Description of Property.* — See note 2.

570. See note 2.

(3) *Description of Fraudulent Instrument.* — See note 3.

had no property subject to execution "of which these plaintiffs have any knowledge," is not a sufficient averment of the financial condition of the defendant. *Davis v. Chase*, (Ind. 1902) 64 N. E. Rep. 88.

568. 1. *Wood v. Grayson*, 16 App. Cas. (D. C.) 174 [citing 5 ENCYC. OF PL. AND PR. 567 *et seq.*]; *Gassenheimer v. Kellogg*, 121 Ala. 109. See also *Level Land Co. No. 3 v. Sivyver*, 112 Wis. 442.

2. *Rice v. Eiseman*, 122 Ala. 343; *French v. Commercial Nat. Bank*, 79 Ill. App. 110; *Lane v. Union Nat. Bank*, 75 Ill. App. 299; *Stubblefield v. Gadd*, 112 Iowa 681.

Granting Relief Otherwise than as Prayed. — Where a complaint in a creditor's action shows that the plaintiff is entitled to some form of equitable relief, he will not be denied any relief because he has asked for a money judgment. *Webb v. Staves*, 1 N. Y. App. Div. 145.

Relief under General Prayer, though Not under Special Prayer. — Where a bill attacking attachments against the property of the debtor, on the ground that the same were sued out by certain creditors to hinder, delay, and defraud other creditors, asks a special relief, that the attachment be declared to be a general assignment, and also prays for general relief, the complainant is entitled to relief under the general prayer, though not under the special prayer. *Steiner v. Parker*, 108 Ala. 357. See also *Beery v. Naylor*, 65 Kan. 368.

569. 1. *Bayouset v. York*, 18 Tex. Civ. App. 428.

In *Burlington Protestant Hospital Assoc. v. Gerlinger*, 111 Iowa 293, it was held that an allegation in the complaint to set aside a conveyance as in fraud of creditors which sets out that such conveyance "was in fraud of the rights of creditors of the grantor, and made for the purpose of hindering, delaying, and defrauding

them," was sufficient when no motion to make the complaint more definite and certain had been interposed. See also *Searles v. Little*, 153 Ind. 432; *Armstrong v. Dunn*, 143 Ind. 433; *Lavigne v. Tobin*, 52 Neb. 686.

2. *Smith v. Tate*, (Ind. App. 1903) 66 N. E. Rep. 88; *Wyman v. Jensen*, 26 Mont. 227; *Muir v. Hodges*, 116 Fed. Rep. 912; *Brown v. John V. Farwell Co.*, 74 Fed. Rep. 764. See also *Sheffer v. Hines*, 149 Ind. 413; *Taylor v. Badoux*, (Tenn. Ch. 1899) 58 S. W. Rep. 919; *Stacker v. Wilson*, (Tenn. Ch. 1899) 52 S. W. Rep. 709.

Incumbrances. — It is not necessary to aver particularly the nature and amount of the incumbrances on the property in controversy. *Freeman v. Stewart*, 119 Ala. 158.

Partial Description of Property. — In an action to set aside a conveyance of real property as in fraud of creditors, where part of the land is sufficiently described, the fact that there is uncertainty in the description of the land is not voidable objection to the whole bill. *Little v. Sterne*, 125 Ala. 609.

570. 2. But see *Fearey v. O'Neill*, 149 Mo. 467; *Boorum, etc., Co. v. Armstrong*, (Tenn. Ch. 1896) 37 S. W. Rep. 1095.

3. *Lapeer First Nat. Bank v. Chapman*, 77 Ill. App. 105.

Bill to Declare Conveyance an Assignment. — In *Alabama* a bill filed under the statute to have certain transfers, mortgages, and writs of attachment adjudged a general assignment must show that the several conveyances and attachments were so connected as to constitute but one transaction, that they covered all or substantially all the debtor's property, and that they were made to secure antecedent debts after the enactment of the statute. *Lehman-Durr Co. v. Griel Bros. Co.*, 119 Ala. 262; *Opelika Bank v. Kiser*, 119 Ala. 194; *Smith-Dimmick Lumber Co. v. Teague*, 119 Ala. 385.

570. (4) *Averment of Fraud.* — See note 5.

572. See note 1.

570. 5. *Alabama.* — *Green v. Emens*, (Ala. 1902) 33 So. Rep. 540; *Little v. Sterne*, 125 Ala. 609; *Smith-Dimmick Lumber Co. v. Teague*, 119 Ala. 385; *Warren v. Hunt*, 114 Ala. 506.

Indian Territory. — *Hargadine-McKittrick Dry Goods Co. v. Bradley*, (Indian Ter. 1902) 69 S. W. Rep. 862.

Missouri. — *Burnham v. Boyd*, 167 Mo. 185; *Mauch Chunk First Nat. Bank v. Rohrer*, 138 Mo. 369; *Wilkinson v. Goodin*, 71 Mo. App. 394.

Nebraska. — *Kemper v. Renshaw*, 58 Neb. 513.

Tennessee. — *Reed Fertilizer Co. v. Thomas*, 97 Tenn. 478.

Virginia. — *American Net, etc., Co. v. Mayo*, 97 Va. 182; *Alsop v. Catlett*, 97 Va. 364.

West Virginia. — *Billingsley v. Menear*, 44 W. Va. 651; *Chrislip v. Teter*, 43 W. Va. 356; *Vance Shoe Co. v. Haught*, 41 W. Va. 275.

Wisconsin. — *Krouskop v. Krouskop*, 95 Wis. 296.

United States. — See also *De Hierapolis v. Lawrence*, 115 Fed. Rep. 761.

Discovery of Fraud. — An allegation of the time, manner, or circumstance of discovering the alleged fraud is required only when the ordinary period of limitation is sought to be prolonged through lack of the alleged fraud. *Lehman v. Crosby*, 99 Fed. Rep. 542. See also *Vodrie v. Tynan*, (Tex. Civ. App. 1900) 57 S. W. Rep. 680.

See the case of *Gassenheimer v. Kellogg*, 121 Ala. 109, holding that "general averments of facts, from which, unexplained, a conclusion of fraud arises, are sufficient."

In the case of *Banking House v. Darr*, 139 Mo. 660, it was held that the objection that the complaint did not particularize the acts of fraud could not be raised after the defendant pleaded to the merits.

Allegations of Constructive Fraud. — A complaint to set aside a fraudulent conveyance, which alleges that the conveyance was without consideration and that at the time it was executed the party thereby, or by means of other conveyances, had become wholly insolvent, sufficiently shows a constructive fraud. *Dunklee v. Rose*, 12 Colo. App. 420.

Allegation of Information and Belief. — An allegation which sets out that plain-

tiff is informed and be judgment debtor has tr property for the purpose his creditors, is an insult of fraud. *Nichols. Hubert*, 150 Mo. 620.

Illustration. — In a con aside a conveyance all fraud of creditors, it is allege that the grantee property with knowledge lent purpose of the gran ing it, or that the grante volunteer who received without giving a valuable therefor. *State v. Pars* 579. See also *State v. Ind.* 671; *Pierce v. Hov* 626; *Flook v. Armentrout*

Objection Waived. — Ge tions of fraud are suffici a complaint if timely obje taken by demurrer. *Rou* shall, (Ariz. 1899) 59 Pac.

Where a Personal Judgm Against a Fraudulent Ve must allege not only that was fraudulently purcha it has been placed out of creditors. *Wheeler v. Gi* Ch. 1900) 59 S. W. Rep. 1

In *O'Kane v. Vinnedg* 55 S. W. Rep. 711, it was all the allegations of tl taken together convey c idea that the transfer of fraud of the rights of c complaint will be deemed

Averment of Fraudulent A

An averment that the def his property to a third pe held in trust for the use an such debtor "contrary to ciently charges a violati against voluntary assignm of creditors. *Kickbusch* 108 Wis. 634.

572. 1. *McIntyre v. M* 1902) 91 N. W. Rep. 246.

Language of Statute. — W ute provides what shall l the complaint, to have tl ant's property set aside a creditors alleges not havi of statute. *Wing v. We* 115.

Participation of Grantee Fraud. — Where it is alle grantor fraudulently con

573. *Facts and Circumstances.* — See note 1.

574. *b. SUITS TO SUBJECT PROPERTY NOT REACHABLE BY EXECUTION.* — See notes 2, 3.

575. *c. SUITS BY CREDITORS OF DECEDENTS — (1) Insufficiency of Personal Assets.* — See note 2.

(2) *Description of Property.* — See note 3.

576. **XI. AMENDMENTS AND SUPPLEMENTAL BILLS.** — See notes 1, 2.

erty with intent to place it beyond the reach of his creditors, and that the conveyance was made without consideration, it need not be alleged that the grantee had knowledge of, or participated in, the fraud. *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309.

573. 1. *Wood v. Grayson*, 16 App. Cas. (D. C.) 174, wherein it is held sufficient if the fraud is clearly deducible from the specific facts alleged; *Coal City Coal, etc., Co. v. Hazard Powder Co.*, 108 Ala. 218, holding that an averment of fraudulent intent is not necessary where the facts authorize its existence to be inferred and the facts are alleged. See also *Beall v. Lehman-Durr Co.*, 110 Ala. 446.

574. 2. *Bill to Reach Proceeds of Attachment Suits.* — A bill seeking to subject to the debts of the complainant alleged equitable assets consisting of the proceeds of certain attachments levied upon the debtor's property must aver that the attachments were wrongfully sued out. *Balch v. Klein Furnishing Co.*, 121 Ala. 435.

3. *Plattsmouth First Nat. Bank v. Gibson*, 57 Neb. 246.

Equitable Title. — The bill should set out the facts showing the equitable title of property sought to be taken in an action on a creditors' bill to be in the debtor. *Bevins v. Eisman*, (Ky. 1900) 56 S. W. Rep. 410.

575. 2. *Presentation of Claim to Administrator* need not be alleged where a creditor is seeking to enforce a judgment against the estate of the deceased debtor. *Whiteside v. Hoskins*, 20 Mont. 361.

Bush v. Coleman, 121 Ala. 548, holding that a bill seeking to subject to the payment of the complainant's debt certain land purchased by the debtor before his death, the deed to which was taken in the name of another, must aver that the estate is insolvent or that there is a deficiency of legal assets.

3. *Sufficiency of Allegation.* — A pe-

tition under the statute which alleged that the judgment debtor had no property reachable by execution, but that she had an equitable interest in certain lands and in the rents and profits arising therefrom, was deemed sufficient. *Gerety v. Donahue*, 8 Kan. App. 175.

576. 1. *Bryan v. May*, 9 App. Cas. (D. C.) 383; *Wilkinson v. Goodin*, 71 Mo. App. 394; *Wyman v. Jensen*, 26 Mont. 227. See also *Monroe v. Reid*, 46 Neb. 316.

Amending Bill to Conform to Proof. — In a creditors' bill to reach land standing in the name of the defendant's father, it was alleged that the father held the land under a resulting trust. The proof tended to show an express trust, and it was held permissible to amend the complaint by alleging such express trust. *Kilham v. Western Bank, etc., Co.*, (Colo. 1902) 70 Pac. Rep. 409.

When Bill Considered as Amended. — A motion to dismiss a bill for want of equity should not prevail when it is or may be susceptible of amendment which will give it equity. *Lehman-Durr Co. v. Griel Bros. Co.*, 119 Ala. 262.

Amendment Where Attorney for Plaintiff Is Disbarred. — If between the time of sustaining a demurrer to the complaint and perfecting an appeal from the order sustaining such demurrer the attorney for the plaintiff is disbarred, the Supreme Court will take notice of that fact and allow the complaint to be amended. *Whiteside v. Hoskins*, 20 Mont. 361.

Discretion to Permit an Amendment. — It is within the discretion of the chancellor to refuse to permit an amendment of a bill when the cause has been heard and a decree entered. *Montgomery v. Clark*, (Tenn. Ch. 1898) 46 S. W. Rep. 466.

2. See *Metcalf v. Arnold*, 133 Ala. 74; *Henderson v. Hall*, 134 Ala. 455; *Freeman v. Pullen*, 130 Ala. 653.

An Alternative Ground of Relief may

576. Supplemental Bill. — See note 3.

577. When Original Bill Is Wholly Defective. — See note 1.

578. XII. DEMURRER. — See note 1.

580. XIII. ANSWER. — See note 1.

be set up by amendment when the matter of amendment might have been stated in the alternative in the bill as originally filed. *Wimberly v. Montgomery Fertilizer Co.*, 132 Ala. 107.

In *McDonnell v. Finch*, 131 Ala. 85, it was held that where the original bill specially prayed that an alleged fraudulent attachment be declared a general assignment, an amendment to the bill by striking out such prayer and praying that the attachment be declared fraudulent and void as to creditors was harmless, as the relief asked for by the amendment could have been granted under the general prayer for relief in the original bill.

Where Amendment Presents No Issue.

— Where an amendment to a petition presents no issue upon which a court or jury could pass, it will be refused. *Lydia Pinkham Medicine Co. v. Gibbs*, 108 Ga. 138.

Amendments in Matter of Substance. —

In *Shaw v. Monson Maine Slate Co.*, 96 Me. 41, it was held that the plaintiff will not be allowed to amend a creditors' bill, after the case has been reported to the law court, so that it would be a bill to enforce his rights as a pledgee of the property, where it does not appear that the plaintiff's rights will be irretrievably lost if the amendment be refused.

576. 3. *Metcalf v. Arnold*, 132 Ala. 74; *Berney Nat. Bank v. Guyon*, 111 Ala. 491.

Subsequent Acquisition of Property by the Defendant. — *Newlove v. Pennock*, 123 Mich. 260.

In *Matula v. Lane*, (Tex. Civ. App. 1900) 56 S. W. Rep. 112, it was held that where the plaintiff acquires any interest from intervenors after the suit has been brought, it must be set up in an amended or supplemental petition.

577. 1. *Fleischner v. McMinnville Bank*, 36 Oregon 553.

Waiver of Objection. — In a suit to set aside a fraudulent conveyance, based on an alleged attachment, the plaintiff filed a supplemental bill alleging that since the commencement of the suit he had secured judgment in his attachment at law. The supplemental bill was not objected to on the ground that

it attempted to set up new matter since the filing of the original bill and objection was made. *Fleischner v. McMinnville Bank*, 36 Oregon 553.

Subsequent Exhaustion of Remedies Appearing in Supplemental Bill. — In *Fleischner v. McMinnville Bank*, 36 Oregon 553, it was held that where a plaintiff brings a bill to set aside a lien by attachment, and the plaintiff has reduced his claim to a judgment, the most that can be done in the suit is prematurely to set aside the judgment if during its pendency a trial he exhausts his remedies. He may make that fact a ground for a supplemental bill.

578. 1. **Demurrer for Imprecision.** — A demurrer to a bill on the ground of imprecision as to fraud is bad, when fraud is not upheld the equity referred to is not alleged in a bill for enforcement. *Burke v. McMinnville Bank*, 126.

When a Bill Is Both for Discovery and for Relief. — When it is relief, a demurrer to the bill should be overruled. *Morris*, 121 Ala. 126.

A Demurrer for Want of Discovery. — A demurrer for want of discovery of persons interested in the property is bad. *Morris*, 121 Ala. 126.

580. 1. **Averment Unavailing.** — In a bill where the lawful owner of the property is alleged, the defendant, in that possession was not a trespasser, must traverse the averment that the plaintiff was lawfully in possession of the property at the time the goods were taken. *Lincoln*, 68 Conn.

Affirmative Matter of Defense. — In *Gay v. Havermale*, 27 W. Va. 101, it was held that a suit by a judgment creditor to cancel and set aside as void a deed to certain realty, if the facts exist as an equitable defense, and, unless disclosed upon the complaint, the facts must be set forth in the answer.

Allegations of Good Faith. — In an action brought to set aside a fraudulent conveyance as in fraud the answer must allege

583. XV. DISCOVERY — 1. In General. — See note 2.

584. 2. Parties — In General. — See note 4.

clearly that the consideration for which the transfer was made was paid in good faith. *Manhard Hardware Co. v. Rothschild*, 121 Mich. 657.

Unverified Answer. — In an attachment bill to impound certain property of the defendants and subject it to the satisfaction of the plaintiff's judgment, an unsworn answer merely denying that the defendants have fraudulently conveyed the property is insufficient. *Templeton v. Mason*, 107 Tenn. 625.

Allegations of Separate Estate. — In a suit in attachment by a creditor seeking to subject certain goods to the payment of his debt, an answer by the wife of the debtor claiming the property which fails to aver that the goods are her separate estate is insufficient. *Walters v. Brown*, (Tenn. Ch. 1898) 46 S. W. Rep. 777.

Collusive Return by Sheriff. — A return of execution *nulla bona* is conclusive of the question as to whether the creditor has exhausted his legal remedy; and an answer which alleges that the debtor had property subject to levy upon execution, but fails to allege fraud or collusion upon the part of the sheriff, does not state a defense. *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309.

Consideration for Alleged Fraudulent Conveyance. — An allegation in the answer that the plaintiff paid a valuable consideration is good as against allegations in the complaint of want of consideration, where knowledge of the fraudulent intent of the grantor in making the conveyance is not alleged. *State v. Osborn*, 143 Ind. 671.

Pleading and Proof — Fraud. — In an action to recover property held under attachment by the defendant, where the complaint does not show plaintiff's source of title, and the plaintiff by her evidence seeks to show title derived from the attachment debtor, it was held that the defendant had the right to attack her title by showing that the sale from the attachment debtor to her was fraudulent, though the answer did not set up fraud. *Banning v. Marleau*, 121 Cal. 240.

Mere Denials of Fraud and Insolvency are not sufficient. Facts and not conclusions should be stated. *Freeman v. Stewart*, 119 Ala. 158.

Cross-bill. — Where a creditor with a

lien has filed a bill to ascertain the property of his debtor and the liens and priorities against the same, a creditor defendant may file in such suit an answer in the nature of a cross-bill attacking any of the liens involved therein as fraudulent preferences under the statutes in such case made and provided. *Casto v. Greer*, 44 W. Va. 332.

Consideration for Alleged Fraudulent Conveyance. — Where the bill charges certain conveyances to be voluntary and the consideration therefor to be fictitious and simulated, the answer should, in addition to a general denial, contain affirmative averments of the facts relied on as constituting the consideration. *Gamble v. Aultman*, 125 Ala. 372. See also *Killian v. Cox*, 132 Ala. 664.

583. 2. Wren v. Dooley, 97 Ill. App. 88.

Answer under Oath Waived. — A bill is not demurrable upon the ground that it is not a bill of discovery because answer under oath is waived as to all of it except the interrogatories incorporated therein. *Pollak v. Billing*, 131 Ala. 519. See also *Hudson v. Wood*, 119 Fed. Rep. 764.

In Suits Against Personal Representatives. — Where the bill shows that the estate is solvent and the assets superabundant, the mere pretext of the want of discovery will not give equitable jurisdiction against a personal representative who is not shown to have neglected any of the statutory requirements relating to his duties as such representative to the injury of the plaintiff. *Hale v. White*, 47 W. Va. 700.

Alabama. — A simple contract creditor may file a bill for a discovery of assets and to subject them to the payment of debts due him. *Pollak v. Billing*, 131 Ala. 519.

584. 4. Sheriff in Attachment Suit. — Where a bill seeks to set aside a writ of attachment against the property of the debtor as having been fraudulently and collusively sued out, and asks discovery as an incident to the main relief sought, the sheriff, who has possession of the property sought to be reached, is a necessary party defendant and can be made to discover such incidental facts essential to the

586. 3. Bill — *Fishing Bills*. — See note 2.

587. Fraud. — See note 1.

5. Answer. — See note 3.

588. See note 1.

589. XVI. INJUNCTION. — See note 1.

590. See notes 1, 2.

593. XVII. RECEIVERS. — See notes 1, 2.

bill as the description of the property, which the bill shows he alone can discover and that he has declined to discover. *Plaster v. Throne-Franklin Shoe Co.*, 123 Ala. 360.

586. 2. *Drennen v. Alabama Nat. Bank*, 117 Ala. 320, citing *Sweetzer v. Buchanan*, 94 Ala. 574; *Moore v. Alabama Nat. Bank*, 120 Ala. 89, wherein the complaint was similar to that in *Drennen v. Alabama Nat. Bank*, 117 Ala. 320. See also *Guyton v. Terrell*, 132 Ala. 66.

Verification. — A bill seeking to discover legal assets belonging to the defendant must be verified. *Burke v. Morris*, 121 Ala. 126.

But, when discovery is sought as merely incident to relief in matters of ordinary equitable cognizance, the bill need not be sworn to. *Henderson v. Farley Nat. Bank*, 123 Ala. 547; *Plaster v. Throne-Franklin Shoe Co.*, 123 Ala. 360.

587. 1. *Pollak v. Billing*, 131 Ala. 519, holding that it is not necessary that the bill should show any fraudulent conveyance or attempt to fraudulently transfer property. It is sufficient if it avers the insufficiency of visible assets subject to legal process and the existence of assets which are concealed.

3. Action to Set Aside a Fraudulent Mortgage. — In an action to set aside a fraudulent mortgage, where the plaintiff by his pleadings presents a state of case which, under the terms of Gen. Stat. Ky. 1894, § 1910, operates as a transfer and assignment of all of the property of the debtor for the benefit of his creditors, an answer is insufficient which merely consists in the denial that a mortgage "was made in contemplation of insolvency, or with the design to prefer one or more creditors." *Aulick v. Reed*, 104 Ky. 465.

588. 1. *Hegler v. Grove*, 63 Ohio St. 404.

589. 1. *Kirdahi v. Basha*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 715.

Proceeds of Attachment Sale. — Where

attachments issued in and levied on goods of fraudulent grantees and the proceeds of the goods having been under the attachments be paid to such grantee, at the same time payment of such proceeds in its previous order, termination of the *Keneweg Co. v. Schilke*, 287.

Injunction Pendente Lite. — **signee of Corporation.** — If creditor's action brought after assignment by a corporation after it had fraudulently some of its property, and properly granted restriction on signee from disposing of to the extent of the plaintiff's pending the determination of the creditor's action. *Koechl v. Brewing Co.*, 26 N. Y. 287.

590. 1. See *Asbury Nat. Bank v. White*, 60

2. See *Livingston v. Dry Goods Co.*, 12 Colo.

In New York, to justify of a motion for a temporary injunction, the plaintiff must show that the defendant, unless he do some act during the pendency of the action which will prejudice the plaintiff, or that he do some act in violation of the plaintiff's right incident to, or connected with, the subject-matter of the action. *Herbert Booth King*, (Supm. Ct. App. Div.) 2 N. Y. 229.

593. 1. *Gilbert v. Beneficial Endowment Co.*, 121 Cas. (D. C.) 316; *Mears v. Wash.* 148. See also *Livingston v. Swatow Co. v. Catawba Mills*, 780.

2. *Hirsch v. Israel*, 102 N. Y. 287. See also 5 ENCYC. OF PL. AND EQUITY, also *Livingston v. Swatow Goods Co.*, 12 Colo. App.

594. Discretion of Court. — See note 1.

Suits to Set Aside Fraudulent Conveyances. — See note 2.

595. See note 1.

596. Notice. — See note 2.

597. Effect of Answer. — See note 4.

598. XVIII. DECREE — 1. In General. — See note 2.

594. 1. *Wood v. Grayson*, 16 App. Cas. (D. C.) 174; *National Union Bank v. Riger*, 38 N. Y. App. Div. 123.

2. *Cox v. Wall*, 99 Fed. Rep. 546. See also *Taylor v. Dwyer*, 131 Ala. 91; *New Jersey Lumber Co. v. Ryan*, 57 N. J. Eq. 330.

New York. — Where the action is brought by creditors in their own behalf, to set aside a transfer of real estate as fraudulent against them, it is not proper ordinarily to appoint a receiver, but the proper judgment is to set aside the conveyance, so far as it obstructs the plaintiffs' judgment, and permit them to pursue their remedy on their judgment in the usual way. *Harris v. Osnowitz*, 35 N. Y. App. Div. 594; *Bryer v. Foerster*, 14 N. Y. App. Div. 315.

When the Grantee Is Solvent there is no necessity for the appointment of a receiver to take charge of the property conveyed. *Gilreath v. Union Bank, etc., Co.*, 121 Ala. 204. See also *Turnipseed v. Kentucky Wagon Co.*, 97 Ga. 258; *Banner v. Dingus*, (Va. 1899) 33 S. E. Rep. 530.

595. 1. *Hirsch v. Israel*, 106 Iowa 498.

596. 2. *Alexandria Gas Co. v. Irish*, 152 Ind. 535. See also *Smith-Dimmick Lumber Co. v. Teague*, 119 Ala. 385, wherein it was said that the appointment of a receiver, without notice, upon the single verified fact of the insolvency of the debtor should be reversed on appeal.

In *Gilreath v. Union Bank, etc., Co.*, 121 Ala. 204, it was held that the appointment of receivers upon *ex parte* applications is a practice seldom tolerated.

597. 4. **Accounting of Receiver.** — Where a receiver has been appointed in a case, the bill should not be dismissed without requiring him to report and settle his account. *Simmons v. Shelton*, 112 Ala. 284.

598. 2. *Taylor v. Dwyer*, 131 Ala. 91; *Freeman v. Pullen*, 130 Ala. 653; *Woodbury v. Nevada Southern R. Co.*, 120 Cal. 463; *Hunt v. Johnston*, 105 Iowa 311; *Greenough v. Greenough*,

(Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 727 [affirmed 32 N. Y. App. Div. 631]; *Tuthill v. Myrus*, 57 N. Y. App. Div. 37.

Support of Decree. — The evidence must be consistent with the allegations of the complaint, and the terms of the decree must be consistent with both the evidence and the allegations of the complaint. *Mullan v. O'Shea*, 85 Ill. App. 385; *Chatterton v. Mason*, 86 Md. 236; *Wabasha First Nat. Bank v. Brass*, 71 Minn. 211; *Billington v. Sweeting*, 172 Pa. St. 161. See also *Gevers v. Farmer*, 109 Iowa 468; *Norberg v. Records*, 84 Md. 568; *Anderson v. Learoyd*, 176 Mass. 431; *Needles v. Ford*, 167 Mo. 495.

Decree Under Prayer for General Relief. — Under a prayer for general relief, a sale of property not attached may be decreed, where the facts entitling the party to such sale are alleged and proved, although the petition asks specifically for the sale of only the attached property. *Columbia Nat. Bank v. Baldwin*, (Neb. 1902) 90 N. W. Rep. 890.

Relief Under Bill of Discovery. — Full satisfaction of their claims is all the relief complaining creditors are entitled to under a bill of discovery, and therefore a decree is improper which directs the debtor to pay over to a receiver a sum in excess of the aggregate sum asked for by the complainants. *McKissack v. Voorhees*, 119 Ala. 101.

Personal Decree Against Grantee. — A decree in an action seeking to set aside a conveyance on the ground that it is in fraud of creditors, cannot hold the grantee liable for the amount involved unless he has been put on notice by the allegations of the bill that such demand will be made. *Chatterton v. Mason*, 86 Md. 236.

Decree of Dismissal. — A decree dismissing a creditors' bill because the complainant is a simple contract creditor and therefore not entitled to maintain the same, should be without prejudice. *Harrison v. Farmers' L. & T. Co.*, (C. C. A.) 94 Fed. Rep. 728.

600. 2. In Suits to Set Aside Fraudulent Conveyances GENERAL.— See note 1.

b. SALE OF PREMISES FRAUDULENTLY CONVEYED.
See note 2.

600. 1. Emmons v. Barton. 109 Cal. 663; McDowell v. McMurria, 107 Ga. 812; McNally v. White, 154 Ind. 163; Knapp v. Crane, 14 N. Y. App. Div. 120; Schultze v. Schultze, (Tex. Civ. App. 1901) 66 S. W. Rep. 56. See also Home Bank v. Brewster, 15 N. Y. App. Div. 338.

Extent of Fraudulent Donee's Liability.— Walters v. Cantrell, Tex. Civ. App. 1902) 66 S. W. Rep. 790, wherein it was held that the judgment should cancel the deed only as to the amount levied upon.

Conveyance Allowed to Stand as Security for Sum Paid— *Where Fraud Is Not Clearly Proved.*— Where a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is no sufficient evidence of fraud to induce the court to avoid it absolutely, but there are suspicious circumstances as to the adequacy of consideration and the fairness of the transaction, the court will not set aside the conveyance altogether, but will permit it to stand as security for the sum paid. Withrow v. Warner, 56 N. J. Eq. 795; Morrell v. Miller, 28 Oregon 354.

Where there Is Disparity Between the Value of the Property and the Price Paid the court may adopt such specific relief as may be best suited to the exigencies of the case, and, among others, may allow the amount actually paid to be a lien on the property. Wright v. Craig, 40 Oregon 191. See also Schuster v. Farmers, etc., Nat. Bank, 23 Tex. Civ. App. 206, wherein it was held that if there was no intent to defraud creditors, and the debtor was insolvent, and property was sold by deeds for a consideration much less than their market value at that time, then the sales referred to would, as to creditors, be only constructively fraudulent, and it would be proper to treat the deeds as mortgages for the actual amount which constituted the consideration, and to permit creditors to recover the property on payment of such consideration. But see Henderson v. J. B. Brown Co., 125 Ala. 566, wherein it was held that where the claim of the complainant in a suit to set aside a collusive attachment is small

as compared with the full amount to be reached, the court may, nevertheless, decree that the entire sum paid into court for the payment of the complainant's claim and the costs of the creditors who may prove their claims. Henderson v. J. B. Brown Co., 125 Ala. 566.

Where Fraud Is Abundantly Proved the conveyance should be allowed to stand as security for the actual indebtedness proved by the parties. Woods v. Woods, 14 N. Y. App. Div. 220.

2. McNally v. White, 154 Ind. 163; Benton v. Collins, 125 Va. 37; Wollenberg v. Minard, 37 Va. 37; Cumberland First Nat. Bank v. Sons, 42 W. Va. 137.

Forms of Decrees— *Decree of Homestead Exemption.*— Where the court finds a conveyance of land to be void as to the grantor's creditors excepting "forty acres" included in the grantor's homestead, the court should not designate the "forty acres" as some particular part of the land. Doyle v. Wamego First Nat. Bank, (Tex. Civ. App. 1899) 50 Tex. Civ. App. 480.

Where there Are Prior Liens the land fraudulently conveyed should not be sold subject to the liens, but should be sold free of the fraction of such liens as were claimed by the complainant's claim. Dent v. Dent, 50 W. Va. 382.

Where the Grantee Partly in Good Faith the deed should be declared void, and the creditors should be allowed to recover the land free from any claim of the grantee. Schuster v. Farmers, etc., Nat. Bank, 23 Tex. Civ. App. 206.

Extent of Recovery by Creditors.— Where a receiver appointed in a receivership proceeding prosecutes a receivership proceeding against the debtor to set aside a fraudulent conveyance of property and to compel the debtor to account for the proceeds of the property by virtue of such transfer, the receiver is entitled to recover judgment for such a sum only as will satisfy the judgment of the creditors who represent, and the remainder of the proceeds can be retained by the receiver.

601. See note 1.

c. **PERSONAL JUDGMENT AGAINST FRAUDULENT DONEE.** — See note 2.

603. See note 1.

3. Suits to Subject Property Not Reachable by Execution.
— See note 2.

fendant, *Stiefel v. Berlin*, 28 N. Y. App. Div. 103.

Remedy Where Too Much Relief Is Granted. — If a judgment setting aside a fraudulent conveyance gives the plaintiffs more relief than they were entitled to under the findings, the defendant is not entitled to judgment on motion, his remedy being by motion to modify the judgment. *Nelson v. Cottingham*, 152 Ind. 135.

601. 1. *Harris v. Osnowitz*, 35 N. Y. App. Div. 594; *Bryer v. Foerster*, 14 N. Y. App. Div. 315. Compare *Chrislip v. Teter*, 43 W. Va. 356.

In *Mississippi* the decree should not merely vacate the fraudulent transfers, but should fix the amount of the several debts due the respective complainants, order the property to be subjected to the payment of said ascertained debts, and adjudge costs. *Oliver Finnie Grocery Co. v. Bodenheimer*, 77 Miss. 415.

2. *Sabin v. Anderson*, 31 Oregon 487 [citing 5 ENCYC. OF PL. AND PR. 601]; *Vance Shoe Co. v. Haught*, 41 W. Va. 275.

When Decree Not Personal. — Where a creditor purchases property from his debtor in excess of the former's claim, with knowledge of the fraudulent purpose of that debtor, in selling the property, to hinder other creditors, in a suit to set the conveyance aside the decree should not be a personal one against the grantee, but should give the attacking creditors a lien on the property to the extent of the excess thereof over the purchaser's valid claim. *Morrell v. Sharp*, (Iowa 1898) 74 N. W. Rep. 749.

Fraudulent Judgment in Favor of President of Corporation. — A judgment creditor of a corporation cannot maintain an action for a personal judgment against its president to vacate as fraudulent a judgment which the defendant has obtained against the corporation, and which has been satisfied. *Westfall v. Powell*, (Kan. 1896) 45 Pac. Rep. 92.

603. 1. *Morrison v. Houck*, (Iowa 1903) 93 N. W. Rep. 593; *Harrison v.*

Obermeyer, etc., Brewing Co., 64 N. Y. App. Div. 499; *Sabin v. Anderson*, 31 Oregon 487. See also *Sheldon v. Parker*, (Neb. 1902) 92 N. W. Rep. 923.

Accounting as to Equity of Redemption. — Where mortgagees holding property under valid mortgages dispose of the property pursuant to a conveyance by the mortgagor in fraud of his creditors, in a suit to set aside the conveyance the creditors, if successful, are entitled to an accounting at the hands of the mortgagees of the disposition made by them of the property, in order that the mortgagor's equity of redemption therein may be reached and applied to the satisfaction of the creditors' claims. *Kickbusch v. Corwith*, 108 Wis. 634.

Credit for Disbursements. — In *Sabin v. Anderson*, 31 Oregon 487, it was held that the court cannot take an account between the parties to the fraud for the purpose of reimbursing the fraudulent assignees for money expended for their own protection without regard to the rights of creditors.

2. In a suit to reach funds in a trustee's hands a decree that the trustee shall pay forthwith the amount of the judgment against the judgment debtor with interest and costs is good. *May v. Bryan*, 17 App. Cas. (D. C.) 392. See also *May v. Bryan*, 16 App. Cas. (D. C.) 556, wherein a decree providing that unless the trustee shall, within forty-five days, pay the judgment, the interest of the judgment defendant in the estate shall be sold, was affirmed.

Decree Against Trustee. — When an action is brought to set aside a fraudulent conveyance of property which is in the hands of a trustee, and the trustee when summoned persistently and contemptuously refuses to appear and answer questions touching the transfer of such property in his hands, a decree may be entered against him charging him with the full value of the property and compensation for his services may be denied. *French v. Commercial Nat. Bank*, 97 Ill. App. 533, affirmed 199 Ill. 213.

Sale by Master. — In *Massachusetts* a decree to subject the equitable interest

605. 5. Distribution of Fund Among Creditors — SET ASIDE FRAUDULENT CONVEYANCES. — See note 1.

607. Surplus of Proceeds. — See note 1.

b. SUITS TO SUBJECT PROPERTY NOT BY EXECUTION. — See note 2.

of a piece of land to payment of a debt should provide that in case the defendant elected not to make the conveyance of the land to satisfy the judgment of the court, a master should conduct the sale; but upon the sale being made by the master the conveyance should be made by the defendant. *Russell v. Burke*, 180 Mass. 543.

Conditions Precedent to Sale. — In *Carnahan v. Ashworth*, (Va. 1898) 31 S. E. Rep. 65, it was held that in an action to subject realty to the judgment debtor's debts, land shall not be sold under a decree of court until the liens binding it, their amounts, and the order of their priorities have been established.

605. 1. Doster v. Manistee Nat. Bank, 67 Ark. 325; *Senter v. Williams*, 61 Ark. 189; *Goldberg v. Cohen*, 119 N. Car. 68. See also *Applegate v. Applegate*, 107 Iowa 312; *Matula v. Lane*, 22 Tex. Civ. App. 341.

In West Virginia. — *Parkersburg First Nat. Bank v. Prager*, 50 W. Va. 660; *Cumberland First Nat. Bank v. Parsons*, 42 W. Va. 137. Compare *Blubaugh v. Loomis*, 48 W. Va. 666, wherein it was held that in a suit to set aside a fraudulent conveyance no convention of the creditors of the fraudulent grantor is necessary.

Proceedings Before Commissioner. — Any creditor, though not a party to the suit, has the right to appear before the commissioner to whom a cause is referred and present his lien, and if the lien is allowed is entitled to have it decreed without formal pleadings. See Code W. Va., c. 139, § 7. If the court was not satisfied with the claim, it should have recommitted it to the commissioner for further investigation, but the commissioner having reported it as a valid claim, the court could not on its own motion without exception disregard it. *Wilson v. Carrico*, 50 W. Va. 336.

Creditors Who Do Not Join in a Suit to Set Aside a Fraudulent Conveyance cannot claim any of the recovery in such suit until the debts of the attacking creditors have been satisfied. *Wilson v. Carrico*, 50 W. Va. 336.

Creditors Who Do Not Join in a Suit

to Set Aside a Preference cannot share in a recovery of the claims not only of creditors but also of creditors are satisfied. *rigo*, 50 W. Va. 336.

Preferred Creditors Attain the Preferential Condition to share *pro rata* with other creditors. See Code 139. *Wilson v. Carrico* 336.

Notice to File Claims. — a notice to creditors of a sale must be personal, but may be by publication. *Barnett v. Eassey*, etc., R. Co., (Tenn. Ch. Rep. 817.

607. 1. Gilbert v. Beneficial Endowment Assn. 115 Iowa 238. *Cas. (D. C.) 316; Mallory*

2. Bridges v. Cooper, See also *Babbington v. Brewery Co.*, 13 App. Cas. (D. C.) 316; *Mallory* wherein it was held that from the filing of the lien the property is subject to the filing of liens and incumbrances created by the filing of liens, incumbrances, and subsequently created or *Bryan*, 17 App. Cas. (D. C.) 316; *Mallory* wherein it was held that the filing of a lien and the notification issued thereon, created an equitable estate or asset of the debtor, described in no subsequent disposition of the debtor or those assets could defeat that lien, although acquired is subject to the filing of a lien that may have been created by the filing of the property or assets of the debtor.

Fraudulent Sale by Insurer. — Where a sale by an insurer of its property is decreed by the court the court decrees a general sale of the property not only those who have formally intervened but all holders of certificates of insurance, may present their claims and have them adjudicated.

608. Priority Obtained by Owner of Junior Judgment. — See note 1.

609. *c.* SUITS BY CREDITORS OF DECEDENTS. — See note 3.

610. See note 1.

611. See note 1.

612. *d.* PAYMENTS OF DEBTS ACCORDING TO DIGNITY. — See note 2.

614. 6. Interruption of Other Suits. — See note 1.

615. Suits by Creditors of Decedents. — See note 1.

[XIX. COSTS (see also COSTS) — In General. — A decree setting aside a fraudulent transfer should adjudge costs.^{3a}

Payable Out of General Fund. — The costs may be taxed

Washington Beneficial Endowment Assoc., 10 App. Cas. (D. C.) 316.

608. 1. Action to Reach Resulting Trust. — The ordinary rule which is applicable in creditors' actions, that the person who first acquires a lien is to have the benefit of that lien and to have preference over other creditors, although the latter may have senior judgments, applies to actions brought to enforce the rights of a creditor under a statute declaring that a trust shall result in favor of the creditors of one who pays for property which is conveyed to another. *Mandeville v. Campbell*, 45 N. Y. App. Div. 512.

609. 3. *Campbell v. Heiland*, 55 N. Y. App. Div. 95, holding that all that the plaintiff is entitled to is a cancellation of the fraudulent transfer and a *pro rata* distribution for the common benefit of all creditors.

610. 1. *Senter v. Williams*, 61 Ark. 189.

611. 1. *Continental Trust Co. v. Toledo, etc.*, R. Co., 82 Fed. Rep. 642.

612. 2. *Manhattan Trust Co. v. Seattle Coal, etc., Co.*, 19 Wash. 493.

Where the Property Is Reconveyed to the Debtor, all existing judgment liens attach at the same time and the fund must be distributed among them all *pari passu*. *Ware v. Delahaye*, 95 Iowa 667, decided under Code Iowa, § 2882.

614. 1. *American Pig Iron Storage Warrant Co. v. German*, 126 Ala. 194; *Alabama Iron, etc., Co. v. McKeever*, 112 Ala. 134; *State v. Superior Ct.*, 14 Wash. 686.

Consolidation of Suits — Consolidation Allowable. — Whenever the subject-matter of a creditors' bill is the same, even though the parties may be different, consolidation may be allowed at any time, even though the defenses to the different claims may be entirely

different. And where consolidation is consented to by all the parties, they in effect agree that the separate actions shall be discontinued, and a new and distinct action shall be created in which shall be included and litigated all the questions presented by the pleadings in the former actions. *Gilbert v. Washington Beneficial Endowment Assoc.*, 10 App. Cas. (D. C.) 316.

Waiver of Priority. — Where judgment creditors consent to a consolidation of their actions, and no order is made at the time, or requested, to determine their respective priority, and all share in the prosecution and expense of the consolidated suit, it is not error to require such creditors to prorate in the proceeds of the suit. *Nebraska Nat. Bank v. Hollowell*, 63 Neb. 309.

Suit Against Receiver in Another Suit. — A creditor may file a bill to reach and subject assets of his insolvent debtor, in respect of which another creditors' suit has been commenced and a decree appointing a receiver entered, when the effect of the prosecution of such suit or of the decree therein is shown to be a hindrance and delay of the complaining creditor and a fraud upon his rights. *Alabama Iron, etc., Co. v. McKeever*, 112 Ala. 134.

615. 1. Where the Estate Is Insolvent. — Where a creditors' bill recites that the insolvency of the estate of the decedent has been suggested in the probate court, as provided by *Shannon's Code Tenn.*, § 4072, the bill is not defective for the reason that no injunction issued, since an injunction is not necessary after suggestion of insolvency. *Spencer v. Goodlett*, 104 Tenn. 648.

2a. *Oliver Finnie Grocery Co. v. Bodenheimer*, 77 Miss. 415.

against the general fund for distribution among the creditors, although this may be discretionary with the court.²¹

615. When Defendant Entitled to. — A prevailing defendant, as one who has no interest in the controversy and no claims, is entitled to costs.²²

XX. APPEALS (see also APPEALS) — **Judgment.** — In general, an appeal will lie in a creditors' suit from a final judgment.²³

Parties — Parties Interested in Recovery. — Any party has a right to share in the proceeds of a judgment in a creditors' suit by appeal from an order rejecting his claim.²⁴

Parties Not Peculiarly Affected cannot appeal.²⁵

Joinder. — All parties on either side who are affected by the judgment or decree adverse to such party may be joined as parties appellant on an appeal from such judgment.²⁶

615. 26. Manhard Hardware Co. v. Rothschild, 121 Mich. 657.

26. Parkhurst, etc., Co. v. Etna Coal Co., (Tenn. Ch. 1899) 54 S. W. Rep. 58, holding that when a general creditors' action, brought to wind up an assignment made by a corporation and to have the assets distributed, fails to discover any new assets or to protect or preserve the assigned property, it is within the discretion of the court to tax the costs of the action, though not the counsel fees of the complainants, against the general fund.

2d. Malcomson v. Wappo Mills, 97 Fed. Rep. 225.

2c. Order Providing for Future Proceedings Against a Guarantor. — An order that after exhausting their remedy against a principal debtor, creditors may apply for and obtain a judgment against a guarantor is not final and therefore not appealable. *Millard v. Parsell*, 57 Neb. 178.

2f. Parties Coming in under Order for Convention of Creditors. — Under Code W. Va., c. 139, § 7, any creditor of a defendant debtor in a suit to set aside a fraudulent conveyance may, though not a party to such suit, file his claim with the commissioner to whom the case is referred, and if such claim be allowed by the commissioner, the creditor is entitled to have it decreed without formal pleadings; and hence the absence of such pleadings will not deprive such creditor of the right to appeal if his claim be rejected by the court. *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487.

2g. A Fraudulent Grantor cannot ap-

peal from a decree setting aside a conveyance as fraudulent when the decree provides that the proceeds shall be satisfied and paid to the creditors. *Manhard Hardware Co. v. Rothschild*, 121 Mich. 657.

A Receiver is rarely entitled to appeal from a judgment requiring payment of a petition for the proceeds of realty, but may do so when the question is between two sets of creditors for the distribution of the fund. *Bank v. Western Carolina*, 101 N. Car. 432.

2h. Summons and Severance. — **Refusing to Join** — In a creditors' suit, a party refusing to join in proceedings must be heard from a decree setting aside a mortgage as to the nullity of the mortgage as to creditors should be named in the name of all the defendants. *Summons and severance* in an appellate court as to the appeal. *Cross v. Cross*, 92.

Not Always Necessary and severance are not necessary for the maintenance of an appeal by one of the parties to a decree. *Appears from the record* who might have joined in the suit to do so and have been heard. *son v. Trust Co.*, (C. Va.) 174.

Joinder Rendered Unnecessary. — Where, in a creditors' suit, a party is set aside as fraudulent trustee of money from a wife, the bank in which

615. Assignments of Error — Must Be Specific. — Assignments of error must, as in appeals in other suits, specifically point out the error complained of.²ⁱ

Joint Assignment of Error cannot be made by parties who are not jointly affected by the errors so assigned.^{2j}

Questions Considered on Appeal. — Objections for errors committed in the trial court which do not go to the jurisdiction of such court or affect its ability to dispose of the cause will not be considered when presented for the first time on appeal.^{2k}

been deposited by the wife is made a party defendant, and, pending the action, the bank pays out such sum upon the check of the wife, the bank has a right to appeal from a judgment rendered against it and the wife in such action, although the latter does not appeal, and by the payment of the check the bank becomes subrogated to the rights of the wife. *A. T. Albro Co. v. Fountain*, 162 N. Y. 499.

Where the Interests of the Parties Are Severable, each party representing a separate interest must take a separate appeal. An appeal by one party defendant does not bring up for review the case as to the other parties not affected by the issues upon such appeal. *Shapira v. Paletz*, (Tenn. Ch. 1900) 59 S. W. Rep. 774.

615. 2i. Objection to Exhibit. — An objection that a deed was not filed with the complaint as an exhibit, in an action to set aside a fraudulent conveyance of land, will not be considered under an assignment that the complaint does not state facts sufficient to constitute a cause of action. *Searles v. Little*, 153 Ind. 432.

2j. In Suits to Set Aside Conveyances Made by Different Parties. — On appeal from a decree setting aside several conveyances as fraudulent, joint assignments of error by the defendants, where they are not jointly interested in any one parcel of land so conveyed, must fail, as such assignments cannot be good as to all the defendants. *Killian v. Cox*, 132 Ala. 664.

2k. Want of Process Cured. — An objection that no summons was awarded against a creditor defendant in a petition filed in the lower court in a suit brought by another creditor to set aside a fraudulent deed cannot be made for the first time on appeal, where it appears that after the petition was filed an account of liens was ordered and taken, of which such defendant had

due notice. *Flynn v. Jackson*, 93 Va. 341.

Process Served on Only One Partner. — In a suit to set aside as fraudulent a conveyance made by two partners, an objection that process was served on only one of the partners cannot be raised for the first time on appeal. *King v. Baer*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 308.

Failure to Exhaust Legal Remedies. — An objection that creditors cannot subject personal property without first issuing and levying an execution upon it, and having a return of *nulla bona*, cannot be first raised on appeal. *O'Brien v. Stambach*, 101 Iowa 40.

Sufficiency of Complaint. — Where the complaint does not allege the name of the court in which the plaintiff's action was brought, nor that the indebtedness upon which it was based was due and payable, and the defendant answers and allows the case to go to trial without objection, he cannot, upon appeal, raise the question of the sufficiency of the complaint. *Bennett v. Minott*, 28 Oregon 339. See also *Hoffman v. Henderson*, 145 Ind. 613, wherein it was held that where there are two paragraphs in the complaint, the first proceeding upon the theory that no actual consideration was paid by the grantee for the land in controversy, and the second, that she united with her husband in his intent to defraud his creditors, accepting the deed with a knowledge of the fraud, the complaint will be held sufficient when attacked for the first time on appeal.

Failure to Pursue Supplemental Remedy. — An objection that a judgment should not have been rendered in an action by a creditor to reach money in the hands of a trustee, on the ground that the money could have been reached by garnishment proceedings, cannot be raised for the first time on appeal. *Raymond v. Leinberger*, 50 Neb. 815.

615. Objections Available on Appeal. — An objection essential to a correct disposition of the case may be made the first time on appeal.²¹

Presumptions. — Where the record does not show evidence, the findings of the trial court will be presumed to have been sustained by the evidence.²²

Competency of Evidence. — It will be presumed that the chancellor rested his decision upon competent evidence.

Examination of Questions of Fact. — The findings of the trial court upon questions of fact cannot be reviewed on appeal where there was evidence to support them.²³

Dismissal. — The satisfaction of the debt is the basis of a creditors' suit, after the entry of a decree setting aside conveyances as fraudulent, is not ground for dismissal of an appeal from such decree.²⁴

The Costs of an Appeal from a decree entered in a suit are usually taxed against the losing party.²⁵]

No Issue Made. — An objection that there was no issue as to the want of consideration for a deed alleged to have been made for the purpose of defrauding creditors cannot be made for the first time on appeal. *Casey v. Leggett*, 125 Cal. 664.

Consolidation. — Where no exception is taken to an order consolidating a creditors' bill to reach a money deposit transferred by a judgment creditor in fraud of creditors, with an action by an assignee of the certificate of deposit, the propriety of such order cannot be considered on appeal. *Wolters v. Rossi*, 126 Cal. 644.

Issues Not Presented Below. — Where in an action to set aside a fraudulent conveyance the defendant fails to present any issue as to the improvements made upon the property in controversy, or to request any finding concerning such improvements, he cannot insist on the reversal of the judgment because nothing was allowed for such improvements. *Rose v. Dunklee*, 12 Colo App. 403.

615. 21. Insufficiency of Commissioner's Report. — Where a commissioner's report fails to set out the order of liens upon property sought to be subjected to the creditors' claims, objection to it may be taken for the first time on appeal. *Carnahan v. Ashworth*, (Va. 1898) 31 S. E. Rep. 65.

22. Fraud. — Where on an appeal

from a decree dismissing a bill to set aside a conveyance as in fraud of creditors, the defendant denied the charge of absence of testimony in support of the finding of the trial court, the court is summing that the charge is without foundation. 14 App. Cas. (D. C.) 46.

23. Oliver v. McDowell, 45; *Hunt v. Connor*, 74.

24. Fraud. — In suits to set aside conveyances as fraudulent, the finding of the trial court of fraudulent intent is not disturbed on appeal where the evidence to support the finding of the trial court is undisputed. *Poulson v. Stanley*, 122 N. Y. 520; *Benjamin*, 150 N. Y. 520; *Abramson*, (Supm. Ct. Misc. (N. Y.) 520).

25. Boldt v. West, 59 Neb. 283.

26. Appeal by Complainant in Creditors' Bill. — Where a bill is presented by a creditor in a general creditors' bill, and the decree is sustaining the bill as against the debtor, the cost will be taxed against the complainant. *American Handle Co. v. Handle Co.*, (Tenn. Ch. Rep. 709).

CRIMINAL CONVERSATION.

616. I. NATURE OF ACTION. — See notes 1, 2.

617. II. FORM OF ACTION. — See note 1.

III. DECLARATION OR COMPLAINT — *Essential Elements.* —

See note 2.

What Need Not Be Averred. — See note 5.

Particularity of Averment as to Time and Place. — See note 7.

618. Time. — See note 1.

619. IV. PLEA OR ANSWER — 1. **Pleas in Bar of Action** — *b.*
SPECIAL PLEAS — *Collusion or Connivance of Plaintiff.* — See note 2.

616. 1. Gist of Action. — See *obiter In re Tinker*, 3 Am. Bankr. Rep. 580, citing 5 ENCYC. OF PL. AND PR. 616.

Married Woman May Not Maintain Action. — At common law an action for enticing away a husband was wholly different in pleading and proof, as well as in parties, from an action for criminal conversation. *Kroessin v. Keller*, 60 Minn. 373, wherein it was held that a married woman cannot maintain an action simply in the nature of criminal conversation against another woman.

2. *Bailey v. King*, 27 Ont. App. 703, affirmed 31 Can. Sup. Ct. 338.

617. 1. Browning v. Jones, 52 Ill. App. 597.

2. *Browning v. Jones*, 52 Ill. App. 597.

Immaterial Variance. — In *Prettyman v. Williamson*, 1 Penn. (Del.) 224, evidence of marriage in Philadelphia was held to be admissible under an allegation of marriage according to the laws of the state of Delaware.

Misjoinder of Causes of Action. — Where a complaint in one paragraph set forth facts constituting a cause of action against the defendant for enticing away the plaintiff's wife, and in another paragraph set forth a cause of action against the defendant for criminal conversation, and the complaint taken as a whole contained every averment essential to a declaration at common law (except the technical words of trespass) and relied solely on that cause of action, it was held that although not separately numbered

there were two causes of action separately stated, and the complaint was dismissed. *Levy v. Harris*, 29 N. Y. App. Div. 453.

5. **Collusion or Connivance of the Plaintiff** is a bar to the action, but that defense is for the defendant to establish, and need not be negated in the petition. *Smith v. Meyers*, 52 Neb. 70.

7. *Smith v. Meyers*, 52 Neb. 70, citing 5 ENCYC. OF PL. AND PR. 617.

618. 1. Smith v. Meyers, 52 Neb. 70, citing 5 ENCYC. OF PL. AND PR. 618.

Statute of Limitations. — A complaint alleging that the wife's affections were alienated and that such alienation was caused by reason of criminal relations between her and the defendant states a cause of action for criminal conversation, which is barred after two years by Code Civ. Pro. N. Y., § 384. *Currie v. Gardenier*, 59 N. Y. App. Div. 319.

Under the *Ontario* statute, where the wife is enticed away more than six years before the action is brought, but the criminal conversation continues down to the time of the bringing of the action, the husband may recover such damages as he has sustained within the period of six years next before the bringing of the action; but recovery in respect of the enticing away or anything else which happened prior to the six years is barred. *Bailey v. King*, 27 Ont. App. 703, affirmed 31 Can. Sup. Ct. 338.

619. 2. Limitations of Rule. — A husband is not chargeable with collusion from the fact that after he has had

620. 2. **Pleas Insufficient in Bar** — *b.* DECREE OF DIVORCE — See note 2.

621. *d.* **MISCONDUCT OF PLAINTIFF OTHER THAN MISFEASANCE, CONTEMPT, OBSCENITY, ADULTERY, FORNICATION OR CONNIVANCE.** — See note 1.

e. **MISCELLANEOUS.** — See note 5.

his suspicions aroused, he for the purpose of watching his wife, leaves open existing circumstances, where he does not create new ones or invite the wrong. *Puth v. Zimbleman*, 99 Iowa 641.

Later Doctrine. — See *Levy v. Harris*, 29 N. Y. App. Div. 453, *citing* 5 ENCYC. OF PL. AND PR. 619; *Prettyman v. Williamson*, 1 Penn. (Del.) 224; *Morning v. Long*, 109 Iowa 288; *Lee v. Hammond*, 114 Wis. 550.

The Plaintiff's Consent or Connivance Must Be Specially Plead before it can be claimed as a bar to the action. *Morning v. Long*, 109 Iowa 288, *citing* 5 ENCYC. OF PL. AND PR. 618.

620. 2. *Lee v. Hammond*, 114 Wis. 550.

An Act of the Legislature Divorcing Husband and Wife is not a bar to an action for previous criminal conversation,

but such divorce may be a mitigation of damages. *Williamson*, 1 Penn. (D.

621. 1. *Prettyman v. Williamson*, 1 Penn. (Del.) 224; *Brooklyn v. Broome*, 52 Ill. App. 597.

Where the defendant is pleading the allegations of adultery, and is pleading as a separate defense, the plaintiff by his treatment and destroyed his wife's reputation, was held that under Code of Civil Procedure, § 508, such matter could be pleaded as a separate defense only, and should have been pleaded and expressly stated to be a defense only, and that such defense is a bar of the action. *Cole v. B. & C.* (Ct. Spec. T.) 67 N. Y. S. 2d 100.

5. *Lee v. Hammond*,

CROSS-BILLS.

626. II. ANSWER AS CROSS-BILL — 1. Under Statutes. — See note 2.

2. Independently of Statutes. — See note 5.

628. 4. Rules Governing Answers Filed as Cross-bills. — See note 1.

III. NATURE AND OBJECT OF CROSS-BILL — 1. Its Usual Functions. — See note 2.

629. See notes 1, 2.

631. 4. To Obtain Equitable Set-off. — See note 2.

632. 5. For Affirmative Relief — a. IN GENERAL — (1) Rule Stated. — See note 1.

634. (2) Exceptions — (a) Specific Performance. — See note 2.

635. (b) Accounting. — See note 1.

626. 2. *Partee v. Goldberg*, 101 Tenn. 664. See also *Grobe v. Roup*, 46 W. Va. 488.

Tennessee — *Filing Cost Bond*. — An answer will not be treated as a cross-bill where no cost bond is filed. *Cumberland Land Co. v. Canter Lumber Co.*, (Tenn. Ch. 1895) 35 S. W. Rep. 886.

5. *Iowa Bank v. Price*, 9 S. Dak. 582, citing 5 ENCYC. OF PL. AND PR. 626.

Illinois. — A mere answer cannot be treated as a cross-bill. *McGillis v. Hogan*, 85 Ill. App. 194.

New Jersey. — An answer may, by consent, be regarded as a cross-bill so that all the equities of the controversy may be settled in one suit. *Gray v. Taylor*, (N. J. 1897) 38 Atl. Rep. 951.

628. 1. *Goff v. Price*, 42 W. Va. 384 [quoting 5 ENCYC. OF PL. AND PR. 628]; *Partee v. Goldberg*, 101 Tenn. 664; *Martin v. Kester*, 46 W. Va. 438.

2. *Hogg v. Hoag*, 107 Fed. Rep. 807.

629. 1. *Mills v. Larrance*, 186 Ill. 635; *Dunham v. Dunham*, 162 Ill. 589. See also *Gordon v. Johnson*, 186 Ill. 18.

2. *Feige v. Babcock*, 111 Mich. 538; *Hogg v. Hoag*, 107 Fed. Rep. 807; *Springfield Milling Co. v. Barnard*, etc., Mfg. Co., (C. C. A.) 81 Fed. Rep. 261.

631. 2. *Gordon v. Johnson*, 186 Ill. 18.

632. 1. *Griffith v. Security Home Bldg., etc., Assoc.*, 100 Tenn. 410; *Whittemore v. Patten*, 84 Fed. Rep. 51, each citing 5 ENCYC. OF PL. AND PR. 632. See also the following cases:

Alabama. — *Hendrix v. Southern R. Co.*, 130 Ala. 205.

Illinois. — *Stokes v. Little*, 65 Ill. App. 255.

New Jersey. — *Green v. Stone*, 54 N. J. Eq. 387; *Tallman v. Wallack*, 54 N. J. Eq. 655.

Pennsylvania. — *Williams v. Concord Cong. Church*, 193 Pa. St. 120; *Freeland v. South Penn. Oil Co.*, 189 Pa. St. 54.

West Virginia. — *Turner v. Stewart*, 51 W. Va. 493.

United States. — *Nelson v. Lowndes County*, (C. C. A.) 93 Fed. Rep. 538; *Weathersbee v. American Freehold Land Mortg. Co.*, 77 Fed. Rep. 523.

634. 2. See *Griffith v. Security Home Bldg., etc., Assoc.*, 100 Tenn. 410, citing 5 ENCYC. OF PL. AND PR. 634 to 637, inclusive.

635. 1. *Wilcoxon v. Wilcoxon*, 199 Ill. 244 [citing 5 ENCYC. OF PL. AND PR. 635]; *Whittemore v. Patten*, 84 Fed. Rep. 51.

Qualification of Rule. — Where affirmative relief is asked beyond the scope and purpose of the original bill a cross-bill is necessary. *Wilcoxon v. Wilcoxon*, 199 Ill. 244.

636. (c) Partition. — See note 1.

Theory on Which Relief Granted Without Cross-bill. —

638. b. AS BETWEEN CODEFENDANTS. — See no**639.** IV. REQUISITES OF CROSS-BILL — 1. Defenses &

Answer — Cross-bill. — See notes 1, 4.

640. 2. Relevancy to Original Bill. — See note 1.**641.** See notes 1, 2.**643.** Application of Rule. — See notes 1, 2, 3, 4.**636.** 1. *Collins v. Sherwood*, 50 W. Va. 133, *citing* 5 ENCYC. OF PL. AND PR. 636.Where Additional Affirmative Relief Is Sought by one defendant he should file a cross-bill. *Collins v. Sherwood*, 50 W. Va. 133.4. *Freeland v. South Penn. Oil Co.*, 189 Pa. St. 54, *citing* 5 ENCYC. OF PL. AND PR. 634, and approving the doctrine stated on page 636.**638.** 1. *Clements v. Davis*, 155 Ind. 624 [*citing* 5 ENCYC. OF PL. AND PR. 638]; *Jewett v. Iowa Land Co.*, 64 Minn. 531; *Turner v. Stewart*, 51 W. Va. 493; *Commercial Bank v. Sandford*, 103 Fed. Rep. 98.**639.** 1. *Wight v. Downing*, 90 Ill. App. 1.An application for permission to file a cross-bill is properly refused when it is a mere repetition of the averments of an answer. *Woodard v. Bird*, 105 Tenn. 671.4. *Wight v. Downing*, 90 Ill. App. 1.**640.** 1. *Meyer v. Calera Land Co.*, 133 Ala. 554; *Buscher v. Volz*, 25 Ind. App. 400; *Griffin v. Griffin*, 112 Mich. 87 [*citing* 5 ENCYC. OF PL. AND PR. 640]. See also the following cases:*Georgia.* — *Johnson v. Stancliff*, 113 Ga. 886. See also *Ray v. Home, etc., Invest., etc., Co.*, 106 Ga. 492.*Illinois.* — *Parlin, etc., Co. v. Gallo-way*, 95 Ill. App. 60; *Wight v. Downing*, 90 Ill. App. 1.*Minnesota.* — *Compare Jewett v. Iowa Land Co.*, 64 Minn. 531.*Missouri.* — *Mathiason v. St. Louis*, 156 Mo. 196.*New Jersey.* — *Plum v. Smith*, 56 N. J. Eq. 468.*New Mexico.* — *Agua Pura Co. v. Las Vegas*, 10 N. Mex. 6; *Perea v. Harrison*, 7 N. Mex. 666.*Tennessee.* — *Pollard v. Wellford*, 99 Tenn. 113.*Virginia.* — *Derbyshire v. Jones*, 94 Va. 140.*United States.* — *Dickerman v. Northern Trust Co.*, (C. C. A.) 80 Fed. Rep.450; *Goff v. Kelly*, 74 F. Stuart v. Hayden, (C. C. Rep. 402; *Harrison v. Pe* 311.**641.** 1. *Buscher v. V* App. 400 [*citing* 5 ENCYC PR. 641]; *Derbyshire v.* 140; *Hogg v. Hoag*, 107 F. *Dickerman v. Northern* C. A.) 80 Fed. Rep. 45 *Hayden*, (C. C. A.) 72 Fed. Cross-bill Good in Part part of the relief sought is not relevant to the court may without dismissal strike out the part thereof proper. *Plum v. Smith*, 562. *Parlin, etc., Co. v.* Ill. App. 60; *Buscher v.* App. 400; *Mathiason v.* Mo. 196 [*each citing* 5 AND PR. 641]; *Stuart v. H* A.) 72 Fed. Rep. 402; *Northern Trust Co.*, (C. Rep. 450.**643.** 1. Bill to Enjoin Charter. — In a bill to council from revoking the street railway company its tracks from the streets of the railway company cross-bill praying the app receiver for the plaintiff Union St. R. Co. v. Mich. 300.2. Specific Performance. enforce specific performance tract for the sale of land may maintain a cross-bill tion of a vendor's lien res *Gordon v. Johnson*, 1863. Bill to Enforce Liens original suit is to estat close a lien, the defendant a cross-bill for cancellat and its discharge of rec *field Milling Co. v. Barn* Co., (C. C. A.) 81 Fed. R

4. Bill for Foreclosure What Is Not Germane. — ing to foreclose a mortga

645. 3. Consistency with Answer. — See note 3.

646. 4. As to Nature of Relief Sought. — See notes 1, 2.

V. PARTIES TO CROSS-BILL — 1. Parties Complainant — In General. — See note 3.

647. By Persons Not Parties. — See note 3.

648. 4. Parties Defendant — *a.* NECESSITY FOR. — See note 2.

c. CODEFENDANTS. — See note 4.

d. ADDING NEW PARTIES. — See note 5.

649. See note 1.

650. Dismissal. — See note 1.

VI. FRAME OF CROSS-BILL — 1. Allegations — Facts Showing Title to Equitable Relief. — See note 6.

651. Grounds for Relief. — See note 1.

654. **VII. FILING OF CROSS-BILL** — 2. Time of Filing. — See note 2.

655. Discretion of Court as to Time of Filing. — See notes 1, 3.

seeking the cancellation of a deed which is in no way adverted to in the original bill is not germane. Parlin, etc., *Co. v. Galloway*, 95 Ill. App. 60.

645. 3. *Ragor v. Brenock*, 175 Ill. 494.

Striking from Files. — A cross-bill inconsistent with the answer may be stricken from the files. *Ragor v. Brenock*, 175 Ill. 494.

646. 1. *North British, etc., Ins. Co. v. Lathrop*, (C. C. A.) 70 Fed. Rep. 429.

2. *Whittemore v. Patten*, 84 Fed. Rep. 51 [citing 5 ENCYC. OF PL. AND PR. 645-647]; *Weathersbee v. American Freehold Land Mortg. Co.*, 77 Fed. Rep. 523. Compare *Ray v. Home, etc., Invest, etc., Co.*, 106 Ga. 492; *French v. Bellows Falls Sav. Inst.*, 67 Ill. App. 179.

Usury. — A defendant who sets up usury as a defense may file a cross-bill to recover double the amount which the plaintiff has received as interest where such recovery is allowed by statute. *Weathersbee v. American Freehold Land Mortg. Co.*, 77 Fed. Rep. 523.

3. **By Defendant to Cross-bill.** — A party who is brought into a suit as a defendant to a cross-bill may in turn exhibit his cross-bill when necessary to do complete justice between the parties and terminate the litigation. *Blair v. Illinois Steel Co.*, 159 Ill. 350.

647. 3. *Thruston v. Big Stone Gap Imp. Co.*, 86 Fed. Rep. 484.

648. 2. *McGillis v. Hogan*, 85 Ill. App. 194, affirmed 190 Ill. 176; *Martin*

v. Kester, 46 W. Va. 438; *Grobe v. Roup*, 46 W. Va. 488.

4. *Youngson v. Bond*, (Neb. 1902) 90 N. W. Rep. 556; *Grobe v. Roup*, 46 W. Va. 488.

5. *Griffin v. Griffin*, 112 Mich. 87; *Green v. Stone*, 54 N. J. Eq. 387 [each citing 5 ENCYC. OF PL. AND PR. 648]; *Haberman v. Kauffer*, 60 N. J. Eq. 271; *Pollard v. Wellford*, 99 Tenn. 113.

Tennessee — *New Parties Not Brought in by Answer Filed as Cross-bill.* — The rule that new parties cannot be brought in by answers filed as cross-bills applies only to answers so filed and not to formal cross-bills. *Pollard v. Wellford*, 99 Tenn. 113.

649. 1. *Derbyshire v. Jones*, 94 Va. 140.

650. 1. Compare *Haberman v. Kauffer*, 60 N. J. Eq. 271; *Wooster v. Cooper*, 56 N. J. Eq. 759.

6. *Jackson v. Simmons*, (C. C. A.) 98 Fed. Rep. 768.

651. 1. *Simmons v. Bailey*, 105 Tenn. 152; *Jackson v. Simmons*, (C. C. A.) 98 Fed. Rep. 768.

654. 2. *Bowman v. Cleveland Bldg., etc., Assoc.*, (Tenn. Ch. 1900) 59 S. W. Rep. 669.

After Decree. — A cross-bill cannot be filed after hearing a decree where it would call in question matters which, but for the cross-bill, would be concluded by such decree. *Fread v. Fread*, 165 Ill. 228, citing 5 ENCYC. OF PL. AND PR. 653.

655. 1. *Bowman v. Cleveland Bldg., etc., Assoc.*, (Tenn. Ch. 1900) 59 S. W. Rep. 669.

656. 3. Leave to File. — See notes 2, 3.

657. See note 1.

658. VIII. DEFECT OF JURISDICTION UNDER BILL CURED BY CROSS-BILL. — See note 1.

IX. PROCESS — Necessity for. — See notes 2, 3.

661. X. ANSWER TO CROSS-BILL — 3. Duty of I Require Answer. — See notes 3, 4.

5. Effect of Failure to Answer. — See note 7.

662. XII. DEMURRER TO CROSS-BILL. — See notes

XIII. EFFECT OF DISMISSAL OF ORIGINAL

note 9.

663. Cross-bill for Defense. — See note 1.

Cross-bill for Relief. — See note 2.

664. Cross-bill Between Codefendants. — See note 4.

667. XV. HEARING — 3. Amendment of Cross-bill. —

655. 3. Where Cross-bill Does Not Interfere with Operation of Decree. — See *Fread v. Fread*, 165 Ill. 228.

656. 2. To Effect that Leave Is Necessary. — See *Woodard v. Bird*, 105 Tenn. 671; *Dickerman v. Northern Trust Co.*, (C. C. A.) 80 Fed. Rep. 450.

3. After Answer a defendant may file his cross-bill without leave, and this notwithstanding there has been a reference to a master. *Inter State Bldg., etc., Assoc. v. Ayers*, 177 Ill. 9.

657. 1. Granting Leave Discretionary. — The action of the court in refusing leave to file a cross-bill on account of laches is discretionary and not reviewable. *Williams v. Sax*, (Tenn. Ch. 1897) 43 S. W. Rep. 868.

658. 1. Where Relief Sought Is Not Purely Equitable. — Where the cross-bill seeks only such relief as can be had at law it does not cure a defect of jurisdiction in the original bill. *Houston v. Maddux*, 179 Ill. 377, *citing* 3 [5] ENCYC. OF PL. AND PR. 657.

2. *Goff v. Price*, 42 W. Va. 384 [*quoting* 5 ENCYC. OF PL. AND PR. 658]; *Martin v. Kester*, 46 W. Va. 438; *Grobe v. Roup*, 46 W. Va. 488.

3. *Hook v. Mercantile Trust Co.*, (C. C. A.) 95 Fed. Rep. 41, *citing* 5 ENCYC. OF PL. AND PR. 658.

Effect of Appearance. — Where a cross-bill contains no prayer for process and no process is served, the defect is cured by the appearance and participation of the adverse party at the hearing. *Troendle v. Van Nortwick*, (C. C. A.) 98 Fed. Rep. 785.

661. 3. *McGillis v. App.* 195, *affirmed* 190 Ill.

4. *McGillis v. Hogan* 194, *affirmed* 190 Ill. 176.

7. *Messenger v. Peter* 88 N. W. Rep. 209.

662. 2. *Wight v. D.* App. 1; *Agua Pura Co.* 10 N. Mex. 6; *Harrison* U. S. 311.

6. *Wight v. Downing* 1.

9. *Partee v. Goldberg*, [*citing* 5 ENCYC. OF PL. *Meyer v. Calera Land Co* *McGlathery v. Richard* 653; *Etowah Min. Co.* 1 Min., etc., Co., 121 Ala.

663. 1. *Partee v.* Tenn. 664 [*citing* 5 ENCYC. OF PL. AND PR. 663]; *McGlathery* 129 Ala. 653.

2. *Griffin v. Griffin*, *Partee v. Goldberg*, *Pethtel v. McCullough*, *Small v. Peters*, 104 Fed. *citing* 5 ENCYC. OF PL. *Meyer v. Calera Land* 554, *per* Sharpe, J.; *Etowah Min. Co.*, 121 Ala. 673, *per* Sharpe, *Bellows Falls Sav. Ins* 179.

664. 4. *Kennewig* 49 W. Va. 323, *citing* 5 ENCYC. OF PL. AND PR. 664.

667. 2. *Morton v.* Vt. 432, holding that a cross-bill may be amended so as to set aside a hearing tendered during the hearing.

667. 4. Cross-bill, How Dismissed. — See notes 4, 5.

670. XVI. APPEAL — 1. What Decrees or Orders Appealable. —
See notes 1, 2, 4.

667. 4. Etowah Min. Co. v. Wills Valley Min., etc., Co., 121 Ala. 673. *v. Gunn*, 123 Ala. 640. See also *French v. Bellows Falls Sav. Inst.*, 67 Ill. App. 179.

5. Etowah Min. Co. v. Wills Valley Min., etc., Co., 121 Ala. 672, citing 5 *Throne-Franklin Shoe Co. v. Gunn*, 123 Ala. 640.

ENCYC. OF PL. AND PR. 667. *4. French v. Bellows Falls Sav. Inst.*, 67 Ill. App. 179.

670. 1. Throne-Franklin Shoe Co. 67 Ill. App. 179.

CROSS-COMPLAINTS.

674. I. NATURE AND OBJECT OF CROSS-COMPLAINT. — Similarity to Cross-bill. — See notes 1, 2.

2. Against Whom Relief May Be Obtained — ALLEYS. — See note 3.

675. b. AGAINST CODEFENDANTS. — See note 1.

c. AGAINST NEW PARTIES. — See note 4.

677. g. BY PLAINTIFF AGAINST COPLAINT. — See note 2.

678. III. RELATION OF CROSS-COMPLAINT TO ORIGINAL COMPLAINT — 1. Rule Stated. — See notes 1, 2.

2. Application of Rule. — See note 3.

679. 3. Dismissal. — See note 1.

680. V. PARTIES — Defendants. — See note 8.

VI. ALLEGATIONS — Generally. — See note 11.

674. 1. Buscher v. Volz, 25 Ind. App. 400, citing 5 ENCYC. OF PL. AND PR. 674. Randolph County Bank, See also Gillenwaters v. Ind. 529.

2. Buscher v. Volz, 25 Ind. App. 400.

3. California. — Mackenzie v. Hodgkin, 126 Cal. 591; Eureka v. Gates, 120 Cal. 54.

675. 1. Clements v. Davis, 155 Ind. 624.

4. Newhall v. Livermore Bank, 136 Cal. 533; Stockton Sav., etc., Soc. v. Harrold, 127 Cal. 612; Mackenzie v. Hodgkin, 126 Cal. 591; Eureka v. Gates, 120 Cal. 54.

New parties cannot be brought in unless their presence is necessary to a full determination of the rights of the parties then before the court touching the property in litigation between them. *Lewis v. Fox*, 122 Cal. 244.

677. 2. By Plaintiff to Complaint in Intervention. — Either a plaintiff or a defendant may file a cross-complaint to an intervention. *Wall v. Mines*, 130 Cal. 27.

678. 1. Buscher v. Volz, 25 Ind. App. 400; American Exch. Bank v. Davidson, 69 Minn. 319 [each citing 5 ENCYC. OF PL. AND PR. 678]; Hays v. McLain, 66 Ark. 400; Stockton Sav., etc., Soc. v. Harrold, 127 Cal. 612; Lewis v. Fox, 122 Cal. 244; Harris v.

2. American Exch. Bank v. Davidson, 69 Minn. 319.

3. Foreclosure of Mortgage. — A cross-complaint, if it is involved in the plaintiff's claim, include additional land not in the Newhall v. Livermore Bank, 136 Cal. 533; Stockton Sav., etc., Soc. v. Harrold, 127 Cal. 612; U. S. v. Marquam, 41 Oregon v. Anthony, 47 S. Car. 21.

679. 1. Harris v. Randolph County Bank, 157 Ind. 120; Buscher v. Volz, 25 Ind. App. 400. See also American Exch. Bank v. Davidson, 69 Minn. 319, in which case the irrelevant cross-complaint was struck out.

680. 8. Hays v. McLain, 66 Ark. 400.

11. Leach v. Rains, 127 Cal. 533, citing 5 ENCYC. OF PL. AND PR. 678. Center Creek Water, etc., v. Say, 21 Utah 192. The cross-complaint showing its relation to the plaintiff's cause of action in *Randolph County Bank v. Davidson*, 69 Minn. 319, was **Complaint and Cross-complaint** — *Powell v. Wash.* 318.

682. Single Paragraph. — See note 1.

683. IX. PROCESS. — See note 2.

684. See note 1.

X. ANSWER. — See note 6.

682. 1. *Stout v. Harlem*, 20 Ind. App. 200.

683. 2. *California — Service of Process Made Necessary by Statute.* — *Hibernia Sav., etc., Soc. v. Clarke*, 110 Cal. 27. See also *Mackenzie v. Hodgkin*, 126 Cal. 591, holding, however, that where the matters of substance in the cross-complaint are pleaded affirmatively in the defendant's answer which is served on the plaintiff, and the plain-

tiff is not in any way prejudiced by the omission, the failure to serve the cross-complaint is not a fatal irregularity.

Washington. — The defendant to the cross-complaint must be served with a copy thereof or a summons notifying him that it will be filed. *Powell v. Nolan*, 27 Wash. 318.

684. 1. *Smith v. Allen*, 63 Neb. 74.

6. *Cohn v. Kelly*, 132 Cal. 468.

CROSSINGS.

689. III. ALLEGATIONS OF NEGLIGENCE — 1. In
nals. — See note 2.

2. In Speed of Trains. — See note 3.

690. 3. In Construction of Crossing. — See note 2.

4. In Leaving Cars on Track. — See note 3.

691. 5. Of Particular Acts of Negligence. — See no

689. 2. See *Memphis, etc., R. Co. v. Martin*, 117 Ala. 367.

Conjunctive Improperly Used. — Where the statute provides that the engineer must blow the whistle or ring the bell, a count alleging the cause of the injury to have been a failure to blow the whistle and ring the bell is demurrable. *Highland Ave., etc., R. Co. v. South*, 112 Ala. 642.

Pleading Separate Acts of Negligence. — In *Louisville, etc., R. Co. v. Shearer*, (Ky. 1900) 59 S. W. Rep. 330, it was held that a petition alleging negligent failure to give signal of the train's approach and negligent sounding of the whistle when at or near the crossing charged two distinct grounds of negligence, and that it was not necessary for the plaintiff to establish both allegations in order to recover.

In *South Carolina* a plaintiff is entitled to plead and have submitted to the jury two different acts of alleged negligence, such as failure to comply with the statutory requirements as to signals and running the cars at a rapid and high rate of speed. *Bowen v. Southern R. Co.*, 58 S. Car. 222.

3. *Memphis, etc., R. Co. v. Martin*, 117 Ala. 367.

General Allegation of Negligence Sufficient. — Where a complaint sets out a city ordinance regulating the speed of trains and also charges the defendant with negligence in moving its train at a great rate of speed, but does not allege that the defendant was violating the ordinance when the accident occurred, it is not subject to demurrer because it fails to charge negligence based upon a violation of the ordinance. The ordinance as set out is a mere matter of surplusage, as the general allegation of negligence is sufficient.

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cient to support a cause of action. *Warren v. Southern Cal. R. Co.* (Cal. 1901) 67 Pac. Rep. 101.

690. 2. Notice of Defective Condition. — A plaintiff may recover for injuries resulting from the defective condition of a crossing if the company is bound to keep the crossing in a convenient for the public. *Wabash R. Co. v. De Haas*, 1902) 65 N. E. Rep. 192.

Notice of Accident. — In a case where a person injured through a crossing on a highway is required by statute to give notice thereof within a certain time, the person or corporation owning the highway must be given notice of the accident before such notice of an accident is given at a place where a crossing exists. *Nickerson v. New York R. Co.*, 178 Mass. 195.

3. *Baltimore, etc., R. Co. v. Baltimore*, 71 Ill. App. 59, *affirmed*. See also *International, etc., R. Co. v. Locke*, (Tex. Civ. App. 1902) 102 Tex. Rep. 1082.

691. 1. See *Central R. Co. v. Freeman*, 134 Ala. 101, etc., *R. Co. v. Thomas*, etc., *Steele v. Chicago, etc., R. Co.*, 116 Mich. 516; *Rothars v. Illinois R. Co.*, (Miss. 1899) 25 So. 101; *more, etc., R. Co. v. M. Cir. Dec. 742*; *Beopple v. R. Co.*, 104 Tenn. 420; *R. Co. v. Stonecypher*, App. 569; *Cahill v. Ch. Co.*, (C. C. A.) 74 Fed. 101.

Alabama. — The rule is that a crossing is negligent if it is not kept in a safe condition.

691. Proximate Cause. — See note 2.

and wantonness may be averred in very general terms — terms so general, indeed, as to be little, if at all, more than conclusions, leaving the facts to be developed by the evidence." *Louisville, etc., R. Co. v. Orr*, 121 Ala. 489.

Where a count in a complaint alleges that the defendant was guilty of wanton negligence in causing the accident complained of, and then proceeds to state the facts constituting such wanton negligence, a demurrer to the count will be sustained if the particular facts pleaded show simple negligence only. *Central of Georgia R. Co. v. Foshee*, 125 Ala. 199; *Memphis, etc., R. Co. v. Martin*, 117 Ala. 367.

Illinois. — A declaration alleging that the "defendant, by its said servants, so carelessly and improperly drove the said locomotive and train, that by and through the negligence and improper conduct of the defendant, by its said servants in that behalf, the said locomotive engine and train ran into and struck with great force and violence against the plaintiff," is sufficient for a verdict. *Chicago, etc., R. Co. v. Redmond*, 171 Ill. 347.

Tennessee. — An allegation that the defendant "did wrongfully and negligently run one of its engines and cars upon, over, and against the plaintiff," is not open to the objections that it does not specify any facts or circumstances as the cause of the injury, and that it is too vague and indefinite to support an action or to apprise the defendant of the ground of complaint. *Chattanooga Rapid Transit Co. v. Walton*, 105 Tenn. 415.

Defendant Must Be Directly Charged with Negligence. — A complaint alleging that the defendant's locomotive engine, in charge of the defendant's agents and employees, negligently approached the crossing, but not showing that the agents and employees were at the time acting in the line of their employment, fails to charge any negligent acts directly upon the defendant. *Cincinnati, etc., R. Co. v. Voght*, 26 Ind. App. 665. See also *Pittsburgh, etc., R. Co. v. Adams*, 25 Ind. App. 164.

An allegation that "at the time herein referred to, no watchman was stationed or gates or bars maintained at the said crossing," is insufficient without a further allegation that the

placing of such gates or watchman was required by ordinance or statute, or that the defendant was guilty of negligence in failing to do so. *Matz v. Chicago, etc., R. Co.*, 88 Fed. Rep. 770.

Use of Track as Passway. — In *Connell v. Chesapeake, etc., R. Co.*, (Ky. 1900) 58 S. W. Rep. 374, it was held, under the rule that a plaintiff may allege the negligence of the defendant in general terms, that it was not necessary to allege in the petition the facts and circumstances connected with the use of the track as a passway, making the operation of the train in question negligent, as it was operated by the defendant's servants at the time the plaintiff was hurt.

An allegation that the path across a railroad track is well known and publicly used, in the absence of a special demurrer or a motion to make more specific, is equivalent to an averment of notice to the railroad company of the existence of the path. *Cahill v. Chicago, etc., R. Co.*, (C. C. A.) 74 Fed. Rep. 285.

General Averment Not in Aid of Complaint. — An averment that the accident and injury was caused "solely by the wrongfulness, carelessness, and negligence of the defendant, and without any fault" on the plaintiff's part, does not aid the complaint when such averment is not in any way connected with the specific acts of negligence charged, and no reference is made to any act of negligence before mentioned. *Cincinnati, etc., R. Co. v. Voght*, 26 Ind. App. 665.

691. 2. *Cincinnati, etc., R. Co. v. Voght*, 26 Ind. App. 665, holding that averments charging merely that the defendant's engine negligently approached the crossing and that there was an injury fail to show that the plaintiff's injury was caused by the defendant's negligence. See also *Wragge v. South Carolina, etc., R. Co.*, 47 S. Car. 105; *Galveston, etc., R. Co. v. Simon*, (Tex. Civ. App. 1899) 54 S. W. Rep. 309.

Tennessee. — The plaintiff need not aver in terms that the negligence attributed to the defendant was the proximate cause of his injuries but he should aver facts reasonably indicating that the negligence imputed to the defendant was such proximate cause.

- 691. V. DESCRIPTION—1. Of Crossing.**—See note
2. Of Trains and Railroad—Qui Tam Actions.—
692. VII. ALLEGATIONS AND PROOF—In General.—

Beopple v. Illinois Cent. R. Co., 104 Tenn. 420.

Failure to Give Signals.—The omission to give the statutory signals is not sufficient of itself to make out a case, but it must also be alleged that such omission was the proximate cause of the injury. *Baltimore, etc., R. Co. v. Young*, 146 Ind. 374; *Pittsburgh, etc., R. Co. v. Carlson*, 24 Ind. App. 559.

691. 3. Description in Alternative.—A count is involved in uncertainty, if not repugnancy, which alleges in one alternative that two railroad tracks crossed each other, and in another that they approached, where the special negligence alleged is the failure to come to a full stop, as required by the statute, within one hundred feet of the crossing of two tracks. *Highland Ave., etc., R. Co. v. South*, 112 Ala. 642.

4. Ownership of Train.—In *Indianapolis Union R. Co. v. Neubacher*, 16 Ind. App. 21, an action against a union railroad corporation whose tracks were used by several railroad companies, it was held that an allegation in the complaint describing the train which committed the negligent act as belonging to one particular company was immaterial and need not be proved.

692. 2. See International, etc., R. Co. v. Locke, (Tex. Civ. App. 1902) 67 S. W. Rep. 1082; *Texas, etc., R. Co. v. Spradling*, (C. C. A.) 72 Fed. Rep. 152.

Illustrative Cases.—Where it is charged in the complaint that the wantonness of the defendant consisted in a failure to use preventive means after the discovery of the peril, the plaintiff, under such allegation, will not be permitted to recover upon proof that the wantonness consisted in running a train of cars without proper appliances at a given rate of speed over a public crossing where people were wont to pass in large numbers. *Burke v. Alabama Midland R. Co.*, 124 Ala. 604.

In *Chicago, etc., R. Co. v. Beaver*, 109 Ill. 34, the court held that the fact that willows were growing along or near the track of the railway might be proved as a circumstance bearing upon

the question of the exercise of care by the deceased, although the existence of the willows was in the declaration as constituting negligence on the part of the defendant.

Under a declaration charging the defendant with negligence in running a train at a high and unsafe rate of speed, evidence may show the distance with which the train could be stopped. *etc., R. Co. v. Foster*, 74

Where there is no averment that the speed of the train was full or negligent, it is immaterial for the trial court to submit to the jury the question whether the defendant was guilty of negligence by running the train at a very high rate of speed. *Missouri Pacific R. Co. v. Moffatt*, 56 Kan. 667.

Where the specific negligence is charged in the petition or complaint to the operation and management of the defendant of its train, it is immaterial whether the defendant admit evidence or to submit to the jury the question as to the defendant's negligence in failing to maintain the train at a safe rate of speed. *Atchafalaya Co. v. Powers*, 58 Kan. 50, etc., *R. Co. v. Shaw*, 56 Kan. 100.

Under a declaration alleging that the plaintiff, when approaching the crossing, slowed his horse and looked and listened, it is immaterial that the horse was stopped by the plaintiff looked and listened, and that the horse was stopped without amendment. *Michigan Cent. R. Co. v. Proctor*, 61 S. Car. 170.

There can be no recovery of damages by the plaintiff if the complaint does not allege negligence, but, on the contrary, that the wrong complained of was purposely and with intent committed by the defendant against the plaintiff. *Proctor v. South*, 61 S. Car. 170.

What May Be Shown in Allegation of Negligence.—It is immaterial that the defendant neglected its train over the plaintiff's crossing to let in evidence of any negligence of which the defendant may have been guilty in so doing as against the plaintiff. *Chattanooga & Sevier Co. v. Walton*, 105 Tenn.

693. Failure to Give Warning. — See note 3.

VIII. INSTRUCTIONS — Confusing. — See note 4.

694. Misleading. — See note 1.

When a complaint is general in its allegations of negligence, and the defendant desires to know upon what particular acts of negligence the plaintiff relies to sustain his action, it is the duty of the defendant to make a motion to have the complaint made more definite and certain; and when this is not done, the plaintiff has the right to introduce any competent evidence tending to show negligence on the part of the defendant. *Spire v. South Bound R. Co.*, 47 S. Car. 28.

A petition alleging that the crossing was approached negligently and carelessly, and without any care or caution, and without exercising any diligence whatever, is broad enough to allow recovery upon any negligence shown in the running of the train as it approached the crossing, and the fact that the pleading also avers that the whistle was not blown nor the bell rung does not restrict the plaintiff to proof of those facts as the only negligence on which he can rely. *Missouri, etc., R. Co. v. Settle*, 19 Tex. Civ. App. 357.

Amendment to Conform to Proof. — Allegations in the declaration touching the specific acts of negligence and the manner of causing death may be varied or added to by amendment during the progress of the trial, so as to adapt the pleadings to the evidence in all its aspects. *Raleigh, etc., R. Co. v. Bradshaw*, 113 Ga. 862.

Where Two Acts of Negligence Are Alleged, such as leaving a car standing in a street and allowing steam to escape from an engine, recovery may be had upon proof of either. *Galveston, etc., R. Co. v. Simon*, (Tex. Civ. App. 1899) 54 S. W. Rep. 309.

Immaterial Averment Need Not Be Proved. — An allegation in the declaration that it was necessary for the plaintiff to cross the defendant's track is immaterial, and the existence of such necessity need not be established. *Illinois Steel Co. v. Szutenbach*, 64 Ill. App. 642.

Alleging Crossing to Be Public Highway. — An averment that the place where the accident happened is a public crossing is material, and proof of it is necessary to recovery. *Illinois Cent. R. Co. v. Chicago Title, etc., Co.*, 79 Ill. App. 623.

Where the declaration describes the road at the crossing of which the accident occurred as a public road, the plaintiff is precluded from proving it to be a private road without amendment of his pleading. *Southern R. Co. v. Elder*, (C. C. A.) 81 Fed. Rep. 791.

There is no fatal variance between the pleading and the proof where the complaint alleges that the plaintiff was injured at a crossing on the public highway over the defendant's track, and the evidence shows that the highway was not legally laid out over the defendant's right of way, but that the defendant, by its acts and its acquiescence in the public use of the crossing as a public highway, has made such crossing a public highway as to the public. *Coulter v. Great Northern R. Co.*, 5 N. Dak. 568.

Pleading Ordinance. — An averment of the existence of an ordinance regulating the speed of trains within a city is all that is required in order that such ordinance may become entitled to be admitted in evidence. *Lake Erie, etc., R. Co. v. Hancock*, 15 Ind. App. 104.

Under the general allegation of negligence, a violation of a municipal ordinance limiting the rate of speed of trains within the city limits may be shown without pleading it, for its violation would be negligence. *Warren v. Southern California R. Co.*, (Cal. 1901) 67 Pac. Rep. 1. See also *Lake Shore, etc., R. Co. v. Ehlert*, 10 Ohio Cir. Dec. 443.

693. 3. Light on Engine. — An averment that "there was no light upon the rear part of said engine to indicate its approach" is satisfied by proof that there was no such light as was required by law, as an insufficient light is, from a legal point of view, no light at all. *Baltimore, etc., R. Co. v. Cumberland*, 176 U. S. 232.

4. See *Fulp v. Roanoke, etc., R. Co.*, 120 N. Car. 525; *Gulf, etc., R. Co. v. Letsch*, (Tex. Civ. App. 1900) 55 S. W. Rep. 584.

694. 1. See *St. Louis, etc., R. Co. v. Spearman*, 64 Ark. 332; *Cowen v. Merriman*, 17 App. Cas. (D. C.) 186, holding that an instruction that the plaintiff was not entitled to recover if

the jury should find from all the evidence that the deceased received the injuries which caused his death while crossing the railroad tracks at a point which was not a street crossing, is misleading, in view of the fact that the declaration alleges the place of the accident to be at or near a certain crossing; *St. Louis, etc., R. Co. v. Stonecypher*, 25 Tex. Civ. App. 569; *Central Texas, etc., R. Co. v. Bush*, 12 Tex. Civ. App. 291, wherein it was held that a charge containing the following language: "You are instructed that a railway company has the right to run engines or trains over times as it chooses, and a train or an engine time, or as a wild engine itself an act of negligence have been refused, as "or a wild engine" and calculated to mislead."

Instruction Varying from
— An instruction which acts of the defendant proved a form of negligence from that imputed to the declaration is improper. *Co. v. Larrick*, 84 Ill. App.

CRUELTY TO ANIMALS AND CHILDREN.

695. I. **INDICTMENT** — Statutory. — See note 1.

696. Duplicity. — See note 2.

Species of Animals. — See note 3.

Ownership. — See note 4.

Torture. — See note 6.

697. Time. — See note 1.

Variance. — See note 3.

Malice. — See note 6.

II. **INSTRUCTIONS** — Intent. — See note 8.

695. 1. *Com. v. Porter*, 164 Mass. 576.

Very Language of Statute Need Not Be Followed. — *Ex p. Mauch*, 134 Cal. 500.

Unnecessarily Failing to Provide Animals with Food. — An indictment under *Starr & Curt. Annot. Stat. Ill.* 1896, c. 38, par. 122, for cruelty to animals by unnecessarily failing to provide proper food, etc., is defective if it fails to insert the word "unnecessarily." *Ferrias v. People*, 71 Ill. App. 559.

696. 2. *Ferrias v. People*, 71 Ill. App. 559

3. *Compare State v. Groves*, 119 N. Car. 822.

4. **Charge and Custody.** — A complaint under *Pub. Stat. R. I.*, c. 96, § 1 (*Gen. Laws R. I.*, c. 114, § 1), is insufficient if it fails to charge that the accused had the charge and custody of the animals, in addition to the charge of ownership thereof. *State v. Spink*, 19 R. I. 353.

6. **Cruelty to Fowls.** — See *State v. Neal*, 120 N. Car. 613, wherein it was

held that cruelty to chickens was sufficiently charged.

Wilfully Exposing Child. — An indictment for wilfully exposing a child to the inclemency of the weather need not charge that the health of the child was injured by the exposure. *Lynam v. People*, 65 Ill. App. 687.

697. 1. *State v. Cook*, (Conn. 1902) 53 Atl. Rep. 589.

3. **Cruelly Beating Child.** — A charge of beating a child is not supported by proof that the person beaten was of the size and strength of a man. *Collins v. State*, 97 Ga. 433.

6. **Gravamen of Offense.** — An information for driving and beating a horse to death need not allege that the act was wilfully or wantonly committed. *Burgman v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 111.

8. *Com. v. Magoon*, 172 Mass. 214.

Intent. — Where the cruel conduct is wilful, an instruction as to intent is properly refused. *State v. Neal*, 120 N. Car. 613.

CURTESY.

698. I. **TENANT AS PLAINTIFF.** — See note 1.

698. 1. **Action for Obstructing Way — Parties.** — A tenant by curtesy may maintain an action for obstructing a way appurtenant to his premises without joining the owners of the fee. *Costello v. Grand Trunk R. Co.*, 70 N. H. 403.

Requisites of Decree Assigning Curtesy. — A decree assigning curtesy and giving damages for its retention must be supported by the findings of facts contained therein, or by evidence preserved in the record. *Gogan v. Burdick*, 182 Ill. 126.

DAMAGES.

703. II. ALLEGATIONS MUST SHOW DAMAGE — 1. C

See note 2.

705. III. MATTERS IN AGGRAVATION OF DAMAGE —

— See note 3.

708. IV. AD DAMNUM CLAUSE — 2. Under Code

See notes 1, 2.

711. 4. Itemizing Damages. — See notes 1, 2, 3.

712. V. RECOVERY LIMITED BY DEMAND — 2. Ac ing in Damages. — See note 5.

715. 5. Remitting Damages. — See note 1.

717. VI. ALLEGATION OF GENERAL DAMAGE. — Se

703. 2. *Carson v. Texas Installment Co.*, (Tex. Civ. App. 1896) 34 S. W. Rep. 762.

The complaint must allege sufficient facts to enable the court to prescribe the measure of damages. *Smith v. Parker*, 148 Ind. 127; *Wessinger v. Mausur*, etc., *Implement Co.*, 75 Miss. 64.

Ambiguous and Uncertain Statements.

— The allegations of damage must be sufficiently specific to inform the defendant of the facts intended to be established thereunder. *Oriental v. Barclay*, 16 Tex. Civ. App. 193.

705. 3. See *Hall v. Cadillac*, 114 Mich. 99.

708. 1. *British Columbia Bank v. Port Townsend*, 16 Wash. 450.

2. *British Columbia Bank v. Port Townsend*, 16 Wash. 450.

711. 1. See *Kupferschmid v. Southern Electric R. Co.*, 70 Mo. App. 438.

2. *Rathborne, etc., Co. v. Wheelihan*, 82 Minn. 30 [citing 5 ENCYC. OF PL. AND PR. 711]; *Chesapeake, etc., R. Co. v. Hanmer*, (Ky. 1902) 66 S. W. Rep. 375.

3. *Freeland v. Brooklyn Heights R. Co.*, 54 N. Y. App. Div. 90.

712. 5. *Beranek v. Beranek*, 113 Wis. 272, quoting 5 ENCYC. OF PL. AND PR. 712.

District of Columbia. — *Denison v. Lewis*, 5 App. Cas. (D. C.) 328.

Missouri. — *Reed v. Crane*, 89 Mo. App. 670; *Smith v. Royse*, 165 Mo. 654.

Texas. — *Dallas v. Jones*, 93 Tex. 38;

Missouri, etc., R. Co. (Tex. Civ. App. 1902) 323; *Texas, etc., R. Co.* (Tex. Civ. App. 1901) 336; *Martin-Brown Co.* (Tex. Civ. App. 1897) 40 S. W.

715. 1. *District of Denison v. Lewis*, 5 App. 328.

Missouri. — *Reed v. App. 670*; *Smith v. Royse*, *Texas*. — *Missouri, et Pawkett*, (Tex. Civ. App. W. Rep. 323; *Texas, et Mitchell*, (Tex. Civ. App. W. Rep. 336; *Dallas v. 38*.

Remitting Damages in

— To the effect that a be entered in the appeal. *Denison v. Lewis*, 5 App. 328; *Reed v. Crane*, 89 *Smith v. Royse*, 165 Mo. etc., *R. Co. v. Pawke App. 1902* 68 S. W. Re etc., *R. Co. v. Mitch App. 1901* 63 S. W. Re

717. 1. *Goldman v. Y. App. Div. 330*; *Dos Oregon 13*; *Carroll v. C 402*; *Fitchburg R. Co. C. A.*) 87 Fed. Rep. 13. ENCYC. OF PL. AND PR.

the following cases:

Illinois. — *Franklin Co. v. Behrens*, 80 Ill. *Indiana*. — *B. L. Blai 26 Ind. App. 487*.

719. VII. ALLEGATION OF SPECIAL DAMAGE — 1. Generally. — See note 2.

721. See note 1.

723. VIII. EXEMPLARY DAMAGES — 1. Generally. — See note 4.

725. Distinctive Claim Not Necessary. — See note 1.

Iowa. — Bailey v. Centerville, 108 Iowa 20.

Kansas. — Abilene v. Wright, 4 Kan. App. 708; Edgerton v. O'Neil, 4 Kan. App. 73.

Nebraska. — Harvard v. Stiles, 54 Neb. 26; Harshman v. Rose, 50 Neb. 113.

New York. — Russell v. Corning Mfg. Co., 49 N. Y. App. Div. 610.

Ohio. — Hill v. Anderson, 9 Ohio Dec. 480.

Texas. — San Antonio, etc., R. Co. v. Weigers, 22 Tex. Civ. App. 344.

Utah. — North Point Consol. Irrigation Co. v. Utah, etc., Canal Co., 23 Utah 199; Croco v. Oregon Short Line R. Co., 18 Utah 311.

Virginia. — Wood v. American Nat. Bank, 100 Va. 306.

Wisconsin. — Luby v. Bennett, 111 Wis. 613.

United States. — Denver, etc., R. Co. v. Roller, (C. C. A.) 100 Fed. Rep. 738; Wrought-Iron Range Co. v. Graham, (C. C. A.) 80 Fed. Rep. 474.

Failure to Allege General Damages. — Where a complaint contains no *ad damnum* clause, but only special averments of special damages, no general damages can be recovered. Goldman v. Gainey, 67 N. Y. App. Div. 330.

719. 2. Kleiner v. Third Ave. R. Co., 162 N. Y. 193; Sealey v. Metropolitan St. R. Co., 78 N. Y. App. Div. 530; Ten Cate v. Fansler, 10 Okla. 7; Dose v. Toozee, 37 Oregon 13; Fitchburg R. Co. v. Donnelly, (C. C. A.) 87 Fed. Rep. 135, each citing 5 ENCYC. OF PL. AND PR. 719. See also the following cases:

Alabama. — Cain Lumber Co. v. Standard Dry Kiln Co., 108 Ala. 346.

Connecticut. — Morris v. Winchester Repeating Arms Co., 73 Conn. 680.

Illinois. — North Chicago St. R. Co. v. Barber, 77 Ill. App. 257.

Iowa. — Rosenberger v. Marsh, 108 Iowa 47.

Kansas. — Atchinson, etc., R. Co. v. Willey, 57 Kan. 764.

Michigan. — Beath v. Rapid R. Co., 119 Mich. 512.

Missouri. — Krueger v. Chicago, etc., R. Co., 94 Mo. App. 458; Muth v. St.

Louis, etc., R. Co., 87 Mo. App. 422; Harper v. Missouri, etc., R. Co., 70 Mo. App. 604; Macy v. Carter, 67 Mo. App. 323.

Montana. — Root v. Butte, etc., R. Co., 20 Mont. 354.

Nebraska. — Chicago, etc., R. Co. v. Emmert, 53 Neb. 237.

New York. — Clark v. Metropolitan St. R. Co., 68 N. Y. App. Div. 49; Ackman v. Third Ave. R. Co., 52 N. Y. App. Div. 483; Geoghegan v. Third Ave. R. Co., 51 N. Y. App. Div. 369; Cibulski v. Hutton, 47 N. Y. App. Div. 107; Hergert v. Union R. Co., 25 N. Y. App. Div. 218; Toplitz v. King Bridge Co., (Supm. Ct. App. T.) 20 Misc. (N. Y.) 576; Roldan v. Power, (N. Y. Super. Ct. Spec. T.) 14 Misc. (N. Y.) 480; Haszlacher v. Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 865.

Ohio. — Hill v. Anderson, 9 Ohio Dec. 480.

Tennessee. — Louisville, etc., R. Co. v. Ray, 101 Tenn. 1, per Wilkes, J.; Citizens' St. R. Co. v. Burke, 98 Tenn. 650.

Texas. — International, etc., R. Co. v. Thompson, (Tex. Civ. App. 1896) 37 S. W. Rep. 24; Galveston, etc., R. Co. v. Scott, 18 Tex. Civ. App. 321.

Virginia. — Wood v. American Nat. Bank, 100 Va. 306.

Washington. — Carroll v. Caine, 27 Wash. 402.

United States. — Southern Pac. Co. v. Hall, (C. C. A.) 100 Fed. Rep. 760.

721. 1. Loss of Time. — Western, etc., R. Co. v. Patillo, 99 Ga. 97; Texas, etc., R. Co. v. Buckalew, (Tex. Civ. App. 1896) 34 S. W. Rep. 165.

723. 4. Ten Cate v. Fansler, 10 Okla. 7 [citing 5 ENCYC. OF PL. AND PR. 723]; Potter v. Stamfli, 2 Kan. App. 788; Harmon v. Callahan, (Tex. Civ. App. 1896) 35 S. W. Rep. 705.

Actual Damage Must Be Shown. — Where there are no allegations showing actual damages, exemplary damages cannot be recovered. Carson v. Texas Installment Co., (Tex. Civ. App. 1896) 34 S. W. Rep. 762.

725. 1. Louisville, etc., R. Co. v. Ray, 101 Tenn. 1 [citing 5 ENCYC. OF

- 725. 2. Where Actual and Exemplary Damages Are**
See note 2.
- 726.** See note 2.
- 730. IX. DOUBLE AND TREBLE DAMAGES — 4. H**
Found. — See note 1.
- 731. X. DAMAGES FOR INJURY TO PROPERTY — 1.**
See note 1.
- 2. General Allegation of Damage.** — See note
- 733. 3. Special Damage — a. GENERALLY.** — See
- 734. Pleading Circumstances.** — See note 1.
- 735. b. EXPENSES.** — See note 1.
- 739. XI. DAMAGES FOR BREACH OF CONTRACT**
Damages. — See note 1.
- Liquidated Damages.** — See note 2.
- Present and Prospective Damages.** — See note 3.
- 3. General Damages.** — See note 5.
- 741. 4. Special Damages — a. GENERALLY.** — See
- PL. AND PR. 723 [725]]; *Glover v. Charleston, etc., R. Co.*, 57 S. Car. 228; *Richmond Pass., etc., Co. v. Robinson*, 100 Va. 394; *Wood v. American Nat. Bank*, 100 Va. 306. See also *Land v. Klein*, 21 Tex. Civ. App. 3.
- Where exemplary damages are expressly claimed, the fact that the complaint contains the additional words "as expenses of bringing these proceedings" is immaterial. *Jacobus v. Children of Israel*, 107 Ga. 518.
- 725. 2. In Missouri**, under Act March 18, 1895, in all actions where exemplary damages are recoverable the amount of such damages must be separately stated. *Gilfillan v. McCrillis*, 84 Mo. App. 576; *Berrymian v. Cox*, 73 Mo. App. 67. See also *Lamberson v. Long*, 66 Mo. App. 253.
- Contra in South Carolina** under Act of 1898. *Machen v. Western Union Tel. Co.*, 63 S. Car. 363.
- 726. 2. Contra.** — *Glover v. Charleston, etc., R. Co.*, 57 S. Car. 228, decided under 22 Stat. at L. S. Car. 693.
- 730. 1. Jaquith v. Benoit**, 70 N. H. 1.
- 731. 1. The Value of the Property** before and after the injury complained of need not be alleged. *San Antonio v. Pizzini*, (Tex. Civ. App. 1900) 58 S. W. Rep. 635.
- 2. North Point Consol. Irrigation Co. v. Utah, etc., Canal Co.**, 23 Utah 199.
- 733. 2. Missouri.** — *Macy v. Carter*, 67 Mo. App. 323.
- Montana.* — *Root v. Butte, etc., R. Co.*, 20 Mont. 354.
- Nebraska.* — *Chicago, & Emmert*, 53 Neb. 237.
- 734. 1. Root v. Butte**, 20 Mont. 354.
- 735. 1. Injury to Hon
v. Missouri, etc., R. Co., 604.**
- 739. 1. Special Damag**
to Be Shown. — *Roberts*
Ga. 456.
- 2. Hartman v. Ruby**
(D. C.) 45.
- 3. Rathborne, etc., C**
han, 82 Minn. 30, holdi
that the prospective dan
claimed or by fair intend
in the allegations of the
- 5. Russell v. Corning**
N. Y. App. Div. 610, *citi*
PL. AND PR. 739. See al
ing cases:
- Ohio.* — *Hill v. Ande*
Dec. 480.
- Oregon.* — *Dose v. Too*
13.
- General Damages Specie**
It is not ground for objec
plaint that items of ge
are specially pleaded. *I*
son, 9 Ohio Dec. 480.
- 741. 3. Alabama.** — *I*
Co. v. Standard Dry Kiln
346.
- Iowa.* — *Rosenberger*
Iowa 47.
- New York.* — *Toplitz v*
Co., (Supm. Ct. App. T.
Y.) 576; *Roldan v. Power*
Ct. Spec. T.) 14 Misc.
Kraft v. Rice, 45 N. Y. J

743. Evidence of Special Damages Excluded at Trial. — See note 1.

746. XIII. ACTIONS FOR PERSONAL INJURIES — 1. Generally — Describing Injuries. — See note 3.

747. See note 1.

Effect or Result of Injury. — See note 2.

Ohio. — Hill v. Anderson, 9 Ohio Dec. 480.

Oregon. — Dose v. Tooze, 37 Oregon 13.

Washington. — Carroll v. Caine, 27 Wash. 402.

Special Damages in Answer. — See Rosenberger v. Marsh, 108 Iowa 47.

743. 1. J. M. James Co. v. Continental Nat. Bank, 105 Tenn. 1.

746. 3. Youngblood v. South Carolina, etc., R. Co., 60 S. Car. 9; Mexican Cent. R. Co. v. Glover, (C. C. A.) 107 Fed. Rep. 356; Denver, etc., R. Co. v. Roller, (C. C. A.) 100 Fed. Rep. 738 [each citing 5 ENCYC. OF PL. AND PR. 746]; West Chicago St. R. Co. v. Levy, 82 Ill. App. 202, affirmed 182 Ill. 525; Hunter v. Third Ave. R. Co., (Supm. Ct. App. T.) 21 Misc. (N. Y.) 1; Radjavi v. Third Ave. R. Co., 58 N. Y. App. Div. 11; Croco v. Oregon Short Line R. Co., 18 Utah 311. Compare Gulf, etc., R. Co. v. Warlick, 1 Indian Ter. 10.

The complaint, however, must show the character of the injury complained of. An allegation that the plaintiff "received a serious and painful injury" is insufficient. Marshall v. McAllister, 18 Tex. Civ. App. 159.

Where Certain Injuries Are Specified, proof of other injuries not specifically stated is inadmissible. Chesapeake, etc., R. Co. v. Hanmer, (Ky. 1902) 66 S. W. Rep. 375; Muth v. St. Louis, etc., R. Co., 87 Mo. App. 422.

"Other Injuries." — A complaint setting out certain specific injuries to a plaintiff and alleging that "other serious injuries were done him" is sufficient, in the absence of a motion to make more definite, to admit proof of other specific injuries not alleged. Curran v. A. H. Stange Co., 98 Wis. 598. See also Brooklyn Heights R. Co. v. MacLaury, (C. C. A.) 107 Fed. Rep. 644. Compare Chesapeake, etc., R. Co. v. Hanmer, (Ky. 1902) 66 S. W. Rep. 375.

Difference Where General and Where Special Damages Are Claimed. — Chicago, etc., R. Co. v. McDonnell, 194 Ill. 82, citing 5 ENCYC. OF PL. AND PR. 746.

747. 1. Chicago, etc., R. Co. v.

McDonnell, 194 Ill. 82; Youngblood v. South Carolina, etc., R. Co., 60 S. Car. 9, each citing 5 ENCYC. OF PL. AND PR. 747.

2. West Chicago St. R. Co. v. McCallum, 169 Ill. 240; Youngblood v. South Carolina, etc., R. Co., 60 S. Car. 9, each citing 5 ENCYC. OF PL. AND PR. 747. See also the following cases:

Alabama. — Birmingham Southern R. Co. v. Cuzzart, 133 Ala. 262.

Illinois. — Baltimore, etc., R. Co. v. Slanker, 77 Ill. App. 567, affirmed 180 Ill. 357; Joliet v. Johnson, 177 Ill. 178.

Indiana. — Lake Lighting Co. v. Lewis, (Ind. App. 1902) 64 N. E. Rep. 35.

Iowa. — Parker v. Ottumwa, 113 Iowa 649.

Michigan. — Fye v. Chapin, 121 Mich. 675; Snyder v. Albion, 113 Mich. 275; Montgomery v. Lansing City Electric R. Co., 103 Mich. 46.

New York. — Eichholz v. Niagara Falls Hydraulic Power, etc., Co., 68 N. Y. App. Div. 441; Wolf v. Third Ave. R. Co., 67 N. Y. App. Div. 605; Levison v. Bernheimer, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 26.

Texas. — Knittel v. Schmidt, 16 Tex. Civ. App. 7.

Injuries Not Alleged, but which are the natural result of the other injuries specifically set out in the complaint, may be proved without a special allegation in regard thereto. West Chicago St. R. Co. v. Levy, 82 Ill. App. 202, affirmed 182 Ill. 525; Beath v. Rapid R. Co., 119 Mich. 512; Myers v. Erie R. Co., 44 N. Y. App. Div. 11; Missouri, etc., R. Co. v. Mayfield, (Tex. Civ. App. 1902) 68 S. W. Rep. 807; Missouri, etc., R. Co. v. Follin, (Tex. Civ. App. 1902) 68 S. W. Rep. 810; St. Louis Southwestern R. Co. v. Kelton, (Tex. Civ. App. 1902) 66 S. W. Rep. 887; Sherman, etc., R. Co. v. Bell, (Tex. Civ. App. 1900) 58 S. W. Rep. 147; Missouri, etc., R. Co. v. Edling, 18 Tex. Civ. App. 171; Gulf, etc., R. Co. v. Pendery, 14 Tex. Civ. App. 60; Clukey v. Seattle Electric Co., 27 Wash. 70; Mauch v. Hartford, 112 Wis. 40; Maitland v. Gilbert Paper

748. 2. General Damages. — See note 1.

749. Future Effect of Injuries. — See note 2.

750. 3. Special Damages — *a.* **GENERALLY.** — See

Co., 97 Wis. 476; Illinois Cent. R. Co. v. Griffin, (C. C. A.) 80 Fed. Rep. 278.

Injury to Eyesight may be proved under a complaint alleging that the plaintiff sustained "serious and painful internal and other bodily injuries." Quirk v. Siegel-Cooper Co., 43 N. Y. App. Div. 464.

Injuries to Eyesight and Hearing may be proved under an allegation of "bodily injuries and injuries to his head." Mullady v. Brooklyn Heights R. Co., 65 N. Y. App. Div. 549.

Particular Kind of Sickness Caused. — A complaint alleging that the plaintiff "suffered severe bruises and pains for a time, by reason whereof he became swollen, etc., and was made sick, sore, and disabled," is sufficient to admit proof of pleurisy. Hunter v. Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 432.

A complaint alleging that as the result of a personal injury the plaintiff became sick, sore, lame, and disabled, and was permanently prevented from attending to his affairs and business, is sufficient to admit proof of rheumatism and impairment of memory. Chicago Gen. R. Co. v. Kriz, 94 Ill. App. 277.

Nature and Extent of Injuries. — Hunter v. Third Ave. R. Co., (Supm. Ct. App. T.) 21 Misc. (N. Y.) 1.

748. 1. Harvard v. Stiles, 54 Neb. 26; San Antonio, etc., R. Co. v. Weigers, 22 Tex. Civ. App. 344; Denver, etc., R. Co. v. Roller, (C. C. A.) 100 Fed. Rep. 738, each citing 5 ENCYC. OF PL. AND PR. 748. See also the following cases:

California. — Samuels v. California St. Cable R. Co., 124 Cal. 204.

Illinois. — West Chicago St. R. Co. v. Levy, 82 Ill. App. 202, affirmed 182 Ill. 525; Franklin Printing, etc., Co. v. Behrens, 80 Ill. App. 313.

Indiana. — Lake Lighting Co. v. Lewis, (Ind. App. 1902) 64 N. E. Rep. 35.

Iowa. — Bailey v. Centerville, 108 Iowa 20.

Kansas. — Edgerton v. O'Neil, 4 Kan. App. 73; Abilene v. Wright, 4 Kan. App. 708.

New York. — Hunter v. Third Ave. R. Co., (Supm. Ct. App. T.) 21 Misc. (N. Y.) 1.

Nebraska. — Harshman v. Neb. 113.

Utah. — Croco v. Ore. R. Co., 18 Utah 311.

Vermont. — Manley etc., Canal Co., 69 Vt. 1

Washington. — Cluk Electric Co., 27 Wash. 7

United States. — Smith etc., R. Co., 90 Fed. Rep.

Miscarriage. — To the Chicago City R. Co. 2 Ill. 466.

Loss of Marriage. — In plaintiff's prospects of less of a particular man recovered for without action thereto. Smith v. P. R. Co., 90 Fed. Rep. 783

Impairment of the Power the result of a personal injury not be specially alleged. zewski v. Third Ave. R. Co. App. Div. 186.

Damages Accruing After the Suit, as a result of the plaintiff's, may be proved by amending the complaint supplemental pleading. Drew, 117 Cal. 305; Pitts Co. v. Blair, 5 Ohio Cir. Ct. 579.

749. 2. Harvard v. Stiles, 54 Neb. 26; San Antonio, etc., R. Co. v. Weigers, 22 Tex. Civ. App. 344, citing 5 ENCYC. OF PL. AND PR. 748. Lake Lighting Co. v. Lewis, 1902) 64 N. E. Rep. 35. v. Griffith, 103 Iowa 150.

Pain and Suffering. — Wright, 4 Kan. App. 70.

Permanency of Injuries specially alleged to admit of recovery. Ava v. Grenawalt, 73 Ill. App. 1. Tyler v. Third Ave. R. Co. App. T.) 18 Misc. Compare Clark v. Metropolitan R. Co., 68 N. Y. App. Div. 493. that if a permanent and necessary result of the injury it must be specially pleaded.

The fact that an injury is permanent and the plaintiff is not does not preclude recovery for the actual damages. Ankrum v. Marshalltown R. Co., 493.

750. 1. Connecticut.

751. b. MEDICAL ATTENDANCE — NURSING. — See note 2.
752. See note 1.

Winchester Repeating Arms Co., 73 Conn. 680.

Illinois. — O'Connor v. Prendergast, 99 Ill. App. 531; North Chicago St. R. Co. v. Barber, 77 Ill. App. 257; Chicago City R. Co. v. Gregg, 69 Ill. App. 77.

Kansas. — Atchison, etc., R. Co. v. Willey, 57 Kan. 764.

Michigan. — Beath v. Rapid R. Co., 119 Mich. 512; Hall v. Cadillac, 114 Mich. 99.

Missouri. — Krueger v. Chicago, etc., R. Co., 94 Mo. App. 458; Muth v. St. Louis, etc., R. Co., 87 Mo. App. 422.

New York. — Kleiner v. Third Ave. R. Co., 162 N. Y. 193; Sealey v. Metropolitan St. R. Co., 78 N. Y. App. Div. 530; Reed v. Metropolitan St. R. Co., 69 N. Y. App. Div. 103; Clark v. Metropolitan St. R. Co., 68 N. Y. App. Div. 49; Akman v. Third Ave. R. Co., 52 N. Y. App. Div. 483; Geoghegan v. Third Ave. R. Co., 51 N. Y. App. Div. 369; Cibulski v. Hutton, 47 N. Y. App. Div. 107; Hergert v. Union R. Co., 25 N. Y. App. Div. 218; Brachfeld v. Third Ave. R. Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 425; Haszlacher v. Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 865.

Tennessee. — Louisville, etc., R. Co. v. Ray, 101 Tenn. 1, per Wilkes, J.; Bruce v. Beall, 99 Tenn. 303; Citizens' St. R. Co. v. Burke, 98 Tenn. 650.

Texas. — Ft. Worth, etc., R. Co. v. Rogers, 21 Tex. Civ. App. 605; Galveston, etc., R. Co. v. Scott, 18 Tex. Civ. App. 321; International, etc., R. Co. v. Thompson, (Tex. Civ. App. 1896) 37 S. W. Rep. 24.

United States. — Southern Pac. Co. v. Hall, (C. C. A.) 100 Fed. Rep. 760; Fitchburg R. Co. v. Donnelly, (C. C. A.) 87 Fed. Rep. 135.

Cost of Artificial Limb. — The cost of an artificial limb as an element of damage resulting from a personal injury must be specially alleged. Southern Pac. Co. v. Hall, (C. C. A.) 100 Fed. Rep. 760.

Injury to Part of Body Not Mentioned. — To the same effect see O'Connor v. Prendergast, 99 Ill. App. 531; Texas State Fair v. Marti, (Tex. Civ. App. 1902) 69 S. W. Rep. 432; Ft. Worth, etc., R. Co. v. Rogers, 21 Tex. Civ. App. 605.

Employment of Substitutes must be

specially pleaded. Brachfeld v. Third Ave. R. Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 425; Haszlacher v. Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 865.

Postponement of Marriage as a result of a personal injury must be specially alleged. Beath v. Rapid R. Co., 119 Mich. 512.

Impairment of Memory as the result of personal injuries must be specially pleaded. Muth v. St. Louis, etc., R. Co., 87 Mo. App. 422.

Deafness as a result of a personal injury must be specially pleaded. Cibulski v. Hutton, 47 N. Y. App. Div. 107; Hergert v. Union R. Co., 25 N. Y. App. Div. 218.

Damages for Mental Infirmities as the result of personal injuries must be specially alleged. Atchison, etc., R. Co. v. Willey, 57 Kan. 764; Sealey v. Metropolitan St. R. Co., 78 N. Y. App. Div. 530.

751. 2. Illinois Cent. R. Co. v. Hanberry. (Ky. 1902) 66 S. W. Rep. 417; Macon v. Paducah St. R. Co., (Ky. 1901) 62 S. W. Rep. 496; Lloyd v. Knadler, (Ky. 1900) 58 S. W. Rep. 803. See also Elenz v. Conrad, 115 Iowa 183.

Where Payment Is Alleged proof of an unpaid liability for medical attendance is inadmissible. McLaughlin v. San Francisco, etc., R. Co., 113 Cal. 590; Muth v. St. Louis, etc., R. Co., 87 Mo. App. 422; Missouri, etc., R. Co. v. Reasor, (Tex. Civ. App. 1902) 68 S. W. Rep. 332.

Alleging Amount. — Where damages are claimed for expenses incurred for medical attendance and nursing the amount must be stated. Western Union Tel. Co. v. Griffith, 111 Ga. 551; Macon v. Paducah St. R. Co., (Ky. 1901) 62 S. W. Rep. 496; Lloyd v. Knadler, (Ky. 1900) 58 S. W. Rep. 803. *Contra*, Cooney v. Southern Electric R. Co., 80 Mo. App. 226; Kupferschmid v. Southern Electric R. Co., 70 Mo. App. 438; Toledo Electric St. R. Co. v. Westenhuber, 12 Ohio Cir. Dec. 22.

752. 1. Robertson v. Wabash R. Co., 152 Mo. 382; Scott v. Banks, 44 N. Y. App. Div. 28; Missouri, etc., R. Co. v. Belew, 22 Tex. Civ. App. 264.

The Evidence Need Not Show Actual Payment to warrant a recovery. Chicago, etc., R. Co. v. Cleminger, 178 Ill. 536.

753. c. LOSS OF EARNINGS — BUSINESS ENGAGEMENTS.

— See note 2.

755. Contrary Doctrine. — See note 2.**756. Distinctions to Be Observed.** — See note 1.**757. Actions by Married Women.** — See note 1.**758. d. LOSS OF TIME.** — See notes 1, 2.**759. e. MENTAL AGONY.** — See note 1.**763. XVI SLANDER AND LIBEL — 2. General Allegation of Damage — a. GENERALLY.** — See note 3.**753. 2. Connecticut.** — *Morris v. Winchester Repeating Arms Co.*, 73 Conn. 680.*Missouri.* — *Krueger v. Chicago*, etc., R. Co., 94 Mo. App. 458; *Lesser v. St. Louis*, etc., R. Co., 85 Mo. App. 326.**Need Not Allege Amount.** — It is not necessary to state in the complaint the amount of the earnings alleged to have been lost. *Cooney v. Southern Electric R. Co.*, 80 Mo. App. 226.**Diminution of Future Earning Capacity.** — Special damages for loss of earnings must be specially pleaded, but under a general allegation of damages a plaintiff may prove what salary he received before and after the injury, to show diminution of earning capacity and as bearing on the question of general damage. *Palmer v. Winona R.*, etc., Co., 83 Minn. 85, *affirming* 78 Minn. 141.**755. 2. North Chicago St. R. Co. v. Brown, 178 Ill. 187; *Wabash R. Co. v. Smillie*, 97 Ill. App. 7; *Strudgeon v. Sand Beach*, 107 Mich. 496; *Keiffert v. Nassau Electric R. Co.*, 51 N. Y. App. Div. 301; *Missouri*, etc., R. Co. v. Johnson, (Tex. Civ. App. 1896) 37 S. W. Rep. 771; *Texas*, etc., R. Co. v. Bigham, (Tex. Civ. App. 1896) 36 S. W. Rep. 1111. See also *Palmer v. Winona R.*, etc., Co., 78 Minn. 138; *Texas*, etc., R. Co. v. Bowlin, (Tex. Civ. App. 1895) 32 S. W. Rep. 918.****Sufficient Allegation.** — A complaint alleging that the plaintiff was kept away from his business for a certain period, deprived of the use of his foot, and otherwise injured, is sufficient to admit proof of loss of earnings. *Carple v. New York*, etc., R. Co., 16 N. Y. App. Div. 158.Under a complaint alleging a permanent injury to a limb, loss of earning capacity may be shown. *Bailey v. Centerville*, 108 Iowa 20.**Character of Occupation.** — Under a complaint alleging that the plaintiff is an ordinary laborer, proof of a particu-lar employment and his inability to labor at that work is admissible. *Swift v. O'Neill*, 88 Ill. App. 162.**756. 1. Chicago, etc., R. Co. v. Meech, 163 Ill. 305; *North Chicago St. R. Co. v. Barber*, 77 Ill. App. 257. See also *Chicago City R. Co. v. Anderson*, 182 Ill. 298; *North Chicago St. R. Co. v. Brown*, 178 Ill. 187; *Missouri*, etc., R. Co. v. Johnson, (Tex. Civ. App. 1896) 37 S. W. Rep. 771; *Texas*, etc., R. Co. v. Bowlin, (Tex. Civ. App. 1895) 32 S. W. Rep. 918.****General Business.** — Loss of earnings and earning capacity in a plaintiff's general business or regular employment need not be specially pleaded. *Illinois Steel Co. v. Ostrowski*, 194 Ill. 376.**Particular Engagements.** — Damages due to the loss of a particular engagement cannot be recovered unless specially pleaded. *North Chicago St. R. Co. v. Barber*, 77 Ill. App. 257.**757. 1. Compare** *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334.**758. 1. Western, etc., R. Co. v. Patillo, 99 Ga. 97; *Texas*, etc., R. Co. v. Buckalew, (Tex. Civ. App. 1896) 34 S. W. Rep. 165. See also *Mabrey v. Cape Girardeau*, etc., Gravel Road Co., 92 Mo. App. 596. Compare *Edgerton v. O'Neil*, 4 Kan. App. 73.****Sufficiency of Allegation.** — A pleading which notifies the defendant that the plaintiff claims damages for loss of time is sufficient without alleging the quantum of such damage or the plaintiff's occupation. *Lesser v. St. Louis*, etc., R. Co., 85 Mo. App. 326.**2. Haworth v. Kansas City Southern R. Co., 94 Mo. App. 215. See also *Mabrey v. Cape Girardeau*, etc., Gravel Road Co., 92 Mo. App. 596.****759. 1. Norfolk, etc., R. Co. v. Marpole, 97 Va. 594, *citing* 5 ENCYC. OF PL. AND PR. 759. See also *Ft. Scott*, etc., R. Co. v. Lightburn, 9 Kan. App. 642.****763. 3. Cranfill v. Hayden, 22 Tex. Civ. App. 656.**

764. *b.* WORDS ACTIONABLE PER SE. — See note 1.

766. See note 1.

3. Special Damage — *b.* WORDS NOT ACTIONABLE PER SE. — See note 5.

767. *How Special Damages Alleged.* — See note 2.

c. PECUNIARY DAMAGE. — See note 3.

768. *d.* LOSS OF CUSTOMERS. — See note 5.

As General Rule. — See note 6.

769. See note 1.

773. XVIII. MITIGATION OF DAMAGES — 1. Generally. — See note 2.

774. 2. Set up in Answer. — See note 1.

776. 3. Under General Issue. — See note 1.

XIX. DEFECTIVE PLEADING OF DAMAGES — 1. No Cause of Action Stated. — See note 5.

777. 2. Uncertain Statement of Cause of Action — *b.* REMEDIES OF DEFENDANT. — See note 2.

778. See note 1.

779. See note 1.

764. 1. *New York.* — Woodruff *v.* Woodruff, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 15; Smid *v.* Bernard, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 35, *per* Gaynor, J.

South Carolina. — Smith *v.* Bradstreet Co., 63 S. Car. 525.

Tennessee. — J. M. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1.

General and Special Damages. — Where the defamatory words are actionable *per se*, special damages may be given in enhancement of general damages if such special damages are pleaded, but not otherwise. Rembt *v.* Roehr Pub. Co., 71 N. Y. App. Div. 459.

766. 1. McIntyre *v.* Weinert, 195 Pa. St. 52. See also J. M. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1.

5. New York. — Langdon *v.* Shearer, 43 N. Y. App. Div. 607; Rade *v.* Press Pub. Co., (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 254; Bosi *v.* New York Herald Co., (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 622; Smid *v.* Bernard, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 35.

767. 2. Langdon *v.* Shearer, 43 N. Y. App. Div. 607; Rade *v.* Press Pub. Co., (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 254; Smid *v.* Bernard, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 35.

3. Langdon *v.* Shearer, 43 N. Y. App. Div. 607.

768. 5. See Douglass *v.* Daisley, (C. C. A.) 114 Fed. Rep. 628, *citing* 5 ENCYC. OF PL. AND PR. 768.

6. Brinkman *v.* Taylor, 103 Fed. Rep. 773.

769. 1. **General Allegation Insufficient to Show Particular Injury.** — Verbeck *v.* Duryea, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 242.

773. 2. Hicks Drew, 117 Cal. 305; Vierling *v.* Binder, 113 Iowa 337. *Compare* Waxahachie *v.* Connor, (Tex. Civ. App. 1896) 35 S. W. Rep. 692.

774. 1. Reed *v.* Union Cent. L. Ins. Co., 21 Utah 295 [*citing* 5 ENCYC. OF PL. AND PR. 774]; Wuensch *v.* Morning Journal Assoc., 4 N. Y. App. Div. 110; U. S. *v.* Mullan Fuel Co., 118 Fed. Rep. 663.

776. 1. Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414; Mexican Cent. R. Co. *v.* Goodman, (Tex. Civ. App. 1897) 43 S. W. Rep. 580.

5. Not Aided by Bill of Particulars. — A failure to allege special damages where such allegations are necessary for a recovery is not aided by a bill of particulars. Toplitz *v.* King Bridge Co., (Supm. Ct. App. T.) 20 Misc. (N. Y.) 576.

777. 2. Foerst *v.* Kelso, 131 Cal. 376. See also Wessinger *v.* Mausur, etc., Implement Co., 75 Miss. 64.

778. 1. Smith *v.* Bradstreet Co., 63 S. Car. 525.

779. 1. See Marshall *v.* McAllister, 18 Tex. Civ. App. 159.

780. XX. INSTRUCTIONS — 1. Generally. — See 1**2. Should Be Confined to Pleadings and E**

note 2.

781. See note 1.

780. 1. *Trabing v. California Nav., etc., Co.*, 121 Cal. 137; *Southern R. Co. v. O'Bryan*, 112 Ga. 127; *Illinois Cent. R. Co. v. Farrell*, 86 Ill. App. 436; *Union Pac. R. Co. v. Shook*, 3 Kan. App. 710; *Camp v. Wabash R. Co.*, 94 Mo. App. 272; *Todd v. Second Ave. Traction Co.*, 192 Pa. St. 587; *Hazlewood v. Pennybacker*, (Tex. Civ. App. 1899) 50 S. W. Rep. 199; *Beeman St. Clair Co. v. Caradine*, (Tex. Civ. App. 1896) 34 S. W. Rep. 980; *Quincy Horse R., etc., Co. v. Schulte*, (C. C. A.) 71 Fed. Rep. 487. See also *Sherwood v. Grand Ave. R. Co.*, 132 Mo. 339.

Entire Failure to Charge the jury upon the question of damages is reversible error. *Citizens' St. R. Co. v. Burke*, 98 Tenn. 650.

Where Compensation Is the Measure of damages an instruction under which punitive damages might also be awarded is erroneous. *Galesburg Electric Motor, etc., Co. v. Barlow*, 98 Ill. App. 334; *Stover Mfg. Co. v. Millane*, 89 Ill. App. 532; *La Porte v. Wallace*, 89 Ill. App. 517.

Vindictive Damages. — The court should instruct that vindictive damages cannot be awarded without proof of actual damages. *Martin v. Leslie*, 93 Ill. App. 44.

Where Actual and Exemplary Damages Are Claimed the court should explain to the jury the difference between the two. *King v. Sassaman*, (Tex. Civ. App. 1899) 54 S. W. Rep. 304; *Beeman St. Clair Co. v. Caradine*, (Tex. Civ. App. 1896) 34 S. W. Rep. 980.

Suggestion of New Elements. — *Augusta v. Owens*, 111 Ga. 464; *McKenna v. Citizens Natural Gas Co.*, 201 Pa. St. 146.

Interest. — In an action for unliquidated damages it is error to instruct a jury that they must include interest in their verdict. *Jamieson v. New York, etc., R. Co.*, 11 N. Y. App. Div. 50.

Where the Evidence Shows Damage Exceeding the Demand of the Complaint it is error to instruct the jury to allow for the amount of damages shown by the evidence. *Dallas v. Jones*, 93 Tex. 38; *Martin-Brown Co. v. Pool*, (Tex. Civ. App. 1897) 40 S. W. Rep. 820. See also *Missouri, etc., R. Co. v. Pawkett*,

(Tex. Civ. App. 1902) 323.

2. Tennessee, etc., forth, 112 Ala. 80; *La* 135 Cal. 458; *Georgia v. Jackson*, 112 Ga. 6; *Owens*, 111 Ga. 464; *Cedar Rapids*, 106 I merberg v. Metropolitan Mo. App. 563; *Shivering Co.*, 59 Neb. 73; *Co. v. Goldman*, (Tex. 51 S. W. Rep. 275; *perior*, 104 Wis. 454.

781. 1. California Flood, 135 Cal. 458.

Georgia. — *Georgia v. Jackson*, 112 Ga. 6; *Owens*, 111 Ga. 464; *Co. v. Paitillo*, 99 Ga. 1.

Iowa. — *Wheeler v. 235; Shultz v. Griffith*,

Kentucky. — *Illinois Hanberry*, (Ky. 1902) 417; *Macon v. Padue* (Ky. 1901) 62 S. W. Re

Michigan. — *Beath 119 Mich. 512; Hall Mich. 99.*

Missouri. — *Hawort Southern R. Co.*, 94 *Harper v. Missouri, Mo. App. 604; Mamm politan St. R. Co.*, 62

Nebraska. — *Shivering Co.*, 59 Neb. 73.

New York. — *Maimc etc., R. Co.*, 58 N. Y. *McKenna v. Brooklyn 41 N. Y. App. Div. 25;*

Ohio. — *Andrews v. Co.*, 8 Ohio Cir. Dec.

Pennsylvania. — *O'F gahela St. R. Co.*, 17 626.

Texas. — *Texas, etc. man, (Tex. Civ. App. Rep. 275; Houston, Bird, (Tex. Civ. App. Rep. 756; Internationa Thompson, (Tex. Civ. W. Rep. 24; Texas, Buckalew, (Tex. Civ. W. Rep. 165; Missou v. Belew, 22 Tex. Houston, etc., R. Co.*

Tex. Civ. App. 203; Galveston, etc., R. Co. v. Scott, 18 Tex. Civ. App. 321.

Utah. — Stoll v. Daly Min. Co., 19 Utah 271.

Wisconsin. — La Fave v. Superior, 104 Wis. 454.

United States. — Brooklyn Heights R. Co. v. MacLaury, (C. C. A.) 107 Fed. Rep. 644.

Medical Expenses. — Robertson v. Wabash R. Co., 152 Mo. 382; McKenna v. Brooklyn Heights R. Co., 41 N. Y. App. Div. 255; Andrews v. Toledo, etc., R. Co., 8 Ohio Cir. Dec. 584. *Compare* Trumble v. Happy, 114 Iowa 624.

Loss of Time. — Western, etc., R. Co. v. Patillo, 99 Ga. 97; Texas, etc., R. Co. v. Buckalew, (Tex. Civ. App. 1896) 34 S. W. Rep. 165.

DEATH.

786. II. EFFECT OF DEATH IN GENERAL — 1. At

— See note 1.

787. 2. Effect of Survival or Nonsurvival of Right

See note 3.

789. Federal Statutes. — See note 2.

3. Actions ex Delicto and ex Contractu. — See

786. 1. *Matter of Schlesinger*, 36 N. Y. App. Div. 77; *Overlock v. Shinn*, 28 Wash. 205, holding that it is only by statute that a representative has the right to continue an action begun by his principal.

787. 3. Illinois Conference, etc. *v. Plagge*, 177 Ill. 431; *Mitchell v. King*, 187 Ill. 452; *Keep v. Crawford*, 92 Ill. App. 587; *Burnett v. Milnes*, 148 Ind. 230; *Plume v. Lockwood*, 10 N. J. L. J. 119; *Smith v. Mingey*, 72 N. Y. App. Div. 103, *affirmed* in (N. Y. 1902) 65 N. E. Rep. 1122; *McNulta v. Huntington*, 62 N. Y. App. Div. 257, under Code Civ. Pro. N. Y., § 755; *Cheney v. Rankin*, (Supm. Ct. Tr. T.) 27 Misc. (N. Y.) 609; *Long v. Thompson*, 34 Oregon 359; *Sprague v. Greene*, 20 R. I. 153; *Overlock v. Shinn*, 28 Wash. 205; *Baltimore, etc., R. Co. v. Joy*, 173 U. S. 226.

All Causes of Action Survive except such as are expressly mentioned and excluded by the statute. *Brown v. Clow*, 158 Ind. 403.

Exception as to Special Proceeding. — The rule that special proceedings abate by death of a party was changed by statute, which was held, however, not to apply to the Surrogate's Court. *Matter of Schlesinger*, 36 N. Y. App. Div. 77; *Matter of Steencken*, 51 N. Y. App. Div. 417.

Where the Injury is Inflicted in Another Country the survivability of the cause depends upon the laws of that country, and no strength can be added to an action continued by the widow as administratrix by the fact that it was commenced by the husband in his lifetime. *Mexican Cent. R. Co. v. Goodman*, 20 Tex. Civ. App. 109.

Death of Defendant After Assignment of Interest. — Under the statute of Cali-

fornia the death of the assignor, in assigning his interest, in title, is immaterial, as it continues the litigation of the original party. *Tufts v. Rancho Co.*, 124 Cal. 1.

789. 2. *Patton v. E. E. Sanders v. Louisville*, 49 C. C. A. 565.

In *Baltimore, etc., R. Co. v. Joy*, 173 U. S. 226, it was declared that an action be brought in a state and is based on an act which arises under some rule recognized by federal court the state statute a United States statutes; the time an action is brought the state statute a upon the plaintiff's death, where the right of death occurs before suit statute will control.

Law of Domicile of Decedent. — In a common-law action for a personal wrong alleged to have been committed by the defendant who was domiciled in a state at the time of his decease, the latter state determines the extent of the remedy for the wrong. *Whitten v. Bennett*, 77 U. S. 118.

Real Nature of Action. *Patton v. Brady*, 184 U. S. 118, holding that the original article.

Pecuniary Advantage to Heir. *Patton v. Brady*, 184 U. S. 118, holding that the original article.

But where the cause of action is one in which the estate of the decedent is not increased and the

- 790.** 4. *Actio Personalis Moritur cum Persona*. — See note 1.
791. 5. *Equity Practice*. — See note 1.
792. 6. *Admiralty Practice*. — See note 2.
794. 8. *Death After Verdict*. — See note 1.
795. 9. *Death Pending Appeal or Writ of Error*. — See note 2.

plaintiff was damaged only as an indirect consequence of the alleged wrongful act, the tort does not survive, and the action abates by the defendant's death. *Iron Gate Bank v. Brady*, 184 U. S. 665.

Wrong Done to Property, Rights, or Interests. — In *New York* under the statute an action for a wrong done to property, rights, or interests of another, provided the tort be not one of those specially excepted by the statute, may be revived against the executor of the defendant who died pending the action. *Seventeenth Ward Bank v. Webster*, 67 N. Y. App. Div. 228; *Miller v. Young*, 90 Hun (N. Y.) 132.

A Taxpayer's Action against a mayor and city to prevent waste of, or injury to, the estate, funds, or other property of the city, is authorized by statute to protect taxpayers against resulting prejudice and the taxable property from being improperly burdened, and cannot be regarded as analogous to that class of personal actions which abate by the death of a party. *Gorden v. Strong*, 158 N. Y. 407.

790. 1. *Wetherell v. Chicago City R. Co.*, 104 Ill. App. 357.

791. 1. See *Kronenberger v. Heine-mann*, 104 Ill. App. 156.

Code Provisions referring generally to actions and requiring steps to be taken within a fixed time in order to continue an action after the death of a party apply to all classes of actions, without regard to any distinction which might have existed previously between actions at law and suits in equity in respect of the effect of the death of a party. *Overlock v. Shinn*, 28 Wash. 205.

792. 2. *The Margaret B. Roper*, (C. C. A.) 106 Fed. Rep. 741, as to death of libellant pending appeal.

794. 1. In *California* it has been held under a statute that if a party die after verdict or decision and before judgment, the court may nevertheless render judgment. *Fox v. Hale*, etc., *Silver Min. Co.*, 108 Cal. 475; *Ede v. Cuneo*, (Cal. 1898) 55 Pac. Rep. 772.

795. 2. *Billups v. Freeman*, (Ariz. 1898) 52 Pac. Rep. 367, under a statute

providing that the action shall not abate in any case where the cause of action survives, and that judgment shall be rendered in the appellate court as if all the parties were still living; *Long v. Thompson*, 34 Oregon 359, holding that the statute requiring motion for substitution to be made within a year after the death did not apply to a respondent on appeal, and the case being still in the appellate court, appellant could have the representative of the deceased substituted after the expiration of such time; *The Margaret B. Roper*, (C. C. A.) 106 Fed. Rep. 741.

Maryland. — *Goldschmid v. Meline*, 86 Md. 370, like *Harryman v. Harryman*, 49 Md. 67, cited in the original article; *Moore v. Taylor*, 81 Md. 644, (under Code Md., art. 5, § 75, which is a codification of Act 1806, c. 90, § 11) denying application for reargument after death of a party.

Texas. — The statute provides that "If any party to the record, in any cause now pending in or hereafter taken to the Supreme Court or Court of Civil Appeals by appeal or writ of error shall have died heretofore, or shall hereafter die, after the appeal bond has been filed and approved, * * * such cause shall not abate by such death, but the court shall proceed to adjudicate such cause and render judgment therein as if all the parties thereto were living," etc. Where an appeal to the Court of Civil Appeals is perfected in the lifetime of a party his death thereafter will not affect the proceedings in that court or in the Supreme Court on proceedings for review of the action of the Court of Civil Appeals. *Coe v. Nash*, 91 Tex. 113.

Affirmance Entered as of Date of Argument. — Where, on appeal by complainant from a decree dismissing his bill, one of the respondents dies after argument in the appellate court, an affirmance of the decree will be entered as of the date when the cause was argued in the appellate court. *Tallman v. Wallack*, (N. J. 1896) 41 Atl. Rep. 677.

Revivor in Lower Court. — The taking of an appeal from an order granting

796. III. DEATH OF PLAINTIFF — 1. Death of Sol.

a. IN GENERAL. — See notes 1, 2.

798. b. BEFORE FINAL JUDGMENT — (2) After Interlocutory Judgment. — See note 3.

799. See note 1.

800. c. AFTER FINAL JUDGMENT — (1) General. — See note 4.

801. (2) Pending Appeal or Writ of Error. — See note 5.

802. Effect on Action. — See notes 1, 2.

803. d. ACTIONS OF EJECTMENT. — See note 2.

804. See note 1.

f. ACTIONS OF DOWER. — See notes 4, 5.

defendant a new trial, under the statute, and filing a short transcript in the appellate court, does not deprive the lower court of its original jurisdiction to make any order necessary to perfect its own record during the term, and as an incident of that jurisdiction it has power to permit the cause to be revived after appellate's death pending appeal, in order to let the administrator file the bill of exceptions already taken. *Crawford v. Chicago, etc., R. Co.* (Mo. 1902) 66 S. W. Rep. 350.

796. 1. McDonald v. Algeo, 96 Ill. App. 79, *citing* 5 ENCYC. OF PL. AND PR. 786, 796.

2. Statute Strictly Construed. — See *Quinn v. Johnson Forge Co.*, 9 Houst. (Del.) 338.

Statute Not Retrospective. — An act providing for the survival of causes of action cannot be construed to embrace such causes as have abated prior to the date of the act. *Fitzgerald v. Western Union Tel. Co.*, 15 Tex. Civ. App. 143.

New York. — See *Cheney v. Rankin*, (Supm. Ct. Tr. T.) 27 Misc. (N. Y.) 609, decided under Code Civ. Pro. N. Y., § 761.

798. 3. Hambly v. Hayden, 20 R. I. 558; *Laidley v. Jasper*, 49 W. Va. 526, *citing* 5 ENCYC. OF PL. AND PR. 798.

799. 1. Lutz v. Third Ave. R. Co., 44 N. Y. App. Div. 256, where the plaintiff in an action for personal injuries died pending an appeal from a judgment dismissing his complaint.

800. 4. Surviving Partner May Issue Execution. — *Corder v. Steiner*, (Tex. Civ. App. 1899) 54 S. W. Rep. 277.

801. 1. California. — If the appellant dies after argument and submission of the appeal, judgment of affirmance may be entered as of the day

before the death. *Ede v. Ede*, 1898) 55 Pac. Rep. 772.

Death Before Appeal. — *v. Dotson*, 93 Va. 233, holding that a statute under which a court may enter judgment in favor of the plaintiff in an action pending at the death of the plaintiff, has no application to a petition for the writ of error presented after the death of the plaintiff.

802. 1. Harper v. Strong, 123 N. Car. 118. But see *Strong*, 158 N. Y. 407.

2. Heald v. Wallace, 100 S. W. Rep. 80.

Where Only a Moot Question. — Where, pending an appeal from a decree in favor of the plaintiff in a suit filed by a county judge from issuing a writ to collect his salary under a statute, the county claimed was the defendant pending the appeal, the whole case. *Willis v. Perkins*, (Tenn. Ch. App. 1899) 100 S. W. Rep. 347.

803. 4. Burrows v. Cook Co., 113 Mich. 113, holding that the plaintiff be allowed to proceed, at the death, in the name of the plaintiff without revival; *McKeen v. Cook Co.*, 113 Mich. 113, *decided under* 5 ENCYC. OF PL. AND PR. 798.

804. 1. Trespass to Try Title. — *DeMartin*, (Tenn. Civ. App. 1902) 67 S. W. Rep. 177.

4. But see Kincaid v. Strong, 1899) 49 S. W. Rep. 333.

In Equity, and under the Statute. — It is held that death does not abate the suit. *Lynde v. Wakefield*, 100 S. W. Rep. 333.

5. After Dismissal of Action. — *Lynde v. Wakefield*, 100 S. W. Rep. 333.

805. h. INJURIES TO REAL OR PERSONAL PROPERTY — Modern Doctrine. — See note 4.

806. Injuries to Real Property. — See note 2.

807. i. ACTIONS FOR PERSONAL INJURIES — At Common Law. — See note 2.

By Statute. — See note 3.

809. j. ACTIONS FOR LIBEL OR SLANDER. — See notes 1, 2.

k. ACTIONS FOR SEDUCTION. — See note 3.

to the defendant, though no judgment has been entered, the decision and order antedating the plaintiff's death, the defendant may enter judgment at any time, and the plaintiff's executor should be allowed to review the right to an extra allowance, as it remains a cloud upon the estate. *Armstrong v. Union College*, 55 N. Y. App. Div. 302.

805. 4. *Aylsworth v. Curtis*, 19 R. I. 517, holding that such a statute is broad enough to cover an action for damages for the larceny of personal property.

Quo Warranto Proceedings attacking the validity of the corporate existence of a village, no injury having accrued to the personal estate of the complainant, do not survive his death, and even if injury has accrued to the estate, the only action that survives is for the recovery of damages for such injury. *Noyes v. Hyde Park*, 73 Vt. 261.

806. 2. *Allen v. Union Oil, etc., Co.*, 59 S. Car. 571.

807. 2. In *North Carolina* (Code, §§ 1490, 1491) an action for injuries to the person, where such injury does not cause death, does not survive. *Harper v. Nash County*, 123 N. Car. 118.

3. *Merrihew v. Chicago City R. Co.*, 92 Ill. App. 346, holding that the right of action which survives under the statute is for injuries that do not result in death, as if death ensues from the injury the entire right of recovery is included in the action for the death given by another statute; *Atchison, etc., R. Co. v. Rowe*, 56 Kan. 411, holding that the action survives, including the element of damages for pain and suffering resulting from the injury; *Webster v. Hastings*, 59 Neb. 563; *Maher v. Philadelphia Traction Co.*, 181 Pa. St. 391; *Hambly v. Hayden*, 20 R. I. 558; *Daniel v. East Tennessee Coal Co.*, 105 Tenn. 470.

Application of Statute to Pending Actions. — Where under the law existing

at the time of the injury and under which plaintiff brought his action an action for injuries not resulting in death did not survive, a statute providing that actions pending or thereafter brought for such causes shall survive will apply and plaintiff's death will not abate the action. The statute is retroactive and unconstitutional. *Marshall v. McAllister*, 18 Tex. Civ. App. 159.

Appeal from Order Dismissing Complaint. — Pending an appeal from an order dismissing a complaint, death of plaintiff abates the action, and the statute providing that such an action shall not abate by death of a party after "verdict, report, or decision," does not apply. *Lutz v. Third Ave. R. Co.*, 44 N. Y. App. Div. 256.

In Action by a Husband for Injury to His Wife it is held that the death of the husband will not prevent the wife from continuing the suit for those injuries. *Mexican Cent. R. Co. v. Goodman*, 20 Tex. Civ. App. 109; *St. Louis Southwestern R. Co. v. Carwile*, (Tex. Civ. App. 1902) 67 S. W. Rep. 160.

Where the Injury Results in Death the action for the injury which survives does not include the right of action for the death. *Quinn v. Johnson Forge Co.*, 9 Houst. (Del.) 338; *Wetherell v. Chicago City R. Co.*, 104 Ill. App. 357; *Martin v. Missouri Pac. R. Co.*, 58 Kan. 475; *Missouri Pac. R. Co. v. Bennett*, 5 Kan. App. 231.

809. 1. See *Wood v. Boyle*, 17 Pa. Co. Ct. 325, as to death before entry of judgment.

2. Slander Embraces Libel. — The word "slander," in a statute providing that an action for slander shall not survive, embraces libel. *Johnson v. Halde-man*, 102 Ky. 163.

3. Action by Father. — A statute which provides that actions of trespass for damages done to personal estate shall survive does not apply to an action by a father for the seduction of his minor daughter, as the right of the

- 810.** *m.* OTHER ACTIONS EX DELICTO. — See *n.* SUITS FOR DIVORCE. — See note 2.
- 811.** See note 1.
- o.* ACTIONS TO RECOVER PENALTY. — See *p.*
- 812.** *r.* SPECIAL PROCEEDINGS. — See note 2.
- 2.** Death of Nominal Plaintiff — Actions a note 3.
- 813.** See note 2.
- 3.** Death of Equitable Plaintiff. — See note
- 815.** **4.** Death of One of Several Plaintiffs — *a.* IN BEFORE FINAL JUDGMENT. — See note 2.

father to the services of the child is not what is meant by the term "personal estate" as used in the statute, and such action abates on the father's death. *Davis v. Carpenter*, 72 Vt. 259.

810. **1.** Wrongful Attachment. — In *Union Mill Co. v. Prenzler*, 100 Iowa 540, on a counterclaim for damages for wrongful attachment, and where the party counterclaiming died before trial, it was said: "When the action is brought by the representative of one deceased, it is to right the wrong done to his estate, * * * but when the action * * * is brought by the person injured, who dies during the pendency of the action, the law attempts to remedy the wrong done to him and not necessarily to his estate; and the damages in such case are not only compensatory, but may include exemplary as well."

2. On the other hand it is held that after judgment for plaintiff her death deprives the court of all power to review its action and determine plaintiff's right to a divorce. *Kirschner v. Dietrich*, 110 Cal. 502.

A Decree Nisi does not dissolve the marriage, and the death of either party thereafter and before the time when it can be made absolute puts an end to the suit. *Chase v. Webster*, 168 Mass. 223.

To Annul Marriage and Try Property Rights. — In *Barth v. Barth*, 102 Ky. 56, plaintiff in an action for divorce filed an amended petition setting up that the defendant had a living husband at the time of the marriage which rendered said marriage null and void, and sought to have it so declared, and it was held that the suit might be revived by his administrator to try the property rights set up by defendant claiming as widow.

811. **1.** *Coffman v. Finney*, 65 Ohio

St. 61, where both part an appeal from a decree for divorce and alimony.

3. *Butler v. Butler*, citing 5 ENCYC. OF PL. & F. 58 S. 1 Allen v. Petty, 58 S. 1 5 ENCYC. OF PL. AND F.

812. **2.** See *supra*, *Survival or Nonsurvival Action*, note 3.

3. Death of General proceeding brought by guardian of an infant of the death of the infant having attained majority proceeding may be continued upon suggestion of guardian. *Smith v. I* App. Div. 103.

813. **2.** *Byers v.* 141.

The Death of an Officer does not affect the statute does not require any entry on the record. *Manhard v. Rothschild*, 121 Mich.

5. Where a member of individuals for holding common for their mutual power upon several individual members for the equitable title so survive to the survivor of the trust, and therefore of them will not abate trustees relating to the property. *Michenor* La. Ann. 360.

815. **2.** *Crane v.* 606, holding that the estate in common may proceed for the recovery of the estate without revivor, proceed to the rights of plaintiff by inheritance up such interest by petition and recover the

- 815.** *b.* PENDING APPEAL OR WRIT OF ERROR — Appellants. — See note 6.
- 817.** *c.* OTHER ACTIONS EX DELICTO. — See note 1.
- 818.** *h.* ACTIONS BY PARTNERS. — See note 3.
- 820.** IV. DEATH OF DEFENDANT — 1. Death of Sole Defendant — *a.* IN GENERAL. — See note 2.
- 821.** *b.* BEFORE FINAL JUDGMENT — (2) *Before Service of Summons.* — See note 4.
- 822.** (3) *After Verdict.* — See note 3.
- Pending Motion for New Trial.* — See note 4.
- c.* AFTER FINAL JUDGMENT — (1) *Generally.* — See note 5.
- 823.** *Effect on Execution.* — See note 1.
- (2) *Pending Appeal or Writ of Error.* — See note 3.

Northness v. Hillestad, 87 Minn. 304;
Rowe v. Shenandoah Pulp Co., 42 W.
Va. 551.

815. 6. Hunleth v. Leahy, 146 Mo.
408.

817. 1. *Flooding of Land* — *West Virginia.* — To the same effect see
Rowe v. Shenandoah Pulp Co., 42 W.
Va. 551.

818. 3. See Pennsylvania F. Ins.
Co. v. Carnahan, 10 Ohio Cir. Dec.
225, 19 Ohio Cir. Ct. 97.

820. 2. In an action against an ex-
ecutrix to recover on a note and to
foreclose a trust deed securing the
same, where the executrix marries and
then dies her administrator may be
made a party to the suit, and the action
does not abate so as to make it neces-
sary to begin anew. Parks v. Lub-
bock, (Tex. Civ. App. 1899) 50 S. W.
Rep. 466.

821. 4. Connaway v. Overton, 98
Fed. Rep. 574, citing 5 ENCYC. OF PL.
AND PR. 821.

822. 3. Martin v. Hutchens, 21 R.
I. 258.

But when after decision by the court,
but before entry of judgment and be-
fore expiration of the time when a jury
trial must be claimed, defendant dies,
the action abates, for when the day of
entry of judgment arrives there is no
one against whom to enter judgment,
and if the action should be continued
to await the appointment of an admin-
istrator, such administrator when ap-
pointed could not claim a jury trial,
because the time for claiming such trial
would have elapsed. In such a case
the plaintiff's claim must be presented
to the administrator. Fox v. Hopkin-
son, 19 R. I. 704.

Interlocutory Judgment. — See Wasson
v. Hoff, (County Ct.) 27 Misc. (N. Y.)
55, decided under Code Civ. Pro. N.
Y., § 763.

Before Report of Referee. — Signing of
a report by the referee is not the ren-
dering of a report, and if defendant
dies before the report is rendered by
filing or delivery to one of the parties
judgment cannot be entered against
plaintiff in the name of the original de-
fendant. Clark v. Pemberton, 64 N.
Y. App. Div. 416.

4. Linn v. Brecher, 90 Ill. App. 6.

5. *Pending Motion for a New Trial*
death of the moving party does not
abate the action. Sinclair v. Fear, 4
Ohio Dec. 26.

823. 1. *Execution Previously Issued*
will not be affected by the defendant's
death. Blumenthal v. Tibbits, (Ind.
1903) 66 N. E. Rep. 159; Nashville
Trust Co. v. Weaver, 102 Tenn. 66.
See also EXECUTIONS AGAINST PROP-
ERTY.

3. *Before Filing Transcript.* — Where
an appeal is regularly granted and a
transcript is filed the fact that an ap-
pellee dies before the transcript is filed
does not vitiate the appeal, but simply
renders a revivor necessary. Ayres v.
Fuqua, (Ky. 1898) 46 S. W. Rep. 209.

In a Criminal Case death of defendant
pending an appeal is ground for abat-
ing the appeal, and the cause cannot
be heard. The case of such an appeal,
at common law, by heirs or executors
of the defendant, to reverse an attain-
der of treason or felony, was the only
instance of authority for such an ap-
peal, and that was allowed because the
attainder worked a forfeiture of the
estate. State v. Martin, 30 Oregon 108.

- 824.** *Effect of Reversal of Judgment.* — See note 1.
825. *d. ACTIONS OF EJECTMENT.* — See note 2.
827. *h. ACTIONS FOR PERSONAL INJURIES.* —
828. *i. ACTIONS FOR LIBEL OR SLANDER.* — S
k. ACTIONS FOR BREACH OF PROMISE. —
829. *m. OTHER ACTIONS EX DELICTO.* — See
831. See note 1.
n. SUITS FOR DIVORCE. — See note 3.

Contempt Proceedings. — Where, pending an appeal from a judgment imposing a fine in contempt proceedings for violation of an injunction, the appellant dies after the appeal is taken under advisement, the death does not cause the appeal to abate. The contempt proceeding was a civil remedy and was not criminal in its nature, for the enforcement of the decree in the principal suit, and motion to substitute the executor was allowed. *Hannah v. People*, 198 Ill. 77.

824. 1. *Hullett v. Baker*, 101 Tenn. 689.

825. 2. *Michigan.* — *McKenzie v. A. P. Cook Co.*, 113 Mich. 452, *citing* 5 ENCYC. OF PL. AND PR. 825.

827. 3. On the other hand it is held in *Kentucky* that the statute which makes an action for personal injuries or injury to the real or personal estate survive, applies to a statutory action for wrongful death, and such action will survive against the representatives of the wrongdoer. *Morehead v. Bitter*, 106 Ky. 523.

After Verdict the action does not abate by the death of a party, under N. Y. Code Civ. Pro., § 764. *Vitto v. Farley*, 6 N. Y. App. Div. 481.

828. 2. **Against Partners.** — The phrase "the cause of which survives" in a statute providing that "when there are several plaintiffs or defendants in a personal action the cause of which survives, and any of them die before final judgment, the action shall proceed," etc., means shall survive to the surviving plaintiff or plaintiffs or against the surviving defendant or defendants, and not the cause which survives against the representatives of the deceased. Therefore, in an action for libel against two partners, the death of one of the defendants does not cause the action to abate. *Brown v. Kellogg*, (Mass. 1902) 65 N. E. Rep. 378.

5. *Hullett v. Baker*, 101 Tenn. 689.

829. 2. *Warren v. Utah* 429, which was the action for loss occasioned by management of the affairs of a defendant director.

Damages to Personal Estate. *Wainwright*, 173 Mass.

Infringement of Patent. — Made by an infringer, recovery is sought by oil not the same as damages of libel, slander, etc., and not abate with the death of the defendant. *Head v. Porter*, 498.

Damage to Property. — Case for damages done to personal property survives against defendant. *Great Western Co. v. Harris*, 96 Fed. Cl. 11. *Vermont* statute.

831. 1. **Action by Wife.** — An action by a wife against a man, alleging adultery with his husband and conspiracy with his society, does not survive the death of the husband, as an action for assault, battery, imprisonment, or other damage to the person. *Amerman*, 181 Mass. 311.

3. *Bell v. Bell*, 181 U. S. 480, to and *citing* *Francis v. Gratt.* (Va.) 283, as a note in the original article.

But in *Nickerson v. Oregon* 1, it is held that an appellant, having appealed from a judgment for divorce and for one-third of the property, died, neither the suit abates; that the rights are involved the personal representatives of the appellant have an interest in the litigation, the cause will revive, and the cause of continuing the suit touching the right of the appellant, but to ascertain the property has been right from its appropriate conclusion.

822. o. ATTACHMENT, GARNISHMENT, AND TRUSTEE PROCEEDINGS — Attachment. — See notes 2, 4.

823. Garnishment. — See note 1.

p. ACTIONS TO RECOVER PENALTY. — See note 2.

825. 2. Death of One of Several Defendants — a. IN GENERAL. — See notes 3, 5.

827. c. ACTIONS EX CONTRACTU. — See notes 1, 3.

822. 2. Wartman v. Peckar, (Ariz. 1902) 68 Pac. Rep. 534.

4. Contra. — *Yankton Sav. Bank v. Gutterson*, 15 S. Dak. 486, holding that as under the statute an execution could not issue upon the judgment, it is not material, as to the effect of such death to dissolve the lien of the attachment, whether the death occurred before or after judgment.

823. 1. Contra, when the defendant in foreign attachment dies before judgment. *Reynolds v. Nesbitt*, 196 Pa. St. 636.

2. State v. Schuenemann, 18 Tex. Civ. App. 485; *Houston, etc., R. Co. v. Rogers*, 15 Tex. Civ. App. 680.

On the other hand the statute sometimes provides that all causes of action shall survive except such as are expressly mentioned and excluded, and the action for a statutory penalty not being among the latter class it cannot be objected that an action therefor abated on the death of defendant, on account of the nature of the action. *Brown v. Clow*, 158 Ind. 403.

Liquidated Damages. — While suits brought by the state for the breach of a liquor dealer's bond are actions for penalties and abate with the death of the liquor dealer, it does not follow that the same construction must be given to that portion of the statute which authorizes suits by individuals for a breach of such bond, but on the contrary it is held that such suits are for liquidated damages and do not abate with the death of the dealer. *Nolan v. Tennison*, 21 Tex. Civ. App. 332.

825. 3. Rogers v. Chambers, 112 Ga. 258, wherein it appears that the statute of that state provides that in all actions against two or more defendants death of one or more of them pending the suit does not require a continuance to make administrators parties so that the proceedings may go on against all the defendants, but the death may be suggested and the trial proceeded with against the surviving defendant or defendants to the extent

of his or their liability; *Brown v. Kellogg*, (Mass. 1902) 65 N. E. Rep. 378. See also *Asher v. Com.*, 66 S. W. Rep. 759, 23 Ky. L. Rep. 1976, holding that where judgment is rendered in such case against all the parties, being principal and sureties, when one of them, the principal, is dead, this will not invalidate the judgment against the sureties, because they could have been pursued notwithstanding the death of the principal. But see otherwise, on this last point, *Weis v. Aaron*, 75 Miss. 138.

Sureties of Replevy Bond in an attachment suit being by force of the statute considered parties to the suit, where one of them dies the action may be continued as to the others upon suggestion of his death. *Cohen v. Grimes*, 18 Tex. Civ. App. 327.

Defendant Seeking Relief Against Codefendants. — Where a party, upon his motion, is brought in as a defendant to an action against three original defendants to set aside transfers, and in his answer he claims similar relief against the original defendants, he is not a necessary party to the determination of the issues between the plaintiffs and the original defendants, and his death, pending a reference, does not prevent the action from proceeding as between the other parties under the statutory provision that, "in case of the death of one of two or more * * * defendants, if part only of the cause of action, or part of some two or more distinct causes of action, survives * * * against the others, the action may proceed" against such others. The report of the referee as to the dead defendant, however, is void. *Lemon v. Smith*, 20 N. Y. App. Div. 523.

5. In Pennsylvania there is such a statutory provision. *Strause v. Braunter*, 14 Pa. Super. Ct. 125.

827. 1. American Copper Co. v. Lowther, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 441; *Henning v. Farnsworth*, 41 W. Va. 548.

3. Cobb v. Fogg, 166 Mass. 466.

- 838.** *c.* OTHER ACTIONS EX DELICTO. — See
839. *g.* ACTIONS AGAINST PARTNERS. — See
840. *h.* SUITS IN EQUITY — (1) *Generally.* — See
841. *V.* DEATH OF BOTH PARTIES. — See note 2
VI. DEATH OF PUBLIC OFFICER, PARTY. — See
842. *VII.* SUGGESTING DEATH — 1. In General. — See
843. 2. Failure to Suggest — *a.* GENERALLY. — See
847. *IX.* JUDGMENT OR DECREE AFTER DEATH
 Death Occurs Pending Delay by Court. — See note 1.

838. 1. *Injuries to Property* — *New York.* — *O'Brien v. Blaut*, 17 N. Y. App. Div. 288, where the decision is controlled by *Pierson v. Morgan*, (Supm. Ct. Gen. T.) 17 Civ. Pro. (N. Y.) 124, cited in this note in the original article.

Actions of Trespass. — See also *Duis v. Fisher*, 65 S. W. Rep. 337, 23 Ky. L. Rep. 1425.

839. 6. *Finnegan v. Allen*, 60 Ill. App. 354, as to right to have damages assessed upon dissolving an injunction. See also *Ranney-Alton Mercantile Co. v. Hanes*, 9 Okla. 471.

840. 3. *Lemon v. Smith*, 20 N. Y. App. Div. 523, under the statute.

In *Alabama*, where a decree is rendered the same day, but after the death of one of the respondents to a bill in equity, the legal fiction of the relation of judgments does not apply, and the decree is void and properly set aside on motion. *Ex p. Massie*, 131 Ala. 62.

4. *Salinger v. Gunn*, 61 Ark. 414.

841. 2. *Northern Trust Co. v. Palmer*, 171 Ill. 383; *Coffman v. Finney*, 65 Ohio St. 61, pending appeal from decree of divorce and for alimony.

3. *McDonald v. Algeo*, 96 Ill. App. 79, quoting 5 ENCYC. OF PL. AND PR. 841.

842. 1. For necessity of revivor, proper parties by or against whom ac-

tions may be revived or manner of reviving or actions, see article REVIVALS AND ACTIONS.

3. But in *Illinois*, where after the declaration was before summons was served that the service of an issued thereafter within the death and having substituted as plaintiff, the defendant to appear abatement, and judgment should be set aside. *M* 187 Ill. 452.

843. 1. But in *H* 185 Pa. St. 167, in a probate Orphans' Court for the will, where a legatee who had been entered by him before decree, but his suggested, it was held to suggest the death and personal representative should not the fault of the counsel who had undertaken the party, and the decree opened on the petition of the party.

847. 1. *Fox v. Ha* Min. Co., 108 Cal. 79, 12 Sprangers, 113 Wis. 12, cause of action survive *v. Bell*, 181 U. S. 175. *Cuneo*, (Cal. 1898) 55 P

DEATH BY WRONGFUL ACT.

849. I. INTRODUCTORY. — See note *a*.

II. FORM OF ACTION. — See note 1.

850. III. JOINDER OF ACTIONS — Suit by Administrator. — See note 1.

851. Joinder of Actions in Single Count. — See note 2.

IV. PARTIES — 1. **Who May Sue** — *a*. **IN GENERAL.** — See note 3.

852. b. PERSONAL REPRESENTATIVES — **General Rule.** — See note 1.

849. a. See *The Jane Grey*, 95 Fed. Rep. 693, citing 5 ENCYC. OF PL. AND PR. 849.

Notwithstanding the absence of allegations that ought to be found in an action under the statute, the action must be deemed to have been brought under the statute and not at common law. *Hicks v. New York, etc., R. Co.*, 164 Mass. 424.

1. Trespass and Case. — In *Buckalew v. Tennessee Coal, etc., Co.*, 112 Ala. 146, it was held that in an action by an administratrix for the death of her intestate, counts of trespass and case may be joined.

850. 1. In Mississippi an action by an administratrix for the wrongful death of her intestate, under Annot. Code Miss., § 1916, cannot be joined with an action given to the next of kin by Annot. Code Miss., § 663. *McVey v. Illinois Cent. R. Co.*, 73 Miss. 487.

Contrary Rule in Kentucky. — *Louisville R. Co. v. Will*, (Ky. 1902) 66 S. W. Rep. 628; *Lewis v. Taylor Coal Co.*, (Ky. 1902) 66 S. W. Rep. 1044.

Misjoinder and How Cured. — In *Kentucky* the proper remedy for misjoinder of causes of action is by a motion to compel the plaintiff to elect, and not by demurrer. *Lewis v. Taylor Coal Co.*, (Ky. 1902) 66 S. W. Rep. 1044.

851. 2. Schweinfurth v. Cleveland, etc., R. Co., 60 Ohio St. 215, wherein it was held that a count may state that a death was purposely caused, and also that it was negligently caused, by the defendant.

Setting Out Ordinance. — In *Missouri*

a petition setting out the city ordinance which prescribes the duty of street-car drivers, and alleging that by the failure of the driver to perform his duties therein described the deceased was killed, states but one cause of action. *Senn v. Southern R. Co.*, 135 Mo. 512.

3. Boyd v. Brazil Block Coal Co., (Ind. App. 1898) 50 N. E. Rep. 368; *Boston, etc., R. Co. v. McDuffey*, (C. C. A.) 79 Fed. Rep. 934.

852. 1. Major v. Burlington, etc., R. Co., 115 Iowa 309; *Fitzhenry v. Consolidated Traction Co.*, 63 N. J. L. 142; *Hodges v. Webber*, 65 N. Y. App. Div. 170; *Sorensen v. Balaban*, 11 N. Y. App. Div. 164; *Howell v. Yancey County*, 121 N. Car. 362; *Solor Refining Co. v. Elliott*, 8 Ohio Cir. Dec. 225; *Chattanooga Electric R. Co. v. Johnson*, 97 Tenn. 667. See also *Ferguson v. Washington, etc., R. Co.*, 6 App. Cas. (D. C.) 525; *Myers v. Holborn*, 58 N. J. L. 193.

Special Administrator. — In *Swan v. Norvell*, 107 Wis. 625, it was held that under Stat. Wis., § 4255, which creates an action for the wrongful death of a person, and § 4256, which provides that "every such action shall be brought by and in the name of the personal representative of such deceased person," a special administrator may sue for the negligent death of his intestate.

Instantaneous Death. — In *McVey v. Illinois Cent. R. Co.*, 73 Miss. 487, it was held that under the *Mississippi* statute an administrator cannot sue for the death of his intestate where such death was instantaneous.

853. By Implication. — See note 1.

When Representative Cannot Sue. — See note 3.

Term "Personal Representative." — See note 4.

854. Foreign Administrators. — See notes 1, 2.

Resident Administrator Suing for Injuries Received in — See note 3.

856. c. WIDOW OF DECEASED. — See note 1.

Death of One Murdered by Mob. — In *Indiana* the personal representatives of a prisoner murdered by a mob may maintain an action against the sheriff and his sureties for failure on the part of the sheriff to exercise reasonable care in the protection of the prisoner. *Indiana v. Gobin*, 94 Fed. Rep. 48.

Representative Merely Nominal Party. — *Wolf v. Lake Erie, etc.*, R. Co., 55 Ohio St. 517.

853. 1. *Chicago, etc.*, R. Co. *v.* *Young*, 58 Neb. 678; *Chicago, etc.*, R. Co. *v.* *Zernecke*, 59 Neb. 689.

3. *Maule Coal Co. v. Partenheimer*, 155 Ind. 100; *Carden v. Louisville, etc.*, R. Co., (Ky. 1896) 37 S. W. Rep. 839.

Where No Widow or Child Survives. — In *Kentucky* an administrator may sue where the deceased person left no widow or child surviving him. *Lexington, etc., Min. Co. v. Huffman*, (Ky. 1895) 32 S. W. Rep. 611.

4. *Wittman v. Cincinnati, etc.*, R. Co., 10 Ohio Dec. 563.

854. 1. In *New Hampshire* a foreign administrator cannot bring an action for the death of his intestate under Pub. Stat. N. H., c. 191, §§ 8-13, since the statute does not give a new right of action in the administrator, but merely keeps alive a former right of the intestate. *Lyon v. Boston, etc.*, R. Co., 107 Fed. Rep. 386.

2. *Memphis, etc., Packet Co. v. Pikey*, 142 Ind. 304; *Popp v. Cincinnati, etc.*, R. Co., 96 Fed. Rep. 465 (construing the *Ohio* statute). See also *Cincinnati, etc.*, R. Co. *v.* *Thiebaud*, (C. C. A.) 114 Fed. Rep. 918.

Widow Describing Herself as Administratrix. — In *Kansas*, where the plaintiff describes herself in her petition as widow and also as administratrix of the estate of the deceased person, she may recover in her right as such widow, although not entitled to maintain the action as administratrix. *Chicago, etc.*, R. Co. *v.* *Mills*, 57 Kan. 687.

3. In *Illinois* it is held that an administrator may be appointed in a state where the cause of action accrued for the pur-

pose of suing in such state from death by wrongful etc., R. Co. *v.* *Smith*, 77

In *New Jersey* a resident administrator cannot sue in his state for the death of his intestate incurred in another state which gives the right in the widow of the deceased person. *Segal*, 59 N. J. L. 66.

New York — Public A
An action in *New York* occurring in another state maintained by the public as the former state. *Hoeft, etc.*, R. Co., 73 N. Y. A.

In the Federal Courts. — by an administratrix. States District Court in which the administrator sues for the death of her intestate from injuries received in another state, it was held in *junction* that the declaration alleged that the plaintiff of the former state, in an Act Cong. Aug. 13, 1888 at L. 433, which provided the jurisdiction is found in fact that the action is brought in a state of different states, suits only in the district of either the plaintiff or the defendant; and that to sustain a demurrer that neither the negligent defendant nor the injury cause of action arose in the state in which the action was brought. *Van Doren v. R. Co.*, (C. C. A.) 93 Fed.

856. 1. Delaware — *Szymanski v. Blument*, 52 Atl. Rep. 347, it was held that a resident alien widow may maintain an action for the death of her husband, a resident of the state, Del., pt. 1, c. 31, § 2 (p. 788), which provides that death shall be caused by lawful violence or neg-

856. *d.* HEIRS OF DECEASED. — See note 4.

857. *Minor Children.* — See note 1.

e. PARENTS OF DECEASED. — See notes 2, 3.

suit be brought by the party injured, * * * the widow of any such deceased person * * * may maintain an action for and recover damages for the death thus occasioned."

Kansas — Nonresident Widow Suing as Representative. — In *Atchison, etc., R. Co. v. Napole*, 55 Kan. 401, it was held that the amendment of 1889 to Civ. Code Kan., § 422, did not create a new cause of action, but simply changed the remedy by providing that the cause of action given by such section shall not be lost on account of the nonresidence of the deceased or the nonappointment of personal representatives, and therefore that a widow who is resident in another state may maintain an action thereunder for the death of her husband in the state of Kansas.

Louisiana — Conflicting Claims — Interpleader. — Where two women, each claiming to be the widow of the decedent, brought an action for his death, and on appeal these facts were made to appear by affidavit, the action was remanded to enable the defendant to implead both in one suit, that they might establish which was the lawful widow. *Albinest v. Yazoo, etc., R. Co.*, 107 La. 133.

Pennsylvania. — Under Act Pa. April 15, 1851, § 19, which provides that a widow may maintain an action for the wrongful death of her husband, it is held that where a man, after receiving injuries that resulted in his death, brought no action for such injuries, his widow may maintain an action for his death. *Gross v. Electric Traction Co.*, 180 Pa. St. 99.

In *Texas* a widow, as next friend of her minor children, may sue for the death of her husband, though she cannot collect a judgment for more than five hundred dollars without qualifying as guardian. *International, etc., R. Co. v. Sein*, 11 Tex. Civ. App. 386.

856. *4.* *Noble v. Seattle*, 19 Wash. 133. See also *Hindry v. Holt*, 24 Colo. 464.

Action by Widow as Heir. — In *Knott v. McGilvray*, 124 Cal. 128, it was held that a widow may maintain as heir an action for the death of her husband.

Mother. — In *Peterman v. Northern Pac. R. Co.*, 105 Fed. Rep. 335, it was

held that under Rev. Stat. Idaho, § 4100, providing that "when the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death," a mother, who is the sole heir of an unmarried adult son, may maintain in her own name an action for his death by wrongful act.

Husband and Guardian. — Under Code Civ. Pro. Cal., § 377, which gives the right of action in such cases only to the "heirs or personal representatives," a husband may maintain in his own behalf and as the guardian of his minor children an action for the death of his wife. *Redfield v. Oakland Consol. St. R. Co.*, 110 Cal. 277.

Bastard. — Under Annot. Code Miss., § 1549, providing that illegitimates may take by inheritance in certain cases, an illegitimate daughter cannot maintain an action for the death of her half sister who was also an illegitimate daughter of the same mother. *Illinois Cent. R. Co. v. Johnson*, 77 Miss. 727.

857. *1.* *Snyder v. Philadelphia, etc., R. Co.*, 9 Pa. Dist. 3, wherein it was held that minor children cannot maintain an action for the death of their father where such father left a widow surviving him.

2. *Harris v. Kentucky Timber, etc., Co.*, (Ky. 1897) 43 S. W. Rep. 462; *Ohnmacht v. Mt. Morris Electric Light Co.*, 66 N. Y. App. Div. 482; *Killian v. Southern R. Co.*, 128 N. Car. 261; *Holston v. Coal, etc., Co.*, 95 Tenn. 521.

A Stepfather cannot maintain an action for the wrongful death of his stepson. *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104.

3. *Frazier v. Georgia R., etc., Co.*, 96 Ga. 785. See also *Deni v. Pennsylvania R. Co.*, 6 Pa. Dist. 15.

Parent of Bastard. — Under statutes giving the right of action to widow, husband, father, mother, etc., it is held that neither the mother, *Alabama, etc., R. Co. v. Williams*, 78 Miss. 209, one who marries the mother, *Thornburg v. American Strawboard Co.*, 141 Ind. 443, nor the father, *McDonald v. Pittsburgh, etc., R. Co.*, 144 Ind. 459, of a bastard can sue for its death.

860. V. JURISDICTION AND VENUE. — See note 4.

861. Proper County. — See note 2.

VI. ALLEGATIONS — 1. What Particularity Required. —

See note 3.

862. See note 1.

pieters, 136 Cal. 317, it was held that the action may be brought against individual copartners.

Receiver of Private Corporation. — Under the *Texas* statute the action cannot be maintained against a receiver of a private corporation. *Parker v. Dupree*, (Tex. Civ. App. 1902) 67 S. W. Rep. 185.

860. 4. Rudiger v. Chicago, etc., R. Co., 94 Wis. 191, wherein it was held that the action may be maintained in the state in which the injuries were received, *Stewart v. Baltimore, etc., R. Co.*, 168 U. S. 445; *Boston, etc., R. Co. v. Hurd*, (C. C. A.) 108 Fed. Rep. 116; *Erickson v. Pacific Coast Steamship Co.*, 96 Fed. Rep. 80; *Law v. Western R. Co.*, 91 Fed. Rep. 817; *Boston, etc., R. Co. v. McDuffey*, (C. C. A.) 79 Fed. Rep. 934.

Injury Occurring Within Three Miles of Shore. — An action for a death occasioned by the collision of the defendant's and another vessel, within three miles of the shore of a state, is within jurisdiction of its courts. *Lennan v. Hamburg-American Steamship Co.*, 73 N. Y. App. Div. 357.

A Justice of the Peace has no jurisdiction of the action. *Sponseller v. Cleveland Terminal, etc.*, R. Co., 8 Ohio Dec. 307.

Comity. — *Nicholas v. Burlington, etc.*, R. Co., 78 Minn. 43; *Riley v. Grand Island Receivers*, 72 Mo. App. 280; *Boyle v. Southern R. Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 289; *Wabash R. Co. v. Fox*, 1 Ohio Cir. Dec. 148, 20 Ohio Cir. Ct. 440; *Ott v. Lake Shore, etc.*, R. Co., 10 Ohio Cir. Dec. 85, 18 Ohio Cir. Ct. 395, holding, however, that a recovery cannot be had in an action in *Ohio* for a death resulting from an injury received by the decedent in another state, where the plaintiff could not recover on the facts proved under the law of such state. See also *Wabash R. Co. v. Fox*, 64 Ohio St. 133.

Mexico. — In *Mexican Nat. R. Co. v. Slater*, (C. C. A.) 115 Fed. Rep. 593, it was held that the Mexican laws are so dissimilar from the laws of *Texas* and the common law that, in an action at law for a death occurring in *Mexico*, a

federal court sitting in *Texas* cannot enforce the rights of the plaintiff so as to do substantial justice to the parties.

Federal Courts. — Where a nonresident railway company and its resident servants are sued jointly the former cannot have the case removed to a federal court. *Cincinnati, etc., R. Co. v. Cook*, (Ky. 1902) 67 S. W. Rep. 383. See also *Winston v. Illinois Cent. R. Co.*, (Ky. 1901) 65 S. W. Rep. 13. And see generally REMOVAL OF CAUSES.

In *Chesapeake, etc., R. Co. v. Dixon*, 104 Ky. 608, it was held that a defendant railway company cannot remove a case to the federal court on the ground that it was created under laws of another state and is a citizen thereof, while the plaintiff is a citizen of the state in which the action was brought.

Action by Administrator. — In *Popp v. Cincinnati, etc., R. Co.*, 96 Fed. Rep. 465, it was held that a foreign administrator may maintain an action for the death of a decedent in the federal court in *Ohio* under *Bates's* Annot. Stat. Ohio (1897), § 6135, authorizing the personal representative to bring an action in such a case. See also *Cincinnati, etc., R. Co. v. Thiebaud*, (C. C. A.) 114 Fed. Rep. 918.

Action Against Receiver. — In *Malott v. Shimer*, 153 Ind. 35, it was held that an administrator may maintain the action in a state court, without leave of the federal court, against a receiver appointed by the latter court.

861. 2. Kentucky. — Where an accident occurred in one county and the residence of the intestate was in another where the personal representative qualified, it was held that the Circuit Court of the latter county had jurisdiction. *Louisville, etc., R. Co. v. Cooley*, (Ky. 1899) 49 S. W. Rep. 339.

Louisiana. — *Castille v. Caffery Cent. Refinery, etc., Co.*, 48 La. Ann. 322.

3. Cotton Oil Co. v. Shamblin, 101 Tenn. 263, quoting 5 ENCYC. OF PL. AND PR. 861.

862. 1. Falling Elevator. — In an action for death caused by a falling elevator, a complaint which avers facts

865. *Wilful Negligence.* — See note 1.

2. Necessary Allegations — *a.* IN GENERAL
ing Prior Right to Sue. — See note 5.

866. *b.* ALLEGING STATUTE — Domestic Statute. —

867. *Foreign Statute.* — See note 1.

c. WILFUL NEGLIGENCE. — See note 2.

868. *d.* DEPENDENCE ON DECEASED. — See note

showing the legal duty of the injured party to the defendant, a breach of that duty, and that the injuries complained of were proximately caused by such breach is sufficient on demurrer. *Commercial Club v. Hilliker*, 20 Ind. App. 239.

Management of Train. — In an action against a railway company an averment that the defendant had "wrongfully, carelessly, and negligently run its cars and engine upon and against the deceased, thereby causing his death," is a sufficient averment of negligence. *Illinois Cent. R. Co. v. Davis*, 104 Tenn. 442.

Amended Petition. — Where the general charge of negligence has been made, it need not be repeated in an amended petition alleging failure to give proper signals. *Louisville R. Co. v. Will*, (Ky. 1902) 66 S. W. Rep. 628.

865. 1. *Louisville, etc., R. Co. v. Orr*, 121 Ala. 489.

5. Kansas. — In Kansas, in an action by parents for the death of their son, where no personal representative has been appointed, the petition must allege that no such appointment has been made. *Atchinson Water Co. v. Price*, 9 Kan. App. 884.

Ohio. — In an action in Ohio for a death occurring in another state the complaint need not show who is the legal beneficiary or who must sue in such latter state. *Lake Shore, etc., R. Co. v. Andrews*, 8 Ohio Cir. Dec. 73.

866. **5. Not Allegation of Fact.** — In an action in *New York* by an administrator for a death caused by injuries received in another state, an averment that "under and pursuant to the laws of the state of New York, plaintiff, as such administrator, has a right to commence this action for the benefit of said next of kin" is not an allegation of fact which is admitted by demurrer. *Davidow v. Pennsylvania R. Co.*, 85 Fed. Rep. 943.

Alleging Ordinance. — In an action against a railway company for negligence resulting in death, a complaint

referring to an ordinance showing such negligence, the title, substance, date, and force for passage or publication. *Nohrden v. N. Co.*, 54 S. Car. 492.

Statute of Limitation necessary to allege that brought within the period of the statute of limitation. *Rutland R. Co.*, 71 Vt. 100; *Eureka v. Merrifield*, 9

867. 1. *Louisville, Williams*, 113 Ala. 402.

In Absence of Allegation etc., *R. Co. v. William*

Foreign Decisions. — *Ohio* for a death in a complaint need not show the provisions of such latter state. *Shore, etc., R. Co. v. I. Cir. Dec. 73.*

2. Definiteness of Allegation. — A complaint which avers that "through its servants, employees, * * * was running a train of cars through the wilful negligence of its servants, agents and employees, the cars were run against the deceased while he was upon the defendant's railroad track, and the defendant saw, or of ordinary diligence could have seen, the train from running him and thereby have caused injury, sufficiently neglect. *Coleman v. R. Co.*, (Ky. 1896) 945.

868. **2. Married Daughter.** — It is held that a married woman may maintain an action for the death of her father, since the statute of Texas, art. 3021-3027) does not require that damages can be recovered in a case only where the plaintiff is bound to contribute to the death of the plaintiff. *Texas Martin*, 25 Tex. Civ. A.

3. Thompson v. Cl

868. *f.* KNOWLEDGE — On Part of Defendant. — See note 4.
On Part of Deceased. — See note 6.

g. EXISTENCE OF BENEFICIARIES. — See note 7.

870. See note 1.

Co., 104 Fed. Rep. 845, decided under a *Nebraska* statute.

868. 4. Sufficient Allegations. — In an action against a county for a death that was the result of falling from a defective bridge, a petition which states that the commissioners had knowledge of this defect long prior to the date of the accident is a sufficient allegation of notice of the condition of the bridge. *Hardin County v. Coffman*, 10 Ohio Cir. Dec. 91.

In an action for a death resulting from injuries received on account of a defective sidewalk, a complaint which alleges that the defendant wrongfully and negligently suffered the sidewalk to be and remain in a bad and unsafe condition is sufficient under a plea of the general issue. *Storrs v. Grand Rapids*, 110 Mich. 483.

When Knowledge Need Not Be Alleged. — In an action for killing a child by running over him with a street car, where the complaint shows that there was a straight track and that the child was in plain view of the servant in charge of the car, there need be no specific charge that such servant saw the child. *Elwood Electric St. R. Co. v. Ross*, 26 Ind. App. 258.

6. Lake Shore, etc., R. Co. v. Andrews, 8 Ohio Cir. Dec. 73.

7. California. — Webster v. Norwegian Min. Co., 137 Cal. 399.

Illinois. — Foster v. St. Luke's Hospital, 191 Ill. 94; Chicago Terminal Transfer R. Co. v. Helbreg, 99 Ill. App. 563; Assumption v. Campbell, 95 Ill. App. 521; St. Luke's Hospital v. Foster, 86 Ill. App. 282, affirmed 191 Ill. 94; West Chicago St. R. Co. v. Mabie, 77 Ill. App. 176.

Michigan. — Walker v. Lake Shore, etc., R. Co., 104 Mich. 606.

Nebraska. — Chicago, etc., R. Co. v. Van Buskirk, 58 Neb. 252; Chicago, etc., R. Co. v. Bond, 58 Neb. 385.

New York. — Pizza v. Reid, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 123; Boyle v. Southern R. Co., (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 289.

Ohio. — Halloran v. Cleveland, etc., R. Co., 4 Ohio Dec. (Reprint) 14, Cleve. L. Rec. 12.

Wisconsin. — Brown v. Chicago, etc., R. Co., 102 Wis. 137.

United States. — Davidow v. Pennsylvania R. Co., 85 Fed. Rep. 943.

Necessity for Direct Averment. — Allegations from which it can be inferred that the action is for the benefit of the next of kin are sufficient without a direct averment to that effect. *Hamilton v. Bordentown Electric Light, etc., Co.*, (N. J. 1902) 52 Atl. Rep. 290.

Action by Widow. — Under Laws Mo. 1891, p. 182 (Rev. Stat. Mo. 1899, § 8820), giving the right of action in such case to the widow of the person killed, his lineal heirs, or adopted children, the complaint in an action by the widow need not mention the children of the deceased person. *Hamman v. Central Coal, etc., Co.*, 156 Mo. 232.

Where in an action under Comp. Stat. Neb., c. 21, by a widow, as administratrix, for the death of her husband, the petition alleges that the decedent left six children, giving the names and ages of each, it need not aver that he left a widow. *Chicago, etc., R. Co. v. Oyster*, 58 Neb. 1.

Declaration Not Cured by Verdict. — In *St. Luke's Hospital v. Foster*, 86 Ill. App. 282, affirmed 191 Ill. 94, it was held that a declaration which fails to allege the existence of beneficiaries is not cured by verdict. See also *West Chicago St. R. Co. v. Mabie*, 77 Ill. App. 176.

Widow Not Named as Beneficiary. — Where a certificate of the voluntary relief department of a railroad company provides that recovery in an action against the railroad company shall bar any claim, under the certificate, the widow of a member of such department who sues as administratrix and recovers against the railroad company the full penalty prescribed by statute, cannot afterwards sue on the certificate simply because she was not named in the former action as beneficiary. *Oyster v. Burlington Relief Dept.*, (Neb. 1902) 91 N. W. Rep. 699.

Objections, How Taken. — In *Massachusetts* an objection that the declaration did not allege the existence of beneficiaries cannot be taken for the first time on appeal. *Hicks v. New York, etc., R. Co.*, 164 Mass. 424.

870. 1. Connecticut. — Budd v. Meriden Electric R. Co., 69 Conn. 272.

870. Names of Beneficiaries. — See note 2.

h. REBUTTING CONTRIBUTORY NEGLIGENCE. — See note 4.

871. See note 1.

3. Under Peculiar Statutory Provisions. — See note 1.

872. See note 1.

873. 4. Surplusage and Immaterial Allegations. — See note 1.

874. 5. Allegations of Damages — *a.* GENERALLY. — See note 1.

3, 4.

Kentucky. — *East Tennessee Telephone Co. v. Simm*, 99 Ky. 404, decided under a later statute than that governing the Kentucky case cited to the contrary doctrine in 5 ENCYC. OF PL. AND PR. 869.

Oregon. — *Perham v. Portland Electric Co.*, 33 Oregon 451.

870. 2. *Budd v. Meriden Electric R. Co.*, 69 Conn. 272.

Beneficiaries Not Named. — *Chicago, etc., R. Co. v. Oyster*, 58 Neb. 1.

4. *Illinois Cent. R. Co. v. Davis*, 104 Tenn. 442.

871. 1. *Where Child Was Very Young.* — *Elwood Electric St. R. Co. v. Ross*, 26 Ind. App. 258.

2. *Eureka v. Merrifield*, 9 Kan. App. 579.

Where there Are Two Concurrent Remedies. — A complaint which alleges that the defendant enticed and hired the plaintiff's son to labor for the defendant at his sawmill, and that he "unlawfully placed plaintiff's said son to work among * * * lawless boys at said mill, and where defendant negligently and carelessly and knowingly permitted said minor boys to wrangle and lawlessly fight," and that the son was shot by the employees of the defendant and by its negligence and carelessness, does not state a cause of action under Stat. Ky. (1894), § 4. *Harris v. Kentucky Timber, etc., Co.*, (Ky. 1897) 43 S. W. Rep. 462.

Where Marriage Defeats Right of Action. — Where the petition alleged that the child was six years of age, an averment that he was unmarried was held to be unnecessary. *Baird v. Citizens' R. Co.*, 146 Mo. 265.

872. 1. *Stern v. La Compagnie Generale Transatlantique*, 110 Fed. Rep. 996, citing 5 ENCYC. OF PL. AND PR. 871.

873. 1. *Rigdon v. Temple Water Works Co.*, 11 Tex. Civ. App. 542 (allegation of poverty).

874. 3. *Chicago, etc., R. Co. v. Supp. Pl. & Pr.* — 604

Van Buskirk, 58 Neb. etc., *R. Co. v. Bond*, 51 Chicago, etc., *R. Co. v.* 678.

Action by Administrator. — Complaint by an administrator, *Wis.*, §§ 4255, 4256, where the deceased was unmarried, was seventeen years of age, healthy, capable of money, and that he surviving him, sufficient loss by his death. *Oshkosh Electric Light* Wis. 94.

Indiana. — Where each the complaint avers that left surviving him a wife and infant son, the presumption the widow and the infant to the services of the that such services were both. *Chicago, etc., R.* 155 Ind. 634.

Nebraska. — In an action as administratrix for the husband, a petition alleging the deceased left a wife and wholly dependent upon support sufficiently shows. *Kearney Electric Co. v. Neb.* 390. See also *O. Co. v. Crow*, 54 Neb. 7. allegation that the deceased widow and next of kin sufficient; *Friend v. Bu.* 674.

Texas. — A petition where the plaintiffs are the children of the deceased to their support, his sobriety and industry, and pleads for a judgment for and on account of not defective because *damnum* clause. *Inter R. Co. v. Culpepper*, App. 182.

4. Punitive Damages. — See note 1.

875. Particulars Constituting Loss. — See note 1.

876. *b.* LOSS OF SERVICES. — See note 2.

877. 6. Allegations and Proof — *a.* OF NEGLIGENCE — Where Definite Act Is Alleged. — See note 1.

General Allegation. — See note 4.

879. *b.* OF DAMAGES. — See note 1.

c. OF EXISTENCE AND NAMES OF BENEFICIARIES. — See note 2.

is no allegation of punitive damages, compensatory damages alone can be recovered. *Gillilan v. McCrillis*, 84 Mo. App. 576.

875. 1. District of Columbia *v.* Wilcox, 4 App. Cas. (D. C.) 90; *Erb v. Morasch*, 8 Kan. App. 61; *Tucker v. Draper*, 62 Neb. 66; *Omaha, etc., R. Co. v. Crow*, 54 Neb. 747; *Kearney Electric Co. v. Laughlin*, 45 Neb. 390; *Haug v. Great Northern R. Co.*, 8 N. Dak. 23; *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631.

Services of Peculiar Value. — Where in an action by a husband for the death of his wife damages are sought for services of the wife that were peculiarly valuable, such services and their value should be alleged. *Gulf, etc., R. Co. v. Younger* (Tex. Civ. App. 1897) 40 S. W. Rep. 423.

876. 2. Loss of Society of Deceased. — It is sufficient to allege that the plaintiff has been damaged "by reason of the loss of the service and society and fellowship" of the deceased in the sum of five thousand dollars. *Tucker v. Draper*, 62 Neb. 66.

In an Action by a Mother for the death of her minor son, the petition need not allege the loss of services to her. *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104.

877. 1. *Johnson v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1902) 66 S. W. Rep. 906.

4. Management of Engine. — In an action for the death of one resulting from injuries received while riding on a handcar alleged to have been run against by the defendant's engine, an allegation that the defendant ran such engine upon and against said handcar without ringing the bell or blowing the whistle or giving any warning whatever is a general allegation under which the plaintiffs may introduce any evidence tending to prove negligence by the defendant in failing to give warning of the approaching engine.

Turner v. Norfolk, etc., R. Co., 40 W. Va. 675.

Petition Aided by Answer. — Where the petition fails to allege that the defendant did not use due care to prevent the accident after the deceased was seen on the track by its employees, such defect is supplied by an allegation in the answer that "defendant's servants used every effort to stop said engine and prevent an accident." *International, etc., R. Co. v. Sein*, 11 Tex. Civ. App. 386.

879. 1. District of Columbia *v.* Wilcox, 4 App. Cas. (D. C.) 90.

But if special damages have been sustained, such damages must be alleged and proved. *Thompson v. Chicago, etc., R. Co.*, 104 Fed. Rep. 845.

Amount of Damages. — In an action by a father for the death of his son, it was held that the plaintiff need only allege the amount of his damages in order to prove his age and expectancy of life and that he had no other means of support than the services of the deceased. *International, etc., R. Co. v. Knight*, 91 Tex. 660.

Loss of Services. — Where, in an action for the death of a mother, the only damages alleged were loss of services, and the plaintiffs testified that they paid the mother for the services she performed for them, it was held that no recovery could be had. *Galveston, etc., R. Co. v. Polk*, (Tex. Civ. App. 1901) 63 S. W. Rep. 343.

2. Number of Beneficiaries. — Where a declaration by an administrator alleged that the next of kin of the decedent were his mother, brother, and sister, it was held that the plaintiff might show that the deceased left a brother and sister surviving him. *Freeman v. Illinois Cent. R. Co.*, 107 Tenn. 340.

In *Illinois Cent. R. Co. v. Davis*, 104 Tenn. 442, it was held that in an action by a widow for the death of her husband, proof of the number, ages, and sex of her children was admissible.

879. d. OF PARTICULAR FACTS. — See note 3.

880. VII. AMENDMENT — 1. In General. — See See also AMENDMENTS.

2. Adding Parties. — See note 4.

881. 3. Alleging Existence of Beneficiaries. — See

882. 4. Alleging Foreign Statute. — See note 2.

5. Giving Further Particulars. — See note 4

though the children were not mentioned in the declaration.

An allegation that "decendent leaves heirs and next of kin who are entitled to damages, and who have been damaged," is sufficient to permit evidence to establish who were the proper beneficiaries, if any, and how damaged by the decedent's death. *Commercial Club v. Hilliker*, 20 Ind. App. 239.

Mother as Next of Kin. — In *Kansas*, in an action by a mother as next of kin, the plaintiff must prove that there has been no personal representative appointed. *Atchison, etc., R. Co. v. Judah*, 10 Kan. App. 577, 62 Pac. Rep. 711.

879. 3. Descriptio Personæ. — Where the complaint describes the deceased as a convict such description must be proved. *Burkalew v. Tennessee Coal, etc., R. Co.*, 112 Ala. 146.

880. 1. Amendment Relates to Commencement of Action. — *Louisville, etc., R. Co. v. Pointer*, (Ky. 1902) 69 S. W. Rep. 1108.

2. See generally, supporting the rule of the text, *Sawyer v. Perry*, 88 Me. 42; *Lower v. Segal*, 60 N. J. L. 99; *Fitzhenry v. Consolidated Traction Co.*, 63 N. J. L. 142.

Alleging Time of Filing Original Petition. — Where the plaintiff filed an amended petition which alleged that the deceased was killed on a certain date, which date was less than six months prior to the filing of the original petition, it was held that it was not necessary to allege further that the original petition was filed within six months of the death. *Barth v. Kansas City El. R. Co.*, 142 Mo. 535.

Where Plaintiff Has Sued in Wrong Capacity. — In *Van Doren v. Pennsylvania R. Co.*, (C. C. A.) 93 Fed. Rep. 260, it was held that where one who was both widow and administratrix of the decedent sued in the wrong capacity, the court should permit an amendment.

4. Legal Plaintiff Omitted

Where, in an action by children for the death of their band and father, the cross showed that the mother was living, it was held that the plaintiffs should have requested postponement of the trial until amended, joining the mother, *veston, etc., R. Co. v. Civ. App.* 1897) 43 S. W.

Where Action Survives

Where Action Survives. v. Brooklyn Heights R. 145, it was held that where brought by the sole adm next of kin for the death of a decedent, upon the death of the decedent his personal representative should be substituted as plaintiff.

Pending Rehearing.

Pending Rehearing. — *1 Co. v. Partenheimer*, 15 was held that where an action for the death of an intestate, the widow of could not be substituted pending a rehearing in court.

881. 1. Chicago Term R. Co. v. Helbreg, 99 N. J. L. 109; *Nohrden v. North Eastern S. Car.* 492.

A husband who sues for the death of his children for the death of his children may amend his petition so that it more clearly appears that the children are the real parties in interest. *Bourriague*, 105 La. 77.

Effect of Statute of Limitations

an amendment is barred. *Foster v. St. Luke's Hosp.* 94; *Foley v. Suburban R. Co.* App. 108.

882. 2. Effect of Statute of Limitations. — *Boston, etc., R. Co. v. C. C. A.* 108 Fed. Rep. 108; *Louisville, etc., R. Co. v. C. C. A.* 108 Fed. Rep. 108; *Ky.* 1902) 69 S. W. Rep. 108.

4. Louisville, etc., R. Co. v. C. C. A. 108 Fed. Rep. 108; *Ky.* 1895) 32 S. W. Rep. 108; *Kimball, (C. C. A.)* 845, holding that an amendment to sue should be permitted.

884. IX. PLEA OR ANSWER — Challenging Plaintiff's Appointment as Administrator. — See note 4.

Pleading Statute of Limitations. — See note 7.

[Replication. — See note 7a.]

885. X. INSTRUCTIONS — 2. As to Negligence — Following Allegations. — See notes 3, 4.

Changing Cause of Action. — In an action founded on the alleged negligence of a railroad engineer, an amendment which omitted an averment of drunkenness and incompetency, and alleged that the engineer was the vice-principal of the railroad company, was held to state a new cause of action. *Texas Cent. R. Co. v. Frazier*, (Tex. Civ. App. 1896) 34 S. W. Rep. 664.

884. 4. *Hughes v. Richter*, 161 Ill. 409; *Chicago, etc., R. Co. v. Smith*, 180 Ill. 453, holding that the representative capacity of the plaintiff cannot be put in issue by an instruction.

Proof of Marriage. — Where the answer specially denies the plaintiff's capacity to sue as widow and denies that she had ever been the wife of the decedent, averring that at the time of her marriage to him she knew that he was already married, proof of the former marriage will be permitted. *Albinst v. Yazoo, etc., R. Co.*, 107 La. 133.

Unverified Denial. — In *Kansas*, in an action by a widow to recover for the death of her husband, an allegation of the petition that no personal representative of the estate had been appointed is put in issue by an unverified denial. *Vaughn v. Kansas City, etc., R. Co.*, (Kan. 1902) 70 Pac. Rep. 602.

7. In *New Jersey* a question as to the time of the commencement of an action may be raised by a plea in bar. *Margaret County v. Pacific Coast Borax Co.*, 67 N. J. L. 48.

7a. Release by Foreign Administrator. — Where the plea sets up a release by a foreign administrator, a replication alleging fraud in the appointment of such foreign administrator, and further that the deceased at the time of his death was a resident of the state in which the action was brought, and that the cause of action arose in such state and has always been outside of the state in which another administrator was appointed, is good. *Pisano v. B. M. & J. F. Shanley Co.*, 66 N. J. L. 1.

Defendant Not Joint Tortfeasor. — A replication that the defendant and another were joint tortfeasors is good as a traverse to an averment in the plea that the acts complained of in the declaration were committed by the defendant and another party. *Pisano v. B. M. & J. F. Shanley Co.*, 66 N. J. L. 1.

885. 3. A charge which requires the jury to disregard an allegation that the deceased went on the defendant's track to save her child is bad. *Louisville, etc., R. Co. v. Orr*, 121 Ala. 489.

An instruction as to the care exercised by the deceased person at the time of the injury need not be couched in the exact language of the petition, where it is no enlargement thereon. *Baird v. Citizens' R. Co.*, 146 Mo. 265.

Where a complaint alleges death from two negligent acts or omissions, an instruction that if death was caused by either, and the other necessary facts exist to authorize a recovery by the plaintiff, he may recover on the one so established is proper where the "other necessary facts" are properly defined in other parts of the charge. *Texas, etc., R. Co. v. Bell*, (Tex. Civ. App. 1897) 39 S. W. Rep. 636.

Where it was alleged that the accident resulting in death was caused by failure to make proper repairs and by excessive speed, an instruction that if the jurors believed from the evidence that the unrepaired track or excessive speed caused the accident they should find for the plaintiffs, though it should also appear that a broken axle contributed to cause the accident; but that, if they should find that the accident was caused solely by the broken axle, they should find for the defendant, was held not to ignore the allegation that the accident was due to the unrepaired condition of the track and to excessive speed. *Johnson v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1902) 66 S. W. Rep. 906.

4. Where the evidence was confined to the acts of negligence alleged in the petition, it was not prejudicial error for

886. 3. As to Damages—In General.—See note 1.

the instructions to confine the jury to such allegations, where the verdict shows that the jury found on the acts alleged. *Louisville R. Co. v. Will*, (Ky. 1902) 66 S. W. Rep. 628.

886. 1. It is the duty of the court to tell the jurors what elements they should take into consideration in estimating the plaintiff's damages, and an instruction that requires the jury to consider the deceased's age, habits of industry, capacity for labor, and probable earnings is proper. *Knight v. Sadtler Lead, etc., Co.*, 91 Mo. App. 574.

"The measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy," was held to be a proper instruction. *Mendenhall v. North Carolina R. Co.*, 123 N. Car. 275. See also *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256.

An instruction that if the evidence proves that the deceased was contributing to the support and maintenance of his parents they are entitled to damages is erroneous, since it renders it unnecessary for the jury to look to the willingness and ability of the deceased to make such contributions in the future; and such error is not cured, but is only intensified, by an instruction that the measure of damages is the pecuniary value of the maintenance and support of the parents by the deceased. *Galveston, etc., R. Co. v. Power*, (Tex. Civ. App. 1899) 54 S. W. Rep. 629.

In *Pennsylvania*, in an action by a husband to recover for the death of his wife, a charge that the plaintiff can recover only the money value of the wife's services to him, aside from any sentimental consideration, is proper. *Waechter v. Second Ave. Traction Co.*, 198 Pa. St. 129.

Failure to Request Enumeration of Elements.—In *Malott v. Shimer*, 153 Ind. 35, it was held that an instruction limiting the recovery to pecuniary damages was not objectionable because it failed to enumerate the elements allowable to such pecuniary damages, where such enumeration had not been requested.

Elements Not Alleged.—In *Freeman*

v. Illinois Cent. R. Co., 107 Tenn. 340, it was held that a charge that the mother and brother and sister of the deceased were not entitled to his wages, as a matter of law, and that they were not dependent upon him in any sense, need not be given where no such claim was made in the declaration and damages were not sought on this ground.

Probable Expenses.—While it is proper for the jury to consider the probable expenses of the deceased had he lived, yet the failure to instruct them to do so does not constitute error. *Southern R. Co. v. Evans*, (Ky. 1901) 63 S. W. Rep. 445.

Assuming that Deceased Was Means of Support.—An instruction that the jurors may assess damages at such sum as they believe from the evidence to be a just compensation for the loss of the means of support sustained by the next of kin is erroneous in that it assumes that the deceased was a means of support to the plaintiff. *Illinois Cent. R. Co. v. Bartle*, 94 Ill. App. 57. For proper instructions as to the measure of damages in such a case see *Snyder v. Lake Shore, etc., R. Co.*, (Mich. 1902) 91 N. W. Rep. 643, an action for the death of a boy eleven years of age; *O'Fallon Coal, etc., Co. v. Laquet*, 198 Ill. 125, where the jury was instructed to consider the pecuniary benefits which the plaintiff might have derived from the deceased had the deceased not been killed.

Actual and Exemplary Damages.—An instruction to find such sum as will reasonably and fairly compensate the estate of the deceased for the destruction of his power to earn money and, if the negligence of the defendant was gross, to find such further sum as punitive or exemplary damages as the evidence warrants, is not improper. *Louisville, etc., R. Co. v. Kelly*, 100 Ky. 421. See also *Cincinnati, etc., R. Co. v. Cook*, (Ky. 1902) 67 S. W. Rep. 383.

An instruction to find such damages as will punish the defendant and furnish an example to deter others from like practices is improper where there was not gross negligence. *Southern R. Co. v. Barr*, (Ky. 1900) 55 S. W. Rep. 900.

Apportionment of Damages.—In an action by parents for the death of a child, the failure of the court to in-

886. Tending to Influence Amount. — See notes 2, 3, 4.

struct the jury to apportion damages is not ground for reversal where no such instruction was requested. *Missouri, etc., R. Co. v. Evans*, 16 Tex. Civ. App. 68.

For Particular Instructions Approved see *Chicago, etc., R. Co. v. Beaver*, 199 Ill. 34; *Anthony Ittner Brick Co. v. Ashby*, 198 Ill. 562; *Chicago, etc., R. Co. v. Kelly*, 182 Ill. 267; *Louisville, etc., R. Co. v. Millet*, (Ky. 1898) 46 S. W. Rep. 498; *Chesapeake, etc., R. Co. v. Lang*, (Ky. 1897) 40 S. W. Rep. 451; *Louisville, etc., R. Co. v. Kelly*, 100 Ky. 421; *McLamb v. Wilmington, etc., R. Co.*, 122 N. Car. 862; *Houston, etc., R. Co. v. White*, 23 Tex. Civ. App. 280; *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72.

For Particular Instructions Disapproved, see *Baltimore, etc., R. Co. v. Golway*, 6 App. Cas. (D. C.) 143; *Southern R. Co. v. Barr*, (Ky. 1900) 55 S. W. Rep. 900; *Louisville, etc., R. Co. v. Shumaker*, (Ky. 1899) 53 S. W. Rep. 12; *Gulf, etc., R. Co. v. Southwick*, (Tex. Civ. App. 1895) 30 S. W. Rep. 592; *Chicago, etc., R. Co. v. Porterfield*, 19 Tex. Civ. App. 225; *Galveston, etc., R. Co. v. Worthy*, 87 Tex. 459.

886. 2. What Language Proper. — An instruction to assess damages "at whatever sum, in your opinion, he is entitled to, not exceeding the sum of five thousand dollars," is improper in not giving a basis on which damages are to be ascertained. *Hunt v. Kille*, (C. C. A.) 98 Fed. Rep. 49. See also *Locher v. Kluga*, 97 Ill. App. 518.

An instruction that permits the jury to find any amount that it may deem fair and just, not exceeding a maximum of five thousand dollars, regardless of any pecuniary loss by the plaintiff, is improper. *Denver, etc., R. Co. v. Spencer*, 25 Colo. 9.

3. Alabama Mineral R. Co. v. Jones, 114 Ala. 519; *Harrison v. Sutter St. R. Co.*, 116 Cal. 156; *Jones v. McMillan*, (Mich. 1901) 88 N. W. Rep. 206; *Walker v. Lake Shore, etc., R. Co.*, 104 Mich. 606; *Pickett v. Wilmington, etc., R. Co.*, 117 N. Car. 616. In these cases the instructions held to be improper were based on annuity tables.

In *Western, etc., R. Co. v. Bussey*, 95 Ga. 584, an instruction as to the measure of damages which failed to charge that in the annuity tables there were two columns, one designed to

compute interest at six per cent. and the other at seven, was held not to be ground for reversal where the damages assessed were not excessive.

4. An instruction calling the attention of the jury to the amount claimed in the petition will not be ground for reversal unless it appears that the verdict was affected by it. *International, etc., R. Co. v. Sein*, 11 Tex. Civ. App. 386.

An instruction to find such sum as the evidence shows the plaintiffs would have received from the assistance of the deceased had he not been killed is erroneous, and is not cured by a further instruction to find an amount, under the instructions given, that will compensate the plaintiffs for loss sustained by the killing of the deceased. *Ft. Worth, etc., R. Co. v. Sivells*, (Tex. Civ. App. 1902) 67 S. W. Rep. 517.

An instruction which tells the jury to assess damages without any reference to the evidence is erroneous; so is an instruction that leaves the jury free to assess the damages based upon a reasonable expectation of benefit, as of right or otherwise, which the next of kin might have received from the continuance of the life of the deceased, without proof that such collateral kindred were in the habit of receiving such pecuniary aid from the deceased. *Locher v. Kluga*, 97 Ill. App. 518.

In *Sclurba v. Metropolitan R. Co.*, 73 N. Y. App. Div. 170, it was held to be erroneous to instruct that "if the jury find that the plaintiff is entitled to a verdict, a verdict for more than nominal damages must be given," since in this class of cases the measure of damages under Civ. Code Pro. N. Y., § 1904, is a pecuniary loss, to be determined by the jury.

Value of Future Contributions. — In an action by parents for the death of a son it was held to be error to instruct the jury to consider what would be the amount of the pecuniary aid the parents would have received from the decedent had he not been killed, and to refuse to instruct as to the value of such amount which had been contributed from time to time. *Ft. Worth, etc., R. Co. v. Morrison*, 93 Tex. 527.

An instruction that requires the jury to allow the amount of the pecuniary contributions which the deceased, had

886. [4. Application of General Rules. — In the note are set forth cases applying general rules as to instructions in actions for death by wrongful act. 4a.]

he lived, would have made to his mother after becoming of age is erroneous, since the true measure of damages is compensation for the loss sustained by the plaintiff by the death of her son, and what sum would give such compensation is a question for the jury. *International Light, etc., Co. v. Maxwell*, (Tex. Civ. App. 1901) 65 S. W. Rep. 78. See also *Ft. Worth, etc., R. Co. v. Hyatt*, 12 Tex. Civ. App. 435.

In an action for the death of a mother, an instruction that the jury may allow for the probable loss of any benefit of a pecuniary value which a child would probably have received from its mother on its arrival at majority is not erroneous. *Redfield v. Oakland Consol. St. R. Co.*, 110 Cal. 277.

An instruction that the amount of the damages to which the plaintiffs would be entitled would be "the money value, if any, of the life of the dead person," instead of "the money value to the plaintiffs of the life of the dead person," is erroneous. *Houston, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1901) 66 S. W. Rep. 72.

Where the court charged that the father could compel the son to support him in his old age and that the jury had the right to consider that fact, it was held to be error to refuse a requested instruction that the father has no claim on the earnings of the son beyond the age of twenty-one years, except in case the father becomes poor and the son is shown to have means. *Keenan v. Brooklyn City R. Co.*, 145 N. Y. 348.

Solatium. — An instruction to consider the ability of the deceased to earn money and to support, maintain, care for, and protect his wife and children, and to educate and train the latter, and the loss to the wife and children caused by being deprived of the use and comfort of his society, was held not to include a *solatium*. *Northern Pac. R. Co. v. Freeman*, (C. C. A.) 83 Fed. Rep. 82.

Where the declaration alleged that the next of kin "have been and are" deprived of the "comfort, assistance, companionship, and support" of the deceased, an instruction that if the jury

should find that the plaintiff had proved his case as alleged in his declaration they should assess damages in such sum as they should find had been proved was held not to be open to the objection that it allowed damages as a *solatium*, where there were other instructions limiting the recovery to the actual pecuniary loss. *Wabash R. Co. v. Smith*, 162 Ill. 583.

Where the complaint alleges damages for pecuniary loss only, an instruction to assess the damages at whatever sum the jury "should deem just and reasonable from all the evidence in the case" does not authorize an assessment of damages by way of *solatium*. *Chicago, etc., R. Co. v. Kneirim*, 152 Ill. 458.

Loss of Society. — In *Knight v. Sadtler Lead, etc.*, Co., 75 Mo. App. 541, which was an action by a wife for the death of her husband, an instruction permitting a recovery for the loss of the society of the deceased was held to be erroneous.

Action by Husband — Interest of Child. — In an action by a husband as administrator, on behalf of himself and his minor child, for the negligent killing of his wife, it is error to instruct the jury to consider the child's interest in its mother's life. *Chattanooga Electric R. Co. v. Johnson*, 97 Tenn. 667.

Mentioning Mother. — Where there was some question as to whether the statute authorized the mother to receive any portion of the verdict, it was held that an instruction "if you find for the plaintiff, you may say in your verdict what proportion of the sum so found shall go to the father or mother of the deceased," though erroneous, was not prejudicial as influencing the jury to consider the needs of the mother, in view of the fact that there was also a proper instruction as to the measure of damages. *Louisville, etc., R. Co. v. Pointer*, (Ky. 1902) 69 S. W. Rep. 1108.

Father and Mother. — It is not error to designate in the instruction the persons for whom the action is brought as the father and mother of the deceased. *Leiter v. Kinnare*, 68 Ill. App. 558.

886. 4a. In an action for the death of a girl twelve years of age it is not error

887. XI. VERDICT — 1. Apportionment of Damages. — See note 1.

2. Special Findings — What Consistent with General Verdict. — See note 3.

888. XIII. OBJECTIONS ON APPEAL — For Defective Allegations. — See note 5.

to instruct the jurors that with reference to the care that she took for her own safety at the time of the injury they should consider her age, capacity, and discretion. *Baltimore, etc., R. Co. v. Then*, 159 Ill. 535.

Where it has not been alleged that the act of the deceased at the time when he received the injury which resulted in death was rash or reckless, it is error to inject such issue into the case by instructions. *Louisville, etc., R. Co. v. Orr*, 121 Ala. 489.

An instruction that a recovery might be had if the deceased was led by the absence of signals or warnings to believe that he could cross the track in safety, and while attempting to do so, without his fault or negligence, was struck and killed by a running train solely on account of the negligence of the defendant, was held to be not erroneous. *Schweinfurth v. Cleveland, etc., R. Co.*, 60 Ohio St. 215.

Pecuniary Condition. — An instruction that if the jury believes from the evidence that the deceased left surviving him a widow and children, and that by the death of the deceased such widow and children have been and are deprived of their means of support, then in law the plaintiff is entitled to recover, is not objectionable in that it places the right of recovery upon the pecuniary condition of the widow and next of kin of the deceased. *Economy Light, etc., Co. v. Stephen*, 187 Ill. 137.

An instruction to find such sum as the beneficiaries might have received from the assistance or earnings of the deceased had he not been killed is not erroneous where accompanied by an instruction that the feeling of the beneficiaries, loss of society, or any other fact than the pecuniary injuries cannot be considered. *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229.

The Question of Due Care is for the jury. See *Willey v. Boston Electric Light Co.*, 168 Mass. 40; *Houlihan v. Connecticut River R. Co.*, 164 Mass. 555; *Hicks v. New York, etc., R. Co.*,

164 Mass. 424. See also *International, etc., R. Co. v. Culpepper*, 19 Tex. Civ. App. 182.

"Reasonable" or "Ordinary" Care. — In an action for the death of a locomotive fireman caused by the falling of a rock or mass of dirt on the track of the defendant, an instruction that if the jury should believe from the evidence that at the time when the accident occurred the section foreman could have known by "reasonable care" that the track was in a dangerous and unsafe condition was held not to be objectionable because the court did not use the words "ordinary care." *Louisville, etc., R. Co. v. Pointer*, (Ky. 1902) 69 S. W. Rep. 1108.

887. 1. In *International, etc., R. Co. v. Johnson*, 23 Tex. Civ. App. 160, it was held that a verdict awarding damages in specified amounts to each plaintiff separately will support a judgment. See also *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631, wherein it was held that the manner of apportioning damages is a question exclusively for the jury.

Apportionment Void in Part. — Where a judgment is for damages to be divided *pro rata* between minor children and adult children who are not entitled to recover, the appellate court will not award the entire damages to the minor children, but will award to them only their *pro rata* part. *International, etc., R. Co. v. DeBajligethy*, 9 Tex. Civ. App. 109.

3. Where the general verdict is not in irreconcilable conflict with the answers to the interrogatories it must stand, as all reasonable presumptions in support of the general verdict will be indulged. *Chicago, etc., R. Co. v. Thomas*, 155 Ind. 634.

888. 5. *Hamman v. Central Coal, etc., Co.*, 156 Mo. 232.

Suing as Administrator. — A refusal to permit an amendment showing that the plaintiffs had qualified as domiciliary administrators is reviewable on appeal or writ of error from a judgment of dismissal. *Hodges v. Kimball*, (C. C. A.) 91 Fed. Rep. 845.

889. *Damages.* — See note 1.

XIV. ABATEMENT — 1. *By Death of Plaintiff.* — See notes 2, 3.

890. *Action by Father and Mother.* — See note 1.

2. *By Death of Beneficiaries.* — See note 2.

3. *By Death of Defendant.* — See note 3.

889. 1. *Turner v. Norfolk, etc., R. Co., 40 W. Va. 675.* See also *Kuhn v. Delaware, etc., R. Co., 92 Hun (N. Y.) 74.*

Province of Court. — While an appellate court cannot assess damages, it may express an opinion as to the amount beyond which the verdict should be deemed fairly wrong. *Conley v. Maine Cent. R. Co., 95 Me. 149.*

2. *In Georgia,* where the mother dies without bringing an action for the death of her son, such action does not survive to her administrator. 2 Code Ga., § 3825, providing for the survival to the personal representative of such an action, applies only to a cause already begun. *Frazier v. Georgia R., etc., Co., 101 Ga. 77.*

In Kentucky an action by a father as administrator, under Stat. Ky. (1894), § 6, for the death of his son does not abate upon the death of the father, but may be revived in the name of the succeeding administrator. *Thomas v. Maysville Gas Co., (Ky. 1902) 66 S. W. Rep. 398.*

In Louisiana the right of action survives in case of death in favor of the minor children and widow of the deceased or either of them; and in default of these, in favor of the surviving father or mother, or either of them, for the space of one year from death; but the statute is strictly construed, and hence where the father had begun an action and died, the action does not survive to the minor children of the deceased. *Chivers v. Roger, 50 La. Ann. 57.*

In Huberwald v. Orleans R. Co., 50 La. Ann. 477, it was held that where the widow died without bringing an action for the death of her husband the major heirs could not maintain such action, as it could not be maintained by an heir who was a minor at the death of her mother, and who did not bring the action before coming of age.

In Pennsylvania, where a father brings an action for the death of his daughter and dies before the trial, his personal representative may be substi-

tuted as plaintiff. *Haggerty v. Pittston, 17 Pa. Super. Ct. 151.*

In Wisconsin, where a widow who is the only beneficiary of the deceased dies pending an action by her for his death, such action abates and cannot be revived. *Schmidt v. Menasha Woodenware Co., 99 Wis. 300.*

Objection that the Cause of Action Did Not Survive may be taken at the trial, and is not waived by the defendant's attorney consenting to an order of revival. *Mundt v. Glokner, (Supm. Ct. Tr. T.) 20 Misc. (N. Y.) 63.*

3. *Louisville, etc., R. Co. v. Bean, 94 Tenn. 388; Sanders v. Louisville, etc., R. Co., (C. C. A.) 111 Fed. Rep. 708.*

Death of Representative. — In *New York* the action cannot, upon the death of the administrator, be continued in the name of his executor. The proper course is to procure the appointment of a successor to the administrator and continue the action in the name of such successor. *Hodges v. Webber, 65 N. Y. App. Div. 170.* See also *Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145.*

And an action brought by a father who is also the sole next of kin of the deceased as administrator abates on such father's death, and cannot be revived by an administrator *de bonis non* of the son. *Mundt v. Glokner, (Supm. Ct. Tr. T.) 20 Misc. (N. Y.) 63.*

890. 1. *Senn v. Southern R. Co., 124 Mo. 621.*

2. *Cooper v. Shore Electric Co., 63 N. J. L. 558; Texas Loan Agency v. Fleming, 18 Tex. Civ. App. 668.*

3. See *contra, Hudson v. Adin, 4 Ohio Dec. (Reprint) 211, 1 Cleve. L. Rep. 122.*

Death Before Commencement of Action — *Colorado.* — In *Letson v. Brown, 11 Colo. App. 11,* it was held that under a statute which provides that all actions at law except trespass for injuries to the person shall survive, an action cannot be maintained against the administrators of the wrongdoer for the wrongful death of another, where the wrongful act resulted in the death of the wrongdoer.

DEBT.

- 896. II. WHEN ACTION LIES — 1. In General.** — See note 2.
903. 2. On Contracts — c. SPECIALTIES — (1) Generally. — See note 5.
904. (2) On Bonds. — See note 1.
907. 4. On Statutes — a. PENALTIES. — See notes 1, 2, 3.
908. b. TAXES. — See note 1.
914. IV. PLEADINGS — 2. Declaration — a. IN GENERAL. — See note 1.
917. c. DEBT — (2) Certainty of Description — Disclosing Right of Action. — See note 1.

896. 2. At Common Law an action of debt would lie on a debt appearing by record, or by any other specialty, such as a contract under seal; and would also lie for a definite sum of money due by simple contract. *Hilton v. Guyot*, 159 U. S. 113.

908. 5. McCordell v. Williams, 19 R. I. 701.

904. 1. Recognizance Not Filed. — In *New Hampshire* debt is the proper form of action in the Supreme Court upon a recognizance not filed and made a record. *State v. Wheeler*, 67 N. H. 511.

907. 1. Illinois. — *Robley v. Culwell*, 69 Ill. App. 272, in which case the court said: "Debt is the appropriate action for the recovery of a penalty provided by statute."

United States. — U. S. v. *Younger*, 92 Fed. Rep. 672, citing 5 ENCYC. OF PL. AND PR. 907.

Character of Action — Civil Rather than Criminal. — *Lane v. Frake*, 70 Ill. App. 303.

2. Rhode Island. — *MacDonald v. New York, etc., R. Co.*, 23 R. I. 558, wherein it was held that where a statute (Act R. I., June 25, 1836) provides that damages for loss by fire communicated from the vehicles of a railroad corporation shall be recoverable in an action of debt, a demurrer to a declaration in debt to recover such damages will not lie.

3. Alabama. — *Burns v. Reeves*, 127 Ala. 127.

Cutting Trees. — An action of debt properly lies to recover the statutory

penalty for cutting trees. *Higdon v. Kennemer*, 120 Ala. 193.

908. 1. State v. Fleming, 112 Ala. 179, citing 5 ENCYC. OF PL. AND PR. 908, 909, and holding that debt is the proper action to recover a license tax imposed upon the business of retailing liquor.

Tax upon Express Company. — An action of debt lies to recover a municipal license tax upon express companies. *Southern Express Co. v. Tuscaloosa*, 132 Ala. 326.

License Fees for Erecting Poles and Wires. — An action of debt is the appropriate remedy to recover license fees charged against a telegraph company in respect of its poles and wires, by virtue of municipal ordinances. *Philadelphia v. Atlantic, etc., Telephone Co.*, 109 Fed. Rep. 55.

Corporation Surplus. — An action of debt will lie to recover from a railroad corporation the surplus of its net receipts exceeding ten per cent. of its expenditures, which surplus is, by the terms of the franchise, payable into the treasury of the state. *State v. Manchester, etc., R. Co.*, 69 N. H. 35.

914. 1. Ad Damnum Omitted. — Where an amended declaration contains no *ad damnum* it may be regarded as an additional count, and the *ad damnum* in the original may be regarded as applying to the latter declaration. The objection cannot be raised for the first time upon appeal. *Forsyth v. Vehmeyer*, 176 Ill. 359.

917. 1. Rynders v. Coxie, 80 Ill. App. 629.

918. *Debet and Detinet.* — See note 1.

d. BREACH. — See note 2.

920. *f.* SPECIAL AVERMENTS. — See note 1.

921. *g.* JOINDER OF COUNTS. — See note 1.

h. DAMAGES. — See note 2.

922. *5.* Pleas — *a.* ON SIMPLE CONTRACTS — (1) *Nil Debet.* — See note 4.

923. (3) *Payment.* — See note 1.

924. *b.* ON SPECIALTIES — (2) *Nil Debet.* — See note 2.

Indorsement of Note. — The use of the word "indorse" will operate as the word "assign" in pleading the assignment of a nonnegotiable note. *Smoot v. McGraw*, 48 W. Va. 144.

918. 1. Appeal Bond. — A declaration upon an appeal bond properly and accurately describes an action of debt where, in the commencement of the pleading, it is said that the plaintiffs complain of the defendants "of a plea that they render to the plaintiffs the sum of three hundred dollars which they owe and unjustly detain from the plaintiffs." *Rynders v. Coxle*, 80 Ill. App. 629.

2. Breach by Transferees of Note. — The declaration must contain a breach of obligation or duty, a wrong done, to give cause of action, which wrong or breach of duty, in the case of a promissory note, is the nonpayment of the debt; and an averment of nonpayment being essential, if the note has passed through several hands a declaration must be averred that it was not paid to any of those who had authority to receive payment. *Smoot v. McGraw*, 48 W. Va. 144.

920. 1. Authority to Bring Action. — In *Maine*, under a statute providing that the mayor and treasurer of cities, or the selectmen of any town, or assessors of any plantation, to which a tax is due, "may, in writing, direct an action of debt to be commenced in the name of such city, or of the inhabitants of such town or plantation, against the party liable," it was held in *Wellington v. Small*, 89 Me. 154, that such written direction was necessary to the maintenance of the action and must be alleged in the writ.

921. 1. Joinder of Assumpsit with Debt. — In an action of debt to recover the statutory penalty for cutting trees on the plaintiff's land, a count in assumpsit for the value of the timber cut cannot be introduced by amendment,

as counts *ex contractu* and *ex delicto* may not be joined in the same complaint. *Higdon v. Kennemer*, 120 Ala. 193.

Joinder of Trespass with Debt. — In an action of debt to recover the statutory penalty for cutting trees upon the plaintiff's land, a count for the recovery of damages for the trespass cannot be introduced by amendment, as it would consist of a radical departure from the cause of action stated in the original complaint. *Higdon v. Kennemer*, 120 Ala. 193.

2. Failure to Lay Sufficient Damages. — The failure to lay damages large enough to cover both the debt and damages is an irregularity of form rather than substance, and advantage can be taken thereof only by urging it at the time of entering judgment and thus giving to the plaintiff an opportunity to amend. *Grand Lodge, etc. v. Bagley*, 164 Ill. 340.

922. 4. Hughes v. Kelly, (Va. 1898) 30 S. E. Rep. 387.

Execution. — In *Virginia* the execution of a promissory note is not put in issue by a plea of *nil debet*, the statute requiring an affidavit to be filed denying such execution when alleged in the declaration. *Clason v. Parrish*, 93 Va. 24.

The Assignment of a promissory note can be disputed under a plea of *nil debet*. *Clason v. Parrish*, 93 Va. 24.

923. 1. An Account of Payments need not be filed to admit proof of general payments. *Lawson v. Zinn*, 48 W. Va. 312.

924. 2. When Issue Joined After Plea. — While *nil debet* is not a correct plea, if tested by a demurrer, in an action upon a sealed instrument, yet if issue is joined upon it, it puts the plaintiff upon proof of every material averment in his declaration. *Hughes v. Kelly*, (Va. 1898) 30 S. E. Rep. 387.

- 925.** *c.* ON RECORDS — (1) *Nul Tiel Record*. — See note 1.
 (2) *Nil Debet*. — See note 2.
- 926.** See note 1.
- 927.** (4) *Want of Jurisdiction*. — See note 2.
- 928.** 6. *Replication*. — See note 6.
- 929.** V. PLEADINGS IN BOOK-DEBT — 2. *Declaration*. — See note 2.
- 932.** VI. JUDGMENT. — See note 2.
- 933.** *Interest as Damages*. — See note 1.
- 934.** *Judgment Corresponding to Claim*. — See note 1.

925. 1. A Defect Appearing upon the Face of the Record may be taken advantage of under a plea of *nul tiel record*, but those requiring extrinsic proof to make them apparent must be alleged before being proved. *Wood v. Agostines*, 72 Vt. 51.

2. Foreign Judgment. — *Nul tiel record* is an inappropriate plea to suits upon foreign judgments, inasmuch as they do not create a merger, and are only *prima facie* evidence of an indebtedness. Either debt or *assumpsit* may be maintained upon them, or upon the original indebtedness, if appropriate to those remedies, and the general issue in such cases is *nil debet* or *non assumpsit*, as the case may be, and puts in issue the validity of both the judgments and the debt. *Tourigny v. Houle*, 88 Me. 406.

926. 1. *Vermont*. — *Wood v. Agostines*, 72 Vt. 51.

927. 2. See *Wood v. Augustins*, 70 Vt. 637.

928. 6. See *Hughes v. Kelly*, (Va. 1898) 30 S. E. Rep. 387.

929. 2. *Jurisdiction*. — In *Vermont*

the form of writ prescribed by statute does not require any allegation of the jurisdictional fact; therefore, it is not necessary that jurisdiction be apparent from the face of the writ. *A. H. Berry Shoe Co. v. Dechenes*, 68 Vt. 387.

932. 2. *In Damages Only*. — Independent Order of Mut. Aid *v. Stahl*, 64 Ill. App. 314.

Distinguishing Debt and Damages. — *Forsyth v. Vehmeyer*, 176 Ill. 359.

933. 1. *When the Declaration Does Not Demand Interest* it is error to enter judgment for the aggregate amount of the principal and interest, but it is perfectly proper to give judgment for the amount of the debt and for the amount of interest due thereon as damages. *Grand Lodge, etc. v. Bagley*, 164 Ill. 340.

934. 1. *Illinois*. — In an action on a statute to recover a penalty, the damages inserted in the declaration need only be nominal, and judgment may be entered for an amount in excess of the *ad damnum*. *Indiana Millers Mut. F. Ins. Co. v. People*, 170 Ill. 474.

DECISIONS.

- 938. II. DECISION IN GENERAL — 2. What Must Be Decided. —**
See note 2.
939. 3. As to Time of Rendering Decision. — See note 1.
941. 5. How Decision Should Be Rendered. — See note 1.
942. 6. Filing Decision. — See note 1.

938. 2. Taylor v. Vandenberg, 15 S. Dak. 480.

Code Civ. Pro. N. Y., § 1022, providing that the decision may either "state separately the facts found and the conclusions of law" or state "concisely the grounds upon which the issues have been decided," is not complied with by an indorsement on the complaint signed by the justice as follows: "Complaint dismissed, with costs to be taxed. Judgment may be entered accordingly." And no question for review is brought before the court by an appeal from the judgment entered on such decision. *McManus v. Palmer, 13 N. Y. App. Div. 443.*

939. 1. Griffith v. Cromley, 58 S. Car. 448.

An Oral Decision given at the close of a trial is not rendered void by the failure to file the findings of fact, etc., within ninety days after the trial and submission of the cause, as required by a constitutional provision in *Washington*. *West Philadelphia Title, etc., Co. v. Olympia, 19 Wash. 150.*

Decision Rendered Before Day Set and in Absence of Plaintiff. — Where the court, after denying the motion of the plaintiff for a continuance on account of the absence of a material witness, set a day on which it would render its decision, and afterwards, on a day previous to the day set, without notifying the plaintiff and in his absence, decided against him, it was held that such action was erroneous, as it deprived the plaintiff of the right to take a nonsuit. *Paepcke-Leicht Lumber Co. v. Berkowsky, 73 Ill. App. 400.*

941. 1. Hawaii. — Under Civ. Code Hawaii, § 1138, which provides that where trial is had without a jury, "the

court shall hear and decide the cause both as to the facts and the law, and its decision shall be rendered in writing," a decision not in writing is void. *Maalo v. Kaiapa, 11 Hawaii 705.*

Memorandum. — In *Connecticut* a memorandum of the decision forms no part of the record unless made such by the finding. *Cummings v. Hartford, 70 Conn. 115.* But where, during the term succeeding the trial, the court filed a memorandum for entering up judgment, and seven days later amended the memorandum and the judgment was drawn up in accordance with the amended memorandum, it was held that there was no error. *Harrison v. Clark, 74 Conn. 18.*

In *Indiana*, in *Mundhenke v. Mundhenke, 64 Ill. App. 122*, it was held that the court cannot, by first making a minute of its decision and then announcing its opinion, deprive the plaintiff of his right to take a nonsuit.

In *Minnesota* a memorandum filed by the trial judge is part of his decision. *Kertson v. Great Northern Express Co., 72 Minn. 378.*

942. 1. Roblin v. Palmer, 9 S. Dak. 36.

Contra. — In *Hodecker v. Hodecker, 39 N. Y. App. Div. 353*, it was held that Code Civ. Pro. N. Y., § 1010, providing that upon a trial by the court of an issue of fact or law its decision in writing must be filed in the clerk's office within twenty days after final adjournment of the term, is mandatory, and if not complied with either party may move for a new trial. And in *Lemien v. Lemien, 16 N. Y. App. Div. 264*, it was held that failure to comply with the code provision is ground for reversal.

DECREEs.

- 950. II. KINDS OF DECREEs — 1. Interlocutory.** — See note 1.
2. Final. — See note 2.
951. 3. Nisi. — See notes 2, 3.
955. III. ESSENTIALS OF VALID DECREE — 1. Jurisdiction —
Parties. — See note 3.
957. 3. Issues Must Be Made Up. — See notes 1, 2.
4. Hearing or Submission. — See note 3.
958. IV. NATURE AND EXTENT OF RELIEF — 1. Flexibility of
Decrees. — See note 1.

950. 1. *Maloney v. Jones*, (Tenn. Ch. 1900) 59 S. W. Rep. 700; *Repass v. Moore*, 96 Va. 147; *Denison, etc., R. Co. v. Ranney-Alton Mercantile Co.*, (C. C. A.) 104 Fed. Rep. 595; *Blythe v. Hinckley*, 84 Fed. Rep. 228.
2. *State v. White*, 40 Fla. 297; *Davis v. McCullough*, 192 Ill. 277; *Brodhead v. Minges*, 99 Ill. App. 435; *Maloney v. Jones*, (Tenn. Ch. 1900) 59 S. W. Rep. 700; *Repass v. Moore*, 96 Va. 147; *Gunnell v. Dixon*, (Va. 1903) 43 S. E. Rep. 340; *Hendryx v. Perkins*, (C. C. A.) 114 Fed. Rep. 801; *East Coast Cedar Co. v. People's Bank*, (C. C. A.) 111 Fed. Rep. 446; *West v. East Coast Cedar Co.*, (C. C. A.) 113 Fed. Rep. 742, as to finality of order dismissing bill, though reference is ordered by way of giving effect to the decree.

Decrees Considered Together. — *Petersburg Sav., etc., Co. v. Dellatorre*, 30 U. S. App. 504, holding that after a decree of foreclosure and sale and a reference to the master to ascertain and report the amount of the debt, etc., a decree confirming the report will be considered and taken in connection with the first decree as disposing of all the rights of the parties, constituting the final decree. Compare *Alexander v. Chapman*, 127 Ala. 465.

951. 2. *Spoor v. Tilson*, 97 Va. 279.
3. *Lide v. Park*, 132 Ala. 222, citing 5 ENCYC. OF PL. AND PR. 951, 952, as to a decree sustaining a demurrer and reciting that the complainant has a certain number of days in which to amend, etc.; *Plaisted v. Cooke*, 181 Mass. 118.

955. 3. *Luttrell v. Reynolds*, 63 Ark. 254; *Tate v. Field*, 56 N. J. Eq. 35; *Boyd v. American Carbon Black Co.*, 182 Pa. St. 206; *Morgan v. Morgan*, 42 W. Va. 542; *Gallatin Land, etc., Co. v. Davis*, 44 W. Va. 109; *Graves v. Hedrick*, 44 W. Va. 550. See also *Crawford v. Aultman*, 139 Mo. 262.

In the absence of necessary parties the appellate court will reverse a decree on its own motion. *Craver v. Spencer*, 40 Fla. 135.

In *Kentucky* the code provision contemplates that when the plaintiff elects to make a number of persons defendants in an equitable action he must bring all of them before the court before he can proceed against those who are before it, unless he dismisses it against those who are not summoned and who are not necessary parties. *Wright v. Bickel*, 58 S. W. Rep. 470, 22 Ky. L. Rep. 529.

957. 1. *Southern Home Bldg., etc., Assoc. v. Riddle*, 129 Ala. 562, wherein it was held to be error to render a final decree after answer to the original bill and the subsequent filing of amendments of which the defendants had no notice, and after which no decree *pro confesso* was taken and there was no joinder in the submission of the cause; *Adams v. Gill*, 158 Ill. 190; *Lannert v. Pies*, 4 Ohio Dec. (Reprint) 282, 1 Cleve. L. Rep. 210.

2. *Ropes v. McCabe*, 40 Fla. 388.

3. *Simon v. Thompson*, 1 Indian Ter. 604.

958. 1. See *Bally v. Hornthal*, 154 N. Y. 648.

958. 2. Complete Relief. — See note 2.

960. V. CONSENT DECREES — 1. Validity and Effect. — See notes 1, 2.

961. See note 1.

962. See note 2.

958. 2. Evans v. Kelley, 49 W. Va. 181; *Vierra v. Fontes*, 135 Cal. 126; *Ray v. Home, etc., Invest., etc., Co.*, 106 Ga. 492; *Burke Land, etc., Co. v. Wells*, (Idaho 1900) 60 Pac. Rep. 87; *Oberlein v. Wells*, 163 Ill. 101; *Whalen v. Billings*, 104 Ill. App. 281; *Maryland Home F. Ins. Co. v. Kimmell*, 89 Md. 437; *Zahn v. McMillin*, 198 Pa. St. 20; *Sheppard v. Green*, 48 S. Car. 165; *Swope v. Missouri Trust Co.*, 26 Tex. Civ. App. 133; *Hotchkiss v. Fitzgerald Patent Prepared Plaster Co.*, 41 W. Va. 357; *Franey v. Warner*, 96 Wis. 222. But see *Dyer v. Dyer*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 421.

Issue Left Undetermined. — Where a decree does not accomplish a final result and leaves the complainants without means of reaching a decree which will finally establish the rights of the parties, as where the principal issue in the case is left undetermined, the decree is erroneous. *Peck v. Ayers, etc., Tie Co.*, (C. C. A.) 116 Fed. Rep. 273.

Matters Occurring Pending Suit. — See *Pennsylvania Co. v. Bond*, 99 Ill. App. 535.

960. 1. Consent of Infants. — Infants may be bound by a consent decree. *Thompson v. Maxwell Land Grant, etc., Co.*, 168 U. S. 451.

It is not necessary that a compromise should be presented by petition or any special pleadings, nor that a guardian *ad litem* should consent to it. Where it is made by the mother on her own behalf and as next friend to her children, and after reference to the master it is ratified by the court, it will be upheld. *Wilson v. Schaefer*, 107 Tenn. 300.

2. Bristol v. Bristol, etc., Waterworks, 19 R. I. 631, citing 5 ENCYC. OF PL. AND PR. 960.

Consent of Attorney. — If an attorney agrees to the terms of a decree of which the client has notice, the attorney's death will not prevent the entry of the decree, and if the client wishes further representation he should employ other counsel. *Edwards v. Turner*, (Tenn. Ch. 1897) 47 S. W. Rep. 144.

But the plaintiff's attorney is not authorized by virtue of his employment to consent to a decree which destroys his client's cause of action, and express authority to dismiss an action will not authorize the attorney to consent to a decree on the merits. *Jubilee Placer Co. v. Hossfeld*, 20 Mont. 234.

Withdrawal of Consent. — Where, after an attorney of one party agrees with the attorney for the opposite party that a decree in favor of the latter may be entered, the latter attorney consents to the taking of depositions by his adversary for the purpose of making further resistance, this will be held to be a waiver of the right to a decree as the record then stood. *Sharpless v. Warren*, (Tenn. Ch. 1899) 58 S. W. Rep. 407.

Pro Forma Decree. — Where a party who answers and submits his rights to the court also represents another party to the suit and consents to a *pro forma* decree, on appeal from a part of such decree he is bound by his consent if the decree is not erroneous. *Owens v. Barroll*, 88 Md. 204.

961. 1. Decree in Vacation by Consent. — *Adler v. Van Kirk Land, etc., Co.*, 114 Ala. 551.

Decree Must Conform to Stipulation. — *Strode v. Miller*, (Idaho 1900) 59 Pac. Rep. 893.

In Appellate Court. — Where the evidence justifies stipulated relief, under an agreement that a decree shall be affirmed with specified modifications, a decree in the appellate court will be rendered in harmony with the stipulation. *Lemars First Nat. Bank v. Northwestern Water, etc., Co.*, (Iowa 1898) 74 N. W. Rep. 772.

962. 2. Adler v. Van Kirk Land, etc., Co., 114 Ala. 551; *Clark v. Charles*, 55 Neb. 202; *Thompson v. Maxwell Land-Grant, etc., Co.*, 168 U. S. 451.

Submission to Arbitration. — A consent decree submitting a cause to arbitration and a supplemental decree providing that the award shall not be final, a decree entered on the award is not a consent decree from which an appeal cannot be prosecuted. *Person*

962. 2. Not Necessarily Confined to Issues. — See note 5.

963. 3. Recital of Consent. — See notes 1, 3.

964. VI. DECREES VESTING OR DIVESTING TITLE TO PROPERTY. — See note 2.

965. VII. DECREES IN APPELLATE COURTS — 1. Affirmance, Reversal, Etc. — See note 3.

v. Leathers, (Miss. 1896) 19 So. Rep. 582.

962. 5. *Wilson v. Schaefer*, 107 Tenn. 300; *Bigley v. Watson*, 98 Tenn. 353 [each citing 5 ENCYC. OF PL. AND PR. 962]; *Clark v. Charles*, 55 Neb. 202.

963. 1. *Pennsylvania Co. v. Bond*, 99 Ill. App. 535, where a condition rendered a decree inoperative but was eliminated on appeal. See also *Davison v. Hough*, 165 Mo. 561, citing 5 ENCYC. OF PL. AND PR. 963, holding, however, that in the proceeding before the court the contrary was shown, and there was no attempt to show that the decree in question was rendered by consent.

3. Presumptions. — Where a decree recites that it is by consent it will be presumed that it is upon sufficient evidence. *Schuler v. Hogan*, 168 Ill. 369.

964. 2. See *Gunn v. Gunn*, 95 Ga. 439.

965. 3. *Moses v. Grainger*, 106 Tenn. 7; *Billingsley v. Menear*, 44 W. Va. 651, holding that where a bill is sufficient for one character of relief and insufficient for another, a demurrer being overruled and relief granted to the full extent of the prayer, the appellate court will reverse the decree, sustain the demurrer to the extent indicated, and remand the cause with leave to the plaintiff to amend if he wishes to do so, or if not, to have a decree to the extent indicated.

When Reversed in Entirety. — Where the various questions submitted to the appellate court are so interwoven, not only in the pleadings but in the evidence and findings of the court, that it is impossible to separate them so as to determine with any degree of satisfaction whether the decree may be sustained upon one or more of them and reversed as to others, the court will set aside the decree in its entirety. *New Cache La Poudre Irrigation Co. v. Water Supply, etc., Co.*, 29 Colo. 469. See also *Alfred Richards Brick Co. v. Rothwell*, 19 App. Cas. (D. C.) 178.

With Explanations or Additions. — *Hadden v. Dooley*, (C. C. A.) 74 Fed. Rep. 429, affirming an order refusing

to dissolve an injunction, with directions that the lower court may modify the order as it may be advised, upon application, so as to permit the sale of the property which had been enjoined and the deposit of the proceeds in court to await the final determination of the suit.

Reversal with Directions. — Where a bill is dismissed for "want of jurisdiction" upon the ground that it exhibits no facts to bring the cause within the realm of the equitable jurisdiction because an adequate remedy at law existed, instead of proceeding upon the ground that the court was without jurisdiction because of the failure to declare the amount in controversy such a dismissal is erroneous upon the merits, and it is proper to reverse the decree and remand the cause with direction to dismiss the bill for want of jurisdiction and without prejudice. *Cochran v. Childs*, (C. C. A.) 111 Fed. Rep. 433.

After Execution. — Though before the appeal was taken the decree had been executed by the sale of the appellant's property in accordance with the terms of the decree, this fact does not prevent the reversal of the decree, but if the purchaser's title acquired at such sale is such that a reversal of the decree will not affect it, the appellant will be left to his remedies for restitution. *Walker v. Sarven*, 41 Fla. 210.

Effect of Affirmance. — Where, after the affirmance of a decree, a motion was made by one of the appellants to remand the cause for amendment of the pleadings and for further proceedings, upon the ground that the case was tried upon facts conceded which ought not to have been conceded because they did not exist, and the appellant should not be bound by the concession, it was held that the provision allowing the appellate court to remand a cause for such further proceedings as may be necessary for determining it upon its merits where substantial merits of the case will not be determined by affirmance or reversal did not confer upon the court power to

966. See notes 1, 2.

grant this motion. *Smith v. Hooper*, 95 Md. 16.

Effect of Reversal. — The case stands in the lower court for new trial as if no decree had been rendered. *Henderson v. Harness*, 184 Ill. 520; *Hawkins v. Cleveland, etc., R. Co.*, (C. C. A.) 99 Fed. Rep. 322.

The reversal and remandment of a case does not preclude parties from offering further evidence. *Paige v. Hieronymus*, 102 Ill. 546.

The effect of an order setting aside a decree for money which was the basis of a decree appointing a receiver in a second case is necessarily to destroy the entire ground upon which the decree in that case rests. *Roanoke St. R. Co. v. Hicks*, (W. Va. 1899) 32 S. E. Rep. 790.

The reversal of a decree which ascertains the amount of the debt for which land was directed to be sold necessarily reverses the residue of the decree where, under a different construction, there would remain a decree for the sale of property upon failure of the debtor to pay an unascertained amount. *Effinger v. Kenney*, 92 Va. 245.

Reversal of Decree Vacating Former Decree. — Where a decree entered in a previous term is vacated, the reversal of the vacating decree as unauthorized leaves the filed decree in full force. *Ernst Tosetti Brewing Co. v. Koehler*, 200 Ill. 369.

Effect of Reversal — Where There Are Several Parties. — *Glos v. O'Toole*, 184 Ill. 585, under the statute; *Vance Shoe Co. v. Haught*, 41 W. Va. 275; *Bowlby v. De Wit*, 47 W. Va. 323.

But the appellate court cannot, upon reversing a decree, dismiss a bill absolutely as to all parties where other defendants have been defaulted and a decree has been taken against them to which they have made no objection. *Hewes v. Glos*, 170 Ill. 436.

Remand Without Affirmance or Reversal. — In *Maryland*, under the code provision, the cause may be remanded without either affirming or reversing a decree, where it appears to the appellate court that the substantial merits will not be determined by affirmance or reversal or that the purposes of justice will be advanced by permitting further proceedings in the cause, through amendment of the pleadings,

introduction of further evidence, etc. *Smith v. Hooper*, 95 Md. 16; *Keyser v. Upshur*, 92 Md. 726.

Where, after ample time for preparation and with the point in controversy directly drawn to his attention, a party voluntarily elects to go to trial upon the proof as it stands, the case is not within a statute justifying a remand. *Reeve v. Harris*, (Tenn. Ch. 1897) 50 S. W. Rep. 658; *Powers-Taylor Drug Co. v. Wafford*, (Tenn. Ch. 1899) 53 S. W. Rep. 243; nor does it apply to a case where the defendant has failed to introduce proof of an insistence in his answer, as it will be presumed that if there was such proof it would have been introduced. *Schilling v. Darmody*, 102 Tenn. 439, where the decree was affirmed.

So in *Tennessee* the statute provides that when the court is of opinion that complete justice cannot be had on account of some oversight without culpable negligence, etc., it may remand the cause for further proceedings. See, where the statute was applied in favor of remanding, *Cæsar v. Harris*, 108 Tenn. 653; *Bond v. Montague*, 97 Tenn. 727.

So in the federal courts, where a case is not properly prepared for decision and great injustice may be done if the cause is decided on the record as presented, the appellate court may of its own motion reverse the decree and remand the cause with directions to take further proof and complete the record, and may then rehear the matter. *Barber v. Coit*, (C. C. A.) 118 Fed. Rep. 272; *U. S. v. Rio Grande Dam, etc., Co.*, 184 U. S. 416.

966. 1. *Wilson v. Mitchell*, (Fla. 1901) 30 So. Rep. 703; *Walker v. Sarven*, 41 Fla. 210; *Ragor v. Brenock*, 175 Ill. 494; *Roby v. Chicago Title, etc., Co.*, 194 Ill. 228; *German Evangelical Lutheran St. John's Congregation v. Schmidt*, 101 Ill. App. 288; *Fluharty v. Mills*, 49 W. Va. 446. See also *Western Cornice, etc., Works v. Leavenworth*, 52 Neb. 418.

Law and Equity Counts. — Where there is one count in equity and one at law for damages, the court may affirm as to one and reverse as to the other. *Roberts v. Central Lead Co.*, 95 Mo. App. 581.

2. *Haden v. Swepston*, 64 Ark. 477; *Bigham v. Kistler*, 114 Ga. 453; *Roby*

966. [The court also has power to reverse and at the same time direct a decree upon an original determination of the facts, against the appellant's contention. See note 2a.]

967. 2. Rendition of New Decree. — See note 2.

v. Chicago Title, etc., Co., 194 Ill. 228; *Minchrod v. Ullmann*, 163 Ill. 25; *Hewes v. Glos*, 170 Ill. 436; *Lemars First Nat. Bank v. Northwestern Water, etc., Co.*, (Iowa 1898) 74 N. W. Rep. 772; *Hebron v. Kelly*, 77 Miss. 48; *Tillinghast v. Henderson*, 59 S. Car. 388; *Byers v. Sugg*, (Tenn. Ch. 1900) 57 S. W. Rep. 397; *Parsons v. Smith*, 46 W. Va. 728; *Long v. Willis*, 50 W. Va. 341, correcting a mistake by the pleadings and affirming the decree as corrected; *Carberry v. West Virginia, etc., R. Co.*, 44 W. Va. 260; *Shumate v. Crockett*, 43 W. Va. 491, affirming after correcting a clerical mistake; *Winchell v. Waukesha*, 110 Wis. 101; *Harrison v. Farmers' L. & T. Co.*, (C. C. A.) 94 Fed. Rep. 728, modifying a decree of dismissal absolutely to one of dismissal without prejudice. See also *Mock v. Santa Rosa*, 126 Cal. 330; *Hasbrouck v. Castle*, 58 N. Y. App. Div. 33, affirmed 170 N. Y. 594; *Little v. Gallus*, 39 N. Y. App. Div. 646; *Pollock v. Pollock*, 9 S. Dak. 48.

966. 2a. *Hoover v. Binkley*, 66 Ark. 645, 51 S. W. Rep. 73.

967. 2. *Haden v. Swepston*, 64 Ark. 477; *Riley Bros. Co. v. Melia*, (Neb. 1902) 92 N. W. Rep. 913, wherein it appears that under the statute the appellate court may proceed to render such judgment as the court below should have rendered or may remand the case to the court below for such judgment; *Mace v. Mace*, 40 Oregon 586, where the court entered a decree and remanded the cause with directions to the lower court to enforce the decree, and subsequently (40 Oregon 586) refused to modify the decree, though such modification might have been equitable if under the facts a decree could have been so framed as to protect the rights of the other party; holding, also, that when a case goes back to the lower court for enforcement of the decree, that court may frame a decree pursuant for the modifications sought if facts are made to appear which will justify such modification; *Ex p. Gray*, 48 S. Car. 566; *Talbott v. Manard*, 106 Tenn. 60; *Tuttle v. Clafin*, (C. C. A.) 76 Fed. Rep. 227, reversal with instructions to enter a

decree for the amount ascertained from the record to be proper, without requiring an accounting. See also *W. V. Davidson Lumber Co. v. Jones*, (Tenn. Ch. 1901) 62 S. W. Rep. 386.

While suits in equity are tried anew on appeal and a final decree is usually rendered in the appellate court without remanding, if a party fails to introduce his evidence, relying upon the action of the court in excluding competent evidence, to the introduction of which his objections were sustained, upon reversing a dismissal of the suit the cause will be remanded for such further proceedings as may be deemed proper. *Robson v. Hamilton*, 41 Oregon 239.

Reversal for Jury Trial. — Where the chancellor incorrectly denied the complainant's demand for a jury, and on appeal to the Court of Chancery Appeals that court sustained the right to a jury trial, but made findings of fact designed to be effective if the court of last resort should be of opinion that there was error in granting a jury to the complainant, the cause is properly remanded for a trial by jury and the complainant cannot be allowed to say, in the court of last resort, that the Court of Chancery Appeals should have entered a final decree. The findings of fact by Court of Chancery Appeals will, under the circumstances, be treated as superfluous. *Traugher v. Smelser*, 108 Tenn. 347.

Where there Is No Assignment of Error upon which the appellate court can reverse, it may nevertheless enter a decree in proper form to express the rights of the parties according to the terms of the decision. *McCumber v. Haynes*, 9 Colo. App. 353.

Where Remand Is Requested. — An action of equitable cognizance will ordinarily be tried *de novo* upon the record, and upon reversal the proper judgment to be entered will be directed, but where the appellant asks only for a reversal and that the cause be remanded for a new trial, the order will go as requested. *Vermont L. & T. Co. v. Vaughn*, 25 Wash. 219.

Reversal of Decree and Dismissal of Bill. — See *Freeman v. Pullen*, 130 Ala. 653;

969. VIII. DECREE AFTER DEATH OF PARTY — Death After Argument of Cause. — See note 1.

973. IX. TAKING BILL AS CONFESSED — DECREE PRO CONFESSED — 3. When Bill May Be Taken as Confessed — *a. FAILURE TO APPEAR AND DEMUR, PLEAD, OR ANSWER* — (1) *In General*. — See note 3.

974. See note 1.

975. See note 4.

(2) *Due Service of Process Necessary*. — See note 5.

978. (3) *Failure to Answer* — (a) *In General*. — See note 4.

980. (b) *After Amendment of Bill — Right to Answer After Amendment*. — See note 3.

981. (c) *Insufficient Answer*. — See note 3.

Richter v. Noll, 128 Ala. 198; *Griffin v. Byrd*, 74 Miss. 32; *Maloney v. Jones*, (Tenn. Ch. 1900) 59 S. W. Rep. 700; *Osborne v. Boswell*, (Tenn. Ch. 1900) 61 S. W. Rep. 96, where the complainant prayed and prosecuted a broad appeal from a decree in his favor, the defendant not assigning error, and the bill not being sufficient to justify a decree in the complainant's favor; *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747.

On Appeal from an Interlocutory Order (even before answer filed), the United States Court of Appeals may in a proper case order the dismissal of the bill. *Mast v. Stover Mfg. Co.*, 177 U. S. 485, *affirming* 89 Fed. Rep. 333; *Worth Mfg. Co. v. Bingham*, (C. C. A.) 116 Fed. Rep. 785.

Where Facts Must Be Ascertained. — *Jenkins v. Jenkins University*, 17 Wash. 160, where the record did not furnish necessary information for the reformation of a mortgage. See also *Willis v. Berry*, 104 La. 114, as to authority to remand.

Statement of Account. — In an equitable action the appellate court may state an account as far as it can from the record before it and remand the case for further action by the trial court. *Haggerty v. Brower*, 105 Iowa 395.

969. 1. *Havens v. Seashore Land Co.*, 57 N. J. Eq. 142; *Tallman v. Wallack*, (N. J. 1896) 41 Atl. Rep. 677; *Molineaux v. Raynolds*, 55 N. J. Eq. 187.

973. 3. Where a defendant was returned summoned when as a matter of fact his attorney accepted service and entered an appearance, a decree *pro confesso* entered after the expiration of the statutory term for filing an an-

swer after appearance will not be disturbed, although entered as for a want of appearance. *Harrison v. Morton*, 87 Md. 671.

974. 1. Ignoring Insufficient Plea. — Where a paper purports to be a plea, but is not sworn to or certified as required by the rule, the complainant may ignore it, treat it as no plea, and enter a decree *pro confesso* for want of a plea. If, instead, the complainant moves to strike the plea and for a decree *pro confesso*, it is still within the discretion of the court to permit the defendant to perfect his plea. *Wilson v. Mitchell*, (Fla. 1901) 30 So. Rep. 703.

975. 4. *Messenger v. Peter*, (Mich. 1901) 88 N. W. Rep. 209.

5. *American Freehold Land Mortg. Co. v. Thomas*, 30 U. S. App. 690.

978. 4. Premature Order Pro Confesso. — Where a mortgagee has notice in foreclosure to appear and answer on a certain day, but a decree *pro confesso* is entered on the day previous, such decree will not prevent him from appearing and resisting a final decree, and he cannot attack such decree collaterally, having failed so to appear. *Roberts v. Brooks*, 71 Fed. Rep. 914.

980. 3. New Process of Amendment. — If a bill is materially amended and the defendant fails to appear, the taking of a decree *pro confesso* the same day and without serving process is irregular. *Albright v. Texas*, etc., R. Co., 8 N. Mex. 422.

981. 3. In *Illinois*, under the chancery act, where a bill makes distinct averments the court has the power to compel a specific admission or denial of all allegations which require proof, and if exceptions are sustained to an

982. See notes 1, 2.

983. Irregular Answer. — See note 2.

(d) Upon Demurrer Overruled. — See note 4.

985. 5. Orders Pro Confesso. — See notes 1, 3.

986. See note 1.

6. Effect of Default — a. AS WAIVER OF OBJECTIONS TO BILL. — See note 3.

b. ADMISSIONS IMPLIED BY DEFAULT — What Is Admitted. — See note 5.

989. What Is Not Admitted. — See note 3.

990. c. PROOF OF ALLEGATIONS OF BILL — In Modern Practice. — See note 1.

995. d. SUCCESSFUL DEFENSE BY CODEFENDANT — Where Defendants Jointly Interested. — See note 3.

998. e. RIGHTS OF DEFENDANT AFTER DEFAULT. — See notes 1, 3.

answer and time to file a sufficient answer is given, to which exceptions are also sustained, the bill may be taken as confessed. Under the statute, where a part of the answer only is excepted, to and held to be insufficient, the bill may be taken as confessed in its entirety because no part of the defendant's answer is left standing. *Bauerle v. Long*, 165 Ill. 340.

982. 1. *Bauerle v. Long*, 165 Ill. 340.

2. *Doak v. Stahlman*, (Tenn. Ch. 1899) 58 S. W. Rep. 741.

983. 2. Affidavits filed by defendants in opposition to a preliminary application for the appointment of a receiver, not purporting or intended to be full answers to the bill, will not be regarded as answers so as to preclude the entry of a decree *pro confesso*. *Friedman v. Rehm*, (Fla. 1901) 31 So. Rep. 234.

4. *Ray v. Frank*, (Fla. 1902) 32 So. Rep. 925.

985. 1. Where the final decree recites that it was made upon judgment *pro confesso* and the transcript does not contain the rules taken in the cause, the appellate court has the right to presume, in favor of the regularity of the proceedings, that the judgment *pro confesso* was taken at the rules. *Schoenpflug v. Ketcham*, (Tenn. Ch. 1898) 52 S. W. Rep. 666.

3. *Schoenpflug v. Ketcham*, (Tenn. Ch. 1898) 52 S. W. Rep. 666, before the clerk and master, and entry on rules of the court.

In Florida, where a decree *pro confesso* is not entered in pursuance of any de-

fault in pleading committed on that day nor in pursuance of any order of the judge, the clerk is without authority to grant one. *Ropes v. McCabe*, 40 Fla. 388.

986. 1. *Schmidt v. Haas*, 8 Del. Co. Rep. (Pa.) 133.

3. Rule Applies to Cross-bills taken as confessed. *Messenger v. Peter*, (Mich. 1901) 88 N. W. Rep. 209.

5. *Schoenpflug v. Ketcham*, (Tenn. Ch. 1898) 52 S. W. Rep. 666.

989. 3. *Armstrong v. Douglas Park Bldg. Assoc.*, 176 Ill. 298; *Wong Him v. Callahan*, 119 Fed. Rep. 381.

990. 1. *Henry v. Seager*, 80 Ill. App. 172; *Armstrong v. Douglas Park Bldg. Assoc.*, 60 Ill. App. 318; *Schoenpflug v. Ketcham*, (Tenn. Ch. 1898) 52 S. W. Rep. 666. See also *Price v. Boden*, 39 Fla. 218.

After failure to file a sufficient answer the court may order a decree *pro confesso* and refer the cause to a master to take proof and report. *Bauerle v. Long*, 165 Ill. 340.

In the Absence of a Decree Pro Confesso the complainant must prove his case. *Albright v. Texas*, etc., R. Co., 8 N. Mex. 422.

995. 3. See also *Greer v. Bringhurst*, 23 Tex. Civ. App. 582, citing 5 ENCYC. OF PL. AND PR. 994-996.

998. 1. *Harrison v. Morton*, 87 Md. 671.

3. *Price v. Boden*, 39 Fla. 218.

The defendant can introduce no evidence in defense on the reference, though he may appear and cross-examine the complainant's witnesses. *Bauerle v. Long*, 165 Ill. 340.

999. See note 2.

7. Hearing and Final Decree — Setting Cause for Hearing. —

See note 3.

Hearing and Decree. — See note 4.

1000. See notes 1, 2.

1001. **8. Impeaching Decree — a. BY APPEAL. —** See note 2.

1002. See note 3.

b. BY BILL OF REVIEW. — See note 4.

1004. X. OPENING ORDERS AND DECREES PRO CONFESSO AND ALLOWING DEFENSES — 1. Power to Open — b. IN FEDERAL COURTS. — See note 1.

2. As Exercise of Discretion — And Statutory Regulations

— As Exercise of Discretion. — See note 4.

1007. Final Decrees Pro Confesso. — See note 1.

Statutory Regulations. — See note 2.

1012. 4. Grounds for Opening — c. SURPRISE, ACCIDENT, MISTAKE, OR NEGLIGENCE OF SOLICITOR — Surprise, Accident, or Mistake. — See note 2.

1015. Negligence of Solicitor. — See note 1.

999. 2. Notice of Final Decree. — A rule requiring a party entitled to a decree to "draw the same and file it and give notice" does not require the complainant to serve notice on a defendant who has failed to appear. *Glover v. Jones*, 95 Me. 303.

3. In Tennessee an order *pro confesso* and the final judgment need not be in different entries, but the complainant may have an order *pro confesso* and final decree at the same time. *Stark v. Murphy*, (Tenn. Ch. 1899) 52 S. W. Rep. 736.

4. Price v. Boden, 39 Fla. 218.

1000. 1. See Lynch v. Naylor, 63 Ill. App. 107.

2. North Chicago St. R. Co. v. Ackley, 171 Ill. 100, on appeal.

1001. 2. In Virginia, West Virginia, Etc. — See *Gallatin Land, etc., Co. v. Davis*, 44 W. Va. 109.

1002. 3. Monarch Brewing Co. v. Wolford, 179 Ill. 252; *Roby v. Chicago Title, etc., Co.*, 194 Ill. 228; *Dunfee v. Mutual Bldg., etc., Assoc.*, 101 Ill. App. 477; *Armstrong v. Douglas Park Bldg. Assoc.*, 60 Ill. App. 318.

4. Statutory Remedy Cumulative. — *Gallatin Land, etc., Co. v. Davis*, 44 W. Va. 109; *Shenandoah Valley Nat. Bank v. Shirley*, 26 W. Va. 563.

1004. 1. Where it appears that the court has not acquired jurisdiction over a party by the service of a subpoena in the manner set forth in the

officer's return, and cannot, on the admitted facts, obtain jurisdiction over the said party, a decree *pro confesso* against it will be vacated and the bill dismissed as to such party. *Eldred v. American Palace-Car Co.*, 103 Fed. Rep. 209.

4. Interlocutory Orders Pro Confesso. — *White v. White*, 169 Mass. 52.

1007. 1. Friedman v. Rehm, (Fla. 1901) 31 So. Rep. 234, holding that a decree setting aside such final decree for the mere purpose of permitting a defense to be interposed will be reversed where circumstances authorizing such action are not shown, as deceit, surprise, or irregularity in obtaining the decree.

2. Service by Publication. — Under Act March 3, 1875 (Rev. Stat. U. S., § 643), where a defendant is not personally served he may come in within a year, have the decree set aside, enter an appearance and plead, etc. *American Freehold Land-Mortg. Co. v. Thomas*, 30 U. S. App. 690.

1012. 2. After Enrolment. — See *Friedman v. Rehm*, (Fla. 1901) 31 So. Rep. 234.

Where Diligence Is Not Shown the court is justified in refusing to set aside the decree. *Campbell v. Atwood*, (Tenn. Ch. 1897) 47 S. W. Rep. 168.

1015. 1. In Kelly v. Roane Iron Co., (Tenn. Ch. 1899) 53 S. W. Rep. 1102, the appellate court declined to

1017. *f.* CHARACTER OF PROPOSED DEFENSE—(1) *Meritorious Defense*. — See note 2.

1018. (3) *Confined to Defense by Answer*. — See note 2.

1022. *5.* Application — *d.* FORM OF APPLICATION. — See note 2.

1024. *f.* TO BE ACCOMPANIED BY PROPOSED ANSWER. — See note 3.

1029. *8.* Final Hearing and Decree. — See note 1.

9. Review of Ruling on Application. — See note 4.

1031. XI. DECREES ON DEFAULT AT HEARING—1. Default on Part of Plaintiff. — See note 1.

1032. *3.* Opening Decree. — See note 1.

disturb the discretion of the chancellor in refusing to set aside a *pro confesso*, before decree rendered thereon, upon such ground.

Negligence of Intermediary. — Where one is selected by a party and his attorney as an intermediary between the two, the negligence of the intermediary, whether he was acting as attorney or merely as private agent, must be imputed to the defendant and will not excuse delay in answering so as to justify the setting aside of a decree *pro confesso*. *Stark v. Murphy*, (Tenn. Ch. 1899) 52 S. W. Rep. 736.

1017. *2.* *Biloxi City R. Co. v. Maloney*, (Miss. 1896) 19 So. Rep. 832; *Kelly v. Roane Iron Co.*, (Tenn. Ch. 1899) 53 S. W. Rep. 1102; *Campbell v. Atwood*, (Tenn. Ch. 1897) 47 S. W. Rep. 168.

1018. *2.* Demurrer under Leave to Answer. — Where a decree *pro confesso* is set aside and after such decree leave to answer is given to the defendant because his pleadings were not filed in proper time, he cannot file a demurrer to the complaint. The permission extends only to answering the bill. *Hand v. Hand*, 60 N. J. Eq. 518.

1022. *2.* *Ronan v. Bluhm*, 173 Ill. 277, by petition.

1024. *3.* *Stark v. Murphy*, (Tenn. Ch. 1899) 52 S. W. Rep. 736, holding that a demurrer is not sufficient.

1029. *1.* Where a decree against a nonresident setting aside a sale of land as colorable is opened to allow him to answer, the original bill and decree, together with the evidence in support thereof, are admissible in connection with new evidence to determine the issue thus raised. The question to be determined upon the issues raised by the petition to open the decree and

allow an answer, and by the answer, is whether, upon consideration of the evidence produced under the petition in support of the answer, and of that which was formerly adduced before the first decree was entered, the first decree should be set aside, altered, or changed. *Ronan v. Bluhm*, 173 Ill. 277.

4. Tennessee. — *Edwards v. Turner*, (Tenn. Ch. 1897) 47 S. W. Rep. 144, refusing to disturb the action of the chancellor in setting aside the decree.

1031. *1.* Presumption that Case Was Called. — On an appeal from a decree dismissing a bill for want of prosecution, unless it appears otherwise from the record, the appellate court is bound to presume that the cause was called to be heard in court and that the complainant made default. *New England Mortg. Security Co. v. Davis*, 122 Ala. 555.

1032. *1.* Opened on Application of Defendant. — Where it is evident that the defendant was misled by negotiations between him and the complainant looking to a settlement of the suit and was thus prevented from filing his necessary pleadings or employing an attorney until the case was transferred to the trial docket, the chancellor should remand the cause to the rule docket, and if he erroneously enters judgment without giving to the defendant an opportunity to plead, it will be error to refuse to grant a new trial upon application within fifteen days after the judgment was entered, upon answer tendered and supported by an affidavit which if true would entitle the defendant to large credits on the debt sued for. *Royalty v. Deposit Bldg., etc., Assoc.*, (Ky. 1897) 40 S. W. Rep. 455.

1033. XII. RENDITION, DRAFTING AND SETTLING, SIGNING AND ENTRY, AND ENROLMENT — 1. Rendition — *b. IN VACATION* — (2) *Without Statutory Authority* — *Conflicting Decisions.* — See note 3.

By Consent. — See note 4.

1034. 3. Signing and Entry. — See note 4.

1035. See note 1.

4. Enrolment — In United States. — See note 3.

1039. XIII. FORM OF DECREES — 2. Recitals — In United States. — See note 1.

1033. 3. Simon v. Thompson. 1 Indian Ter. 604, final judgment void if entered in vacation.

4. Submission on Agreement to Compromise. — Where parties submit a cause for final decree in vacation and a written agreement of compromise made by counsels in behalf of the respective parties, there being nothing to indicate that the decree is to be deferred, this is in effect a written consent that the decree may be rendered at that time according to its terms, and is substantial compliance with a chancery rule which requires written consent to authorize submission for decrees in vacation. *Foster v. Foster*, 126 Ala. 257.

1034. 4. Powers of Master. — In *New Jersey*, under a statute empowering the chancellor, under certain circumstances, to authorize a master to perform in his stead the acts therein specified, "not including the final hearing and determination of causes," a decree reciting that it was made upon the consideration of the arguments of the respective counsels upon the pleadings and evidence describes the final hearing and determination of the cause, is final as to the character of the decree, and cannot be supported if it is not signed by the chancellor. *Morton v. Beach*, 56 N. J. Eq. 791.

Notice of Time and Place of Signing. — It is not error if the final decree is not presented to the appellant nor notice given to him of the time or place of signing. *Brooks v. James*, 16 Wash. 335.

1035. 1. The Record Should Show a final decree as the last act in the proceedings in the trial court. *Russell v. Stewart*, 204 Pa. St. 211.

In *Michigan*, though no decree is found on the files of the court and there is no calendar entry thereof, it is sufficient if there is an entry of the decree in the chancery record with the name of the judge attached, counter-

signed by the register, with the date of filing appended, to show that a decree was duly made and filed. *Spaulding v. O'Connor*, 119 Mich. 45.

After an exception to an order duly taken and before the expiration of the time for filing a bill of exceptions, a formal final decree cannot be properly entered, but the case should be left upon the order for a final decree until the time for filing a bill of exceptions has passed or until decision of the question of law raised by the exception. A formal entry of a final decree in equity corresponds to the entry of a final judgment as distinguished from an order in an action at law. *Prescott v. Prescott*, 175 Mass. 64.

Entry on Sunday. — Where a vacation decree was entered by the clerk in his chancery order book on Sunday, it was held that the entry was void. *Lee v. Willis*, 99 Va. 16.

3. See *Consolidated Store-Service Co. v. Dettenthaler*, 93 Fed. Rep. 307, construing Rev. Stat. U. S., § 750, as to entering pleadings, pleas, etc., upon the final record as serving the purpose of the former practice of enrolling decrees in courts of chancery.

1039. 1. In Illinois the practice of preserving the evidence in the record by recitals in the decree has been expressly approved since the statute allowing oral testimony in the chancery court. *Gorman v. Mullins*, 172 Ill. 349.

If the evidence is not preserved otherwise, there should be findings of fact in the decree. *Chapman v. Kane*, 97 Ill. App. 567.

Findings of Fact. — If the court makes special findings intended to embrace all material issues, a failure to find that a material fact charged is true renders a decree based on the findings erroneous. *Farrell v. Bouck*, 60 Neb. 771.

1040. 3. Declaratory Part. — See note 1.

1041. XIV. AMENDMENT, MODIFICATION, AND VACATION — 1. Interlocutory Orders and Decrees — Interlocutory Orders. — See note 5.

1042. Interlocutory Decrees. — See notes 1, 2,

1043. See note 1.

1046. After Affirmance on Appeal. — See note 1.

1047. 3. Final Decrees — *a.* DURING TERM — In General — See note 1.

1049. *b.* AFTER TERM — (1) *Judicial Errors.* — See note 3.

1052. See note 1.

1040. 1. It is not necessary to express an opinion and then to decree it, the decree alone being the opinion and the act. *Fluharty v. Mills*, 49 W. Va. 446.

1041. 5. See *Jeffery v. Robbins*, 62 Ill. App. 190.

1042. 1. *Necessity for Rehearing.* — But see *Campbell Printing Press, etc., Co. v. Marden*, 70 Fed. Rep. 339.

2. *Jeffery v. Robbins*, 167 Ill. 375; *Repass v. Moore*, 96 Va. 147; *Blythe v. Hinckley*, 84 Fed. Rep. 228. See also *Todd v. McFall*, 96 Va. 754.

In a suit for foreclosure of a mortgage which has proceeded as far as decree for foreclosure and sale, the allowance of a petition by a party to enter an appearance and answer and to vacate the decree could be justified only on the ground that otherwise there would be practical denial of justice. *Farmers' L. & T. Co. v. Rockaway Valley R. Co.*, 69 Fed. Rep. 9.

1045. 1. *Tennessee.* — *Maloney v. Jones*, (Tenn. Ch. 1900) 59 S. W. Rep. 700, holding that while a chancellor is bound by a decree rendered by him at a former term, there is no such limitation upon the appellate court on appeal.

1046. 1. *Rhodes v. Ashurst*, 176 Ill. 351, *citing* 5 ENCYC. OF PL. AND PR. 1046.

1047. 1. *Weinberg v. Noonan*, 193 Ill. 165, *citing* 5 ENCYC. OF PL. AND PR. 1047.

1049. 3. *Stephenson v. Harris*, 131 Ala. 470; *Ernst Tosetti Brewing Co. v. Koehler*, 200 Ill. 369, holding that the statutory motion under which, instead of by writ of error *coram nobis*, the court is authorized to set aside a judgment at any time within five years for an error of fact coming within a scope of the writ at common law does not apply to cases in equity; *Kingman v. Chubb*, 8 Kan. App. 167; *Reynolds v. Reynolds*, 115 Mich. 378; *Anderson v.*

McCloud-Love Live Stock Commission Co., 58 Neb. 670 [each *citing* 5 ENCYC. OF PL. AND PR. 1049]; *McQueen v. Whetstone*, 127 Ala. 417; *Schwartz v. Costello*, 11 App. Cas. (D. C.) 553; *Clements v. Empire Lumber Co.*, 96 Ga. 319, holding further that where a decree is amended in a matter affecting the rights of a party without giving to him an opportunity to be heard upon the propriety of such an amendment at the term at which it was made, his motion to set aside the amendment, filed at the next term, is in time; *Barroll v. Forman*, 88 Md. 188; *Cadotte v. Cadotte*, 120 Mich. 667; *Graham v. Swayne*, 48 C. C. A. 411; *McGregor v. Vermont L. & T. Co.*, 44 C. C. A. 146; *Petersburg Sav., etc., Co. v. Dellatorre*, 30 U. S. App. 504; *Jourolman v. East Tennessee Land Co.*, (C. C. A.) 85 Fed. Rep. 251, as to that part of decree relating to costs; *Farmers' L. & T. Co. v. Iowa Water Co.*, 80 Fed. Rep. 467.

Remedy by Original Bill. — See *Holmes v. Roth*, (Tenn. Ch. 1899) 57 S. W. Rep. 405, as opposed to the remedy.

A Decree of Dismissal is a final decree and cannot be vacated after final adjournment. *New England Mortg. Security Co. v. Davis*, 122 Ala. 555.

Decrees in Appellate Courts. — *Morrell v. Miller*, 28 Oregon 354, expressing a doubt as to the power of the court to recall a mandate or to alter a mandate or decree after the expiration of the term in which it is remanded and entered.

A final order of a court of last resort made at a former term cannot be modified. *Roanoke St. R. Co. v. Hicks*, (Va. 1899) 32 S. E. Rep. 790.

Further Exposition of Rule — Rule Same as at Law. — *Ernst Tosetti Brewing Co. v. Koehler*, 200 Ill. 369.

1052. 1. *Action on Motion Made at Previous Term.* — Where a decree is entered on a report of a referee, and

1053. (2) *Clerical Errors*. — See note 1.

(3) *Matters of Course*. — See note 2.

1056. (4) *Mistake or Surprise, Interests Not Heard* — *Mistake or Surprise*. — See note 1.

1057. (5) *Changing Time or Manner of Execution*. — See notes 2, 3.

1058. See note 1.

(6) *By Consent*. — See note 2.

1060. *Remedy for Excess of Authority*. — See note 1.

(7) *Modification, Etc., of Consent Decrees*. — See note 4.

XV. CONSTRUCTION OF DECREES — *Manifest Intention Controls*. — See note 6.

1061. *Limited to Pleadings and Issues*. — See note 3.

motions to set aside the report and decree thereon and for a new trial are made in due time, the court may act upon the motions at a subsequent term. *Wasatch Min. Co. v. Jennings*, 14 Utah 221.

1053. 1. *Mistake or Misrecital* is amendable by the commissioner's report within five years. *Shumate v. Crockett*, 43 W. Va. 491.

2. *Reynolds v. Reynolds*, 115 Mich. 378; *Oliver-Finnie Grocery Co. v. Bodenheimer*, 77 Miss. 415 [each citing 5 ENCYC. OF PL. AND PR. 1053]; *Lynde v. Lynde*, 54 N. J. Eq. 473. See also *Cooper v. Cook*, 108 Iowa 301, where a decree which was incomplete was perfected.

1056. 1. *Mallery v. Quinn*, 88 Md. 38. See also *Dewey v. Stratton*, 52 C. C. A. 135.

1057. 2. *Cadotte v. Cadotte*, 120 Mich. 667.

3. *Mootry v. Grayson*, (C. C. A.) 104 Fed. Rep. 613, citing 5 ENCYC. OF PL. AND PR. 1057.

1058. 1. *Miller v. Cramer*, 48 S. Car. 282.

2. *Reynolds v. Reynolds*, 115 Mich. 378, citing 5 ENCYC. OF PL. AND PR. 1058.

In *Ex p. Gray*, 48 S. Car. 566, a life tenant brought suit against her children, the remaindermen, asking the court to authorize a sale or exchange of land and reinvestment in the interest of all parties concerned, and obtained a decree in accordance with the prayer, providing for the payment, out of the proceeds, of fees for attorney's services in the court. On a petition to vacate the decree filed more than ten years afterwards, it was held that there was no statutory limitation as to the time when such a motion could be made

except in the particular cases provided by the code, and that all parties being interested in seeking the vacation of the decree except the attorneys, who desired to be protected in the right to fees adjudged, the said decretal order of sale should be revoked on the condition of the payment of said fees.

1060. 1. *Reynolds v. Reynolds*, 115 Mich. 378, citing 5 ENCYC. OF PL. AND PR. 1059 [1060].

4. *Stites v. McGee*, 37 Oregon 574; *Bristol v. Bristol*, etc., *Water Works*, 19 R. I. 631, each citing 5 ENCYC. OF PL. AND PR. 960.

6. Although upon overruling exceptions to the findings and decree of the court a final decree ought to be formally made, a decree dismissing exceptions will be understood as that which the court intended its final decree should be. *Russell v. Stewart*, 204 Pa. St. 211.

Dismissal Presumed to Be on Merits. — Where a decree on a general demurrer to a bill is that "the said demurrer be sustained and the bill of complaint dismissed," such decree shows that it was passed upon the merits, and it will not be presumed that the bill was dismissed on the ground that the court had no jurisdiction over the matter. *Bradford Belting Co. v. Kisinger-Ison Co.*, 51 C. C. A. 483.

Construction of Decrees. — See *Salt Lake City v. Salt Lake City Water, etc.*, *Power Co.*, 24 Utah 249.

Former Decrees. — See *Stearns v. Richmond Paper Mfg. Co.*, 92 Va. 408; *Effinger v. Kenney*, 92 Va. 245.

1061. 3. See *Little v. Gallus*, 39 N. Y. App. Div. 646, limiting the decree by modification in the appellate court, making it more definite and certain. See also *Crosby v. Morris*

1062. *Opinion of Court.* — See note 2.

1063. **XVI. DEFINITENESS AND CERTAINTY** — 1. In General. — See note 1.

1066. 2. In Respect of Parties. — See note 1.

1067. 3. Certainty Attainable by Reference — *Id Certum Est, Etc.* — See note 1.

1068. **XVII. ENFORCEMENT** — 1. By Writ of Execution and Attachment — Writ of Attachment. — See note 4.

2. By Execution as at Law. — See note 7.

town, etc., R. Co., (Tenn. Ch. 1897) 42 S. W. Rep. 507; *Ferguson Contracting Co. v. Manhattan Trust Co.*, (C. C. A.) 118 Fed. Rep. 791.

1062. 2. *Vance Shoe Co. v. Haught*, 41 W. Va. 275, holding that a decree cannot be reversed because of a reason given therefor in the opinion.

1063. 1. *Tilley v. Bonney*, 123 Cal. 118; *Rumsey v. People's R. Co.*, 144 Mo. 175, holding bad a decree in foreclosure proceedings which was so indefinite as to the number of particular bonds that those whose duty it was to distribute the fund divided from the proposed sale would be unable to determine who would be entitled to it; *Black v. Black*, 95 Tex. 627, description of land in a suit for partition.

Certainty in Money Decrees. — A decree for money is not sufficient which directs the plaintiffs to recover the amount of the respective notes and judgments with interest thereof specifically set out in the bill, without itself fixing such amount on the date from which interest is to run. *Spoor v. Tilson*, 97 Va. 279.

Where there Are Intervening Plaintiffs with separate claims, the exact amount due to each should be settled by the decree. *Rumsey v. People's R. Co.*, 144 Mo. 175.

Damages "by Way of Equitable Relief." — In a suit to reform a contract, a

decree reforming the contract and awarding damages by way of equitable relief for a breach of the contract as reformed need not recite that the damages are given "by way of equitable relief." *West v. Suda*, 69 Conn. 60.

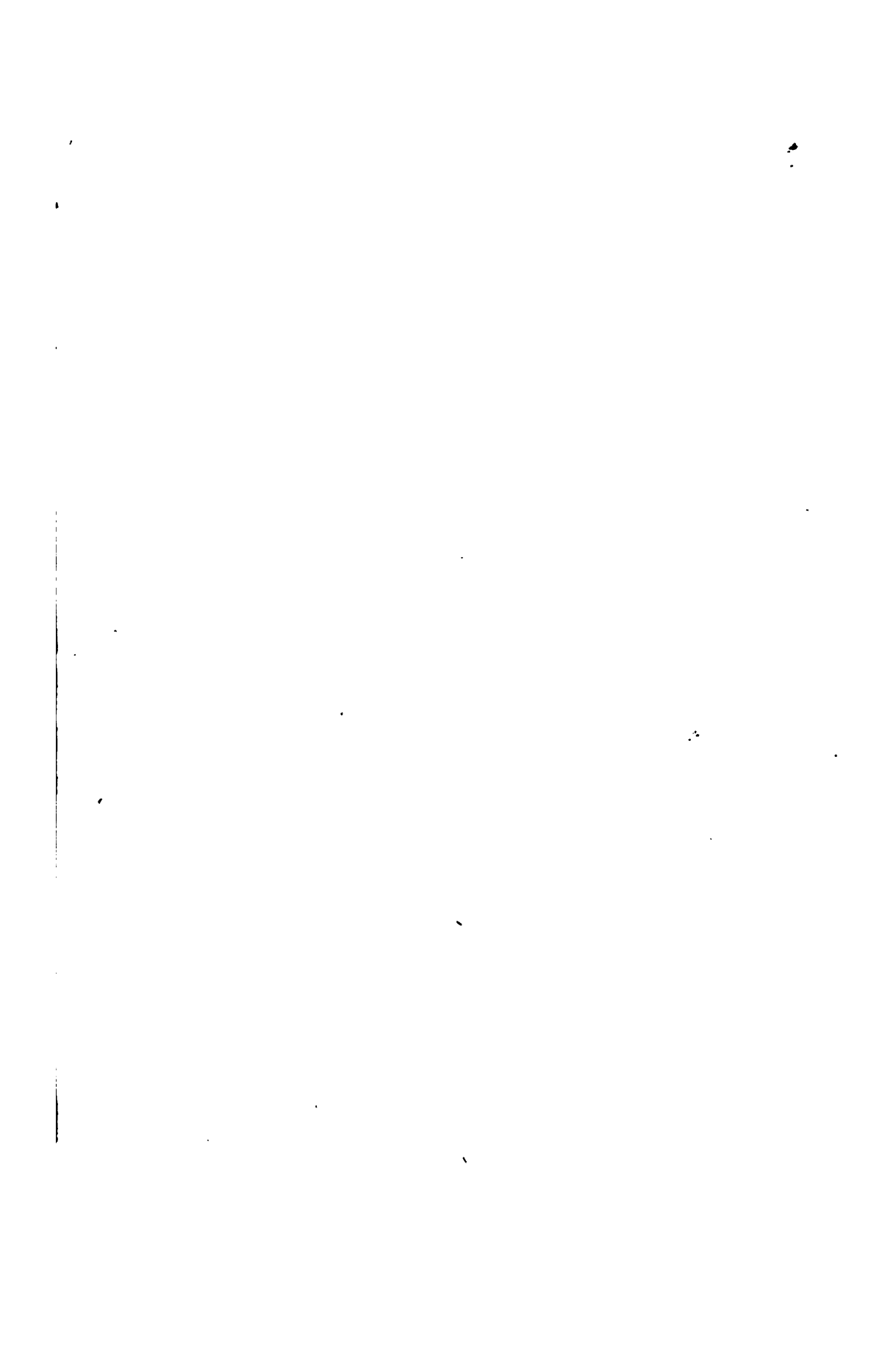
Decree Establishing Water Right. — A decree settling the rights of the complainants to the waters of a stream, but which does not designate the point of diversion as the point at which the water of the several claimants is to be measured, is imperfect, though the decree will be affirmed in all other particulars and remanded with instructions to modify it in the particular in which it is imperfect. *Stuckney v. Hanrahan*, (Idaho 1900) 63 Pac. Rep. 189.

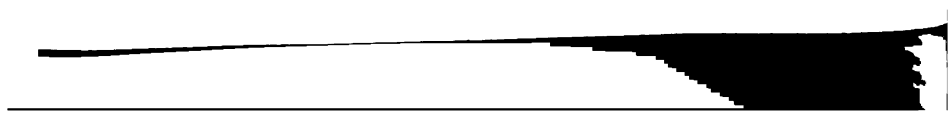
1066. 1. *McRae v. University of The South*, (Tenn. Ch. 1898) 52 S. W. Rep. 463.

1067. 1. *State v. White*, 40 Fla. 297, *citing* 5 ENCYC. OF PL. AND PR. 1067.

1068. 4. See *Leslie v. Mahoning R. Co.*, 22 Pa. Co. Ct. 300.

7. *Hord v. Bradbury*, 156 Ind. 30 [*citing* 5 ENCYC. OF PL. AND PR. 1068]; *Whalen v. Billings*, 104 Ill. App. 281; *Durbin v. Durbin*, 71 Ill. App. 51; *Stuart v. Burcham*, 62 Neb. 84; *Hyder v. Butler*, 103 Tenn. 289, as to authority to issue without direction in decree. See also *Baily v. Horqthal*, 154 N. Y. 648.







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